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Confucianism and Antitrust: China's Emerging Evolutionary Approach to Anti-Monopoly Law

THOMAS J. HORTON*

Abstract

This article discusses the historical, cultural, and philosophical values that have helped mold modern China and its powerful and thriving economy, and examines how they have helped shape and influence China's current Anti-Monopoly Law, which has been in effect since 2008. China's Anti-Monopoly Law reveals China's continuing commitment to honoring and following its traditional Confucian ethics and morals in regulating behavioral and structural competition issues. Rather than following a western neoclassical economic approach, China is pursuing an evolutionary approach in its Anti-Monopoly Law that emphasizes Confucian norms of morality, ethics, fairness, and reciprocity, and the importance of economic diversity, variation and multiplicity. The article explains why continuing cries for China to "get in step" with western neoclassical economic theory are likely to fall on deaf ears.

I. Introduction

In August 2007, the People's Republic of China (PRC), through its National People's Congress, enacted its Anti-Monopoly Law (AML), which first took effect in August 2008.¹ Areas of concern include "Monopoly Agreements,"² "Abuses of Dominant Positions,"³

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1. For excellent discussions of the history of China's AML, see CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS (Adrian Emch & David Stallibrass, eds., 2013); H. STEPHEN HARRIS, JR., PETER J. WANG, YIZHE ZHANG, MARK A. COHEN & SEBASTIEN J. EVRAD, ANTI-MONOPOLY LAW AND PRACTICE IN CHINA (2011); see also Thomas R. Howell, Alan Wolff, Rachel Howe & Diane Oh, *China's New Anti-Monopoly Law: A Perspective from the United States*, 18 PAC. RIM L. & POL'Y J. 53, 55–63 (2009); Zue Kepeng & Charlotte Z. Westfall, *Chinese Monopoly Law: A Practical Guide*, 18 No. 1 COMPETITION J. ANTITRUST & UNFAIR COMPETITION 1 (2009).

2. See Zhōnghuá rénmin gònghéguó fān lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 13–16 (China).

3. See *id.* ch. III, art. 17–19.

"Concentrations of Undertakings,"⁴ and "Prohibitions of Abuse of Administrative Powers to Restrict Competition."⁵ Although China's AML is in its infancy, and numerous questions remain to be answered, China has gained valuable experience in interpreting and enforcing its AML since 2008.⁶

Competition laws and their enforcement provide a probing lens into the fundamental values and norms that undergird a modern society's economic and political systems.⁷ As a result, China's new AML and its first five years of enforcement offer unique potential insights into China's traditional values and culture, and their possible impact on China's developing economy and regulatory system.

This article discusses the historical, cultural, and philosophical values that have helped mold modern China and its powerful and thriving economy and examines how they have helped to shape and influence China's current AML. Rather than following the United States and Europe, China appears to be charting its own course in interpreting and enforcing its competition laws. Based upon China's history, culture, and Confucian ethics and morals, this article forecasts that China's future AML enforcement will be based upon social, moral, and ethical considerations, as well as economic ones.⁸ This article concludes that in the coming years, China should continue to follow an evolutionary, rather than a strict, neoclassical economic approach, in dealing with future behavioral and structural competition issues.⁹

4. See *id.* ch. IV, art. 20–31.

5. See *id.* ch. V, art. 32–37.

6. See, e.g., Thomas J. Horton & Jenny Xiaojin Huang, *Analyzing Information Exchanges between Competitors under the Anti-Monopoly Law*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 1, at 95, 97 ("Although a lot of questions remain to be answered, China's enforcement of the AML has not stagnated.").

7. See, e.g., Mitsuo Matsushita, *Matsushita on China's Anti-Monopoly Law: The First Five Years*, ANTITRUST & COMPETITION POL'Y BLOG (Aug. 12, 2013), available at http://lawprofessors.typepad.com/antitrustprof_blog/2013/08/matsushita-on-.html (arguing that "competition policy and law is part of the society in which it operates and necessarily reflects the features of society and politico-economic system of the country"); RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 3 (Rev'd ed. 2000) ("Competition policy has been one of twentieth-century America's most durable goods. Whether in business, politics, sports, or speech, a vision of robust rivalry—of free competition—has inspired our social theories, directed our practices, and informed our public discourse."); Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195, 201 (2006) ("The history of the continuing debates as to antitrust legislation and regulation reveals that how people think about antitrust issues is generally tied to their underlying assumptions and premises, as well as their implied values."); John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y. L. SCH. L. REV. 893, 897 (1990) (arguing that good competition policy must take into account the "social and political values of a just community, the integrity of individualism in that community, and the ideal of equality of economic opportunity.").

8. This article does not seek to review or duplicate the excellent and extensive scholarship addressing the first five years of China's AML enforcement activities and initiatives. See, e.g., HARRIS ET AL., *supra* note 1; CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 1. Nor should this article be read as a defense of China's one-party Communist government or an attempt to mitigate the serious problems of economic corruption, environmental pollution, or individual and human rights that China must address in the coming decades. A full and fair treatment of such issues is beyond the scope of this article.

9. For detailed discussions of this author's recommended evolutionary approaches to antitrust, see Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 McGEORGE L. REV. -823 (2013) [hereinafter Horton, *Fairness and Antitrust*]; Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BAL'T. L. REV. 615 (2012) [hereinafter Horton, *Antitrust Double Helix*]; and Thomas J. Horton, *The Coming Extinction of*

Part II of this article addresses why China's future AML interpretation and enforcement likely will be guided by social, moral, and ethical considerations, as well as purely economic ones. Section II.A. reviews the diverse and complex economic, political, and social issues facing China today. Section II.A.1. examines the importance to China of its traditional cultural and historical values. As is discussed below, many Chinese fear a westernization of China could undermine its national spirit and transform China into a western appendage. Section II.A.2. then lays out a sampling of the current harsh western criticisms and pressures China faces as it seeks to build and develop its legal system and competition regulation program.

Section II.B. studies China's long history of Confucianism and its effect on Chinese law and government. Section II.B.1. discusses Confucianism, while Section II.B.2. examines the impact of virtue, morality, and the rule of law on Chinese culture. As is demonstrated, Chinese core Confucian values, such as fairness and justice in economic competition, while considered soft and mushy by some western critics, are non-negotiable bedrocks to the Chinese and their leaders. Section II.C., therefore, posits that China is likely to be guided by its unique Confucian history and culture in interpreting and enforcing its AML.

Part III discusses how China has chosen to protect its traditional Confucian morals and values by following an evolutionary approach, instead of a neoclassical economic one, in its AML. The emerging evolutionary approach to antitrust is guided by the exploding fields of evolutionary economics and biology.¹⁰ From a behavioral antitrust perspective, evolutionary theory counsels that morality, ethics, fairness, and reciprocity are crucial to building and sustaining thriving competitive economies.¹¹ On the structural side, evolutionary theory advises that diversity, variation, and multiplicity are critical to maintaining stable and efficient competitive economic systems.¹²

Section III.A. argues that China's AML is based upon an emerging evolutionary approach, rather than a neoclassical economic approach, to behavioral competition issues. China's emerging evolutionary approach to behavioral competition issues is a natural outgrowth of its determination to build a thriving competitive economy while protecting and

Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analysis, 42 LOY. U. CHI. L. J. 469 (2011) [hereinafter Horton, *Coming Extinction*].

10. See, e.g., ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS* 11 (2006) ("The same process that has driven the growing order and complexity of the biosphere has driven the growing order and complexity of the 'econsphere.'"); *id.* at 16 ("The notion that the economy is an evolutionary system is a radical idea, especially because it directly contradicts much of the standard theory in economics developed over the past one hundred years. It is far from a new idea, however. Evolutionary theory and economics have a long and intertwined history."); Paul J. Zak, *Values and Value: Moral Economics*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 259, 276 (P.J. Zak ed., 2008) (discussing the emerging field of evolutionary economics); James Eggert, *Op-Ed, A Silence of Meadowlarks: Can a Songbird's Demise Lead Us to a Better Economics?* WASH. POST, Aug. 4, 1991, at C3 (arguing that the time is ripe "to incorporate ecological thinking and ecological values with market thinking and values"). It is important to recognize that modern evolutionary theory does not in any way incorporate the outmoded theories of social Darwinism and its biased arguments that "there is a struggle and competition, and the weakest go to the wall." See Michael Ruse, *The History of Evolutionary Thought*, *EVOLUTION: THE FIRST FOUR BILLION YEARS* 1, 29 (Michael Ruse & Joseph Travis, eds., 2009); and Horton, *Coming Extinction*, *supra* note 9, at 479–82.

11. See, e.g., Horton, *Coming Extinction*, *supra* note 9, at 522 (discussing the importance of the evolution of human morality, ethics, fairness, and reciprocity to our thriving free-enterprise system).

12. See, e.g., *id.* at 521 (discussing the importance of diversity, variation, and multiplicity in economic systems).

leveraging its traditional Confucian morals and values. Such an approach implies that China is likely to pursue norms of competitive fairness and corporate social responsibility (CSR) going forward.

Section III.B. contends that China is seeking to pursue the evolutionary objectives of promoting diversity, variety, and multiplicity in its approach to structural competition issues. Such an approach is designed to catalyze and promote the entrepreneurial spirit of its citizens and guard the economic contributions of its vast array of small and medium-sized business enterprises.

China and its leaders surely must confront a daunting array of complex questions and issues in seeking to sustain and leverage China's surging international and domestic economic prowess. As examples, do ongoing issues of economic corruption in China show that China's proclamation of the need to maintain its historic and traditional Confucian ethics and morals is little more than hollow rhetoric? Are China's state-owned enterprises (SOEs) and its desire to protect certain national industries inconsistent with China's asserted support for small and medium-sized business enterprises? No easy answers or solutions await China.

China today faces no shortage of international and domestic criticism concerning its economic and political systems. In the competition arena, for example, critics are urging China to adopt and pursue a western neoclassical economic approach to structural and behavioral competition issues. Facing such questions and criticisms, it may be tempting for China and its AML enforcers to abandon China's Confucianist traditions and morals and China's evolutionary approach to competition issues. China and its competition regulators should resist such temptations and pressures and continue following an evolutionary approach in interpreting and enforcing China's AML.

II. China's AML Enforcement Likely Will be Guided by Social, Moral, and Ethical Considerations

American, European, and Japanese antitrust and competition regulators, lawyers, and economists have taken understandable pride in counseling and helping China in drafting, adopting, and interpreting its new AML.¹³ Indeed, "[t]he core provisions of the AML were modeled on EU competition law, and to a lesser extent, on the laws of the United States, Germany, Japan, and other countries."¹⁴

Nevertheless, in seeking to understand China's AML and to make meaningful scholarly predictions about its interpretation and enforcement, it is critical to realize that China is

13. Noted Chinese competition scholar Professor Xiaoye Wang regards China's AML "as a great achievement of international cooperation." Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 *ANTI-TRUST L.J.* 133, 134 (2008). Professor Wang observes that "[t]he competition enforcement agencies of other countries, in particular the U.S. Department of Justice, the U.S. Federal Trade Commission, and the European Commission contributed significant assistance." *Id.*

14. HARRIS ET AL., *supra* note 1, at 2-3. The authors further note that "[m]any of the stated goals of the AML are broadly consistent with those of such other jurisdictions' laws, including preventing or stopping monopolistic conduct, safeguarding and promoting the order of fair market competition, improving economic efficiency, and protecting the interests of consumers." *Id.* See also Wang, *supra* note 13, at 134 ("[I]t is no surprise that many good provisions from other well-established antitrust laws have been incorporated in the Chinese AML.").

attempting to create and sustain unique legal¹⁵ and economic¹⁶ systems. As a result, it is "necessary and crucial not only to carefully examine the words of the AML, but to read them in the context and light of Chinese history, culture, and traditions."¹⁷ As recognized by former American Antitrust Assistant Attorney General R. Hewitt Pate,

Whether we like it or not, Chinese antitrust is going to be different from the U.S. and European varieties. Close attention to the underlying conditions and attitudes that will drive Chinese antitrust enforcement will yield more insight than comparing the AML with that of the U.S. and European statutes and court decisions.¹⁸

Unfortunately, most western antitrust and competition lawyers and economists have little real knowledge of China's rich history and culture. Even such noted Chinese history scholars as John King Fairbank and Merle Goldman have humbly recognized that "[w]e still have much to learn about modern China from her history."¹⁹

Anyone attempting to understand China's AML and predict its future enforcement must first recognize that the PRC is not a western-style democracy. Some scholars have argued that China may be "the only civilization the world has known upon which Western thought exercised little or no influence at all until modern times."²⁰ China's historical culture was largely "independent of Western influences" and its responses to its peoples' economic needs are often peculiar to China and sharply differentiated from other countries.²¹

15. See, e.g., Benjamin Liebman, *Assessing China's Legal Reforms*, 23 COLUM. J. ASIAN L. 17, 31 (2009); see also HARRIS ET AL., *supra* note 1, at 3 ("[D]espite strong influences from EU, U.S., and other competition laws, and though it is likely that China will continue to draw upon the experiences of other jurisdictions in interpreting and applying the AML, it must be borne in mind that China's law is a unique piece of legislation directed to China's unique economic and political circumstances, and not borrowed wholesale from the European Union, United States, or any other system.").

16. See, e.g., Matsushita, *supra* note 7, at 1 ("The Chinese economy is a unique hybrid of market and non-market principles and may present a new model for economic systems to developing countries of the world.").

17. Horton & Huang, *supra* note 1, at 98; see also HARRIS ET AL., *supra* note 1, at 5 ("Those companies doing business in China must now take measures to ensure those compliance policies address the unique aspects of the AML."); HOWELL ET AL., *supra* note 1, at 54 (In the absence of a global set of competition rules, prescribed by the WTO (World Trade Organization) or otherwise, China "could not, even if it had so chosen, conform its policy regime to a single unitary system of multilateral norms. For China, divergence from at least some national competition regimes has been inescapable.").

18. R. Hewitt Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L. J. 195, 211 (2008); see also Matsushita, *supra* note 7, at 1 (arguing that "the features of the AML introduced from Europe will be blended with traditions and values in China as time passes, and ultimately it will provide a model for East Asian or Asian competition laws"); Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 720 (2010). ("This article demonstrates that the transplant in China of a formal antitrust law in the mold of Western antitrust laws takes place under local conditions that are not entirely compatible with Western antitrust models. These local conditions, chiefly the traditional stage China is in, China's market structures, and pervasive state control in China's economy have limited the reach and applicability of the AML. . . . In sum, despite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to these local conditions.").

19. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 381 (2006).

20. NORMAN KOTKER & CHARLES PATRICK FITZGERALD, THE HORIZON HISTORY OF CHINA 10 (Norman Kotker, ed., 1969).

21. *Id.* at 11.

While China's AML shares many aspects of American and European competition law principles, it ultimately serves China's unique socialist political-legal system.²² Article 1 of China's AML boldly proclaims that one of its major purposes is "protecting the consumer and public interests, and promoting the healthy development of the socialist market economy."²³ Article 4 adds that "[t]he State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision and control, and develop a united, open, competitive, and orderly market system."²⁴ Some may argue that such bold pronouncements and objectives are inconsistent with the realities of life today in China and the feelings of China's citizenry, many of whom seem to welcome unbridled western capitalism. Nevertheless, such pronouncements reveal that future competition policy decisions in China "are likely to be influenced as much or more by China's unique culture and history, as by the influences of competition laws and decisions in the EU, the United States, and other jurisdictions."²⁵

This section addresses the various cultural, historical, and social considerations that are likely to impact and influence China's future AML enforcement. Section II.A.1. first discusses China's strong interest in protecting its unique cultural and social values. Section II.A.2. next reviews the key political and economic western and global criticisms of China's AML enforcement activities to date. Section II.B. then analyzes the historical and cultural impact of Confucianism on China's laws and regulations. The relationship of virtue and law in Chinese culture is examined, as well as Chinese conceptions of public and personal morality. Section III.C. discusses why it is likely that China will be guided heavily by its own long history and Confucian traditions in pursuing its future AML enforcement path.

A. ECONOMIC, POLITICAL, AND SOCIAL ISSUES FACING CHINA TODAY

Scholars have struggled to fully understand and define China's current diverse and complex political, economic, and legal systems.²⁶ "[T]he shape of the market economy that China wishes to adopt has remained unresolved," and the Chinese themselves "are struggling with issues, including the appropriate norms of competition, that have long been the subject of controversy within and between capitalist systems."²⁷ This is not surprising, as

22. See Horton & Huang, *supra* note 1, at 98; Ignazio Castelluci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L & COMP. L. 35, 83-84 (2007).

23. See Zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 13-16 (China).

24. *Id.* art. 4.

25. Horton & Huang, *supra* note 1, at 98.

26. See, e.g., FAIRBANK & GOLDMAN, *supra* note 19, at 464-69. The authors observe that while China's "market economy and openness to the outside world [have] loosened the all-encompassing controls of the Mao years, allowing far more intellectual diversity and personal freedom," China is "still an authoritarian state" and its "communist party-state remains in power." *Id.* at 465. They add, "[t]he continuing move to the market and the open-door policies that have led to China's weakening party-state might in time bring about a freer, more democratic society as China's population becomes more prosperous and begins to demand greater rights. . . . Yet the development of appropriate political institutions, such as local elections and the efforts to establish the rule of law, is only at an embryonic stage in China, and could easily be arrested." *Id.* at 469.

27. Scott Kennedy, *The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System*, 49 THE CHINA J. 1 (2003).

China is attempting to achieve full economic modernization without the representative democratic governments and institutions found in most western capitalist countries.²⁸ Moreover, China is attempting to embrace and exploit the economic gains of western-style capitalism while preserving “certain immutable values.”²⁹

1. *Preserving and Protecting China's Traditional Cultural and Historical Values*

Protecting and preserving its immutable cultural, historical, and social values is paramount in China's mind. “Countries all over the world differ greatly in terms of economic development, legal systems, cultural standards, and individual's perception of ethics.”³⁰ China is no exception. The Chinese are rightfully proud of their unique cultural history and values, which they believe to be a superior glue that has helped hold together their great civilization for thousands of years.³¹ Some Chinese critics have gone so far as to accuse their countrymen of “extreme arrogance” in lauding their Chinese values.³²

The Chinese Communist Party's (CCP) leaders recognize that China's recent economic reforms and staggering successes have unleashed potential social, cultural, and economic tensions that could threaten China's societal harmony.³³ “A pervasive sense of insecurity about the future” and a fear of chaos have “haunted the Chinese people since time immemorial.”³⁴ Many in China have long been “appalled by the social evils of unbridled capitalism and extreme individualism in the West.”³⁵

Underlying such fears and tensions is a long history of destructive imperialism in China, which has led to “social disruption and psychological demoralization” and, at times,

28. See FAIRBANK & GOLDMAN, *supra* note 19, at 1.

29. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* xx (1990).

30. Lin Ge & Stuart Thomas, *A Cross-Cultural Comparison of the Deliberative Reasoning of Canadian and Chinese Accounting Students*, 82 J. BUS. ETHICS 189, 190 (2008). The authors further observe that “[d]ifferent cultural backgrounds lead to various ways of perceiving the world, and therefore, individuals in different cultures may come to different conclusions when resolving ethical dilemmas.” *Id.* The famous anthropologist Franz Boas and his followers (including Melville J. Herskovitz and Margaret Mead), believed that “moral values are relative to each culture, and that there is no way of showing that the values of one culture are better than those of another.” Marian Eabrasu, *A Moral Pluralist Perspective on Corporate Social Responsibility: From Good to Controversial Practices*, 110 J. BUS. ETHICS 429 (2012).

31. See, e.g., FAIRBANK & GOLDMAN, *supra* note 19, at 25 (“Because the Asian invaders became more powerful as warriors, the Chinese found their refuge in social institutions and feelings of cultural and aesthetic superiority—something that alien conquest could not take away.”); *id.* at 14 (China “is held together by a way of life and a system of government much more deeply rooted than our own, and stretching further back uninterrupted into the past.”).

32. See, e.g., SPENCE, *supra* note 29, at 720 (quoting BO YANG, *SEEDS OF FIRE: CHINESE VOICES OF CONSCIENCE* 174 (Geremie Barmé & John Minford, eds., 1989)).

33. See, e.g., Geoffrey Kok Heng See, *Harmonious Society and Chinese CSR: Is There Really a Link?* 89 J. BUS. ETHICS 1, 2 (2009) (arguing that addressing China's social and economic issues “is a top national priority because these problems have resulted in social instability that threatens the CCP's grip on power. The CCP recognizes that it could lose political legitimacy if it fails to respond to these problems effectively.”).

34. FAIRBANK & GOLDMAN, *supra* note 19, at 439.

35. Edmund S. K. Fung, *State Building, Capitalist Development, and Social Justice: Social Democracy in China's Modern Transformation, 1921-1949*, 31 MODERN CHINA 318, 320 (2005); see also *id.* at 444 (discussing Chinese beliefs that “a revived Confucianism could provide the intellectual and cultural underpinnings for China's rapid economic development while helping China avoid the immorality and individualism of western capitalism”).

threatened China's "entire way of life."³⁶ Understandably, many Chinese fear a "Westernization" of China that could undermine China's national spirit and transform China into a western appendage.³⁷ Indeed, in late nineteenth-century China, a self-strengthening movement arose with the dual objectives of learning from and adopting western technologies and economic theories, while maintaining China's traditional cultural and social values.³⁸

Behind China's fears of "Westernization" lies the stark reality that there are substantial cultural disconnects between the United States (and many other western nations) and China that cannot be ignored or easily subsumed. For example, cross-cultural comparisons between traditional western cultures and the PRC have received substantial attention in recent years.³⁹ Such studies have revealed dramatic differences in the cultural values of individualism and collectivism in the United States and China.⁴⁰ "These differences reflect the common assertion that advanced Western societies are very individualistic, while Asian cultures have a more collective orientation."⁴¹ Historians John King Fairbank and Merle Goldman observe that "[l]iving so closely with family members and neighbors has accustomed the Chinese people to a collective life in which the group normally dominates the individual."⁴² In the words of the now-deceased China scholar Professor Lucian W. Pye, "[a]t the core of Chinese ethics and morality there has always been the ideal of depressing self-interest and glorifying self-sacrifice for the collectivity."⁴³

Many Chinese believe that their culture more strongly embraces humanism as an ideal than western cultures. The Chinese "have always had a very strong humanist outlook."⁴⁴

36. FAIRBANK & GOLDMAN, *supra* note 19, at 189 ("Today's historians are more likely to stress the social disruption and psychological demoralization caused by foreign imperialism. In these dimensions the long-term foreign invasion[s] of China proved to be a disaster so comprehensive and appalling that we are still incapable of fully describing it."); see also MICHAEL BURLEIGH, *MORAL COMBAT: GOOD AND EVIL IN WWII* 14-21 (2011) (describing Japan's horrific invasion of China in World War II and racism towards the Chinese); IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997) (describing the horrors of Japan's invasion of Nanking during World War II).

37. See SPENCE, *supra* note 29, at 643 (quoting Shannon Brown, *China's Program of Technology Acquisition*, in CHINA'S FOUR MODERNIZATIONS 159-163 (Richard Baum ed., 1980)).

38. FAIRBANK & GOLDMAN, *supra* note 19, at 408.

39. See, e.g., William E. Shafer, Kyoko Fukukawa & Grace Meina Lee, *Values and the Perceived Importance of Ethics and Social Responsibility: The U.S. Versus China*, 70 J. BUS. ETHICS 265 (2007); Vivienne Brand & Amy Slater, *Using a Qualitative Approach to Gain Insights into the Business Ethics Experiences of Australian Managers in China*, 45 J. BUS. ETHICS 167 (2003).

40. See, e.g., Shafer et al., *supra* note 39, at 267.

41. *Id.* at 267. The authors add that "the collectivistic orientation of Chinese societies is often attributed to the influence of Confucianism, with its emphasis on respect for brotherhood, social harmony, and the protection of the interests of one's in-group. . . . The second striking difference is also a reflection of influence of traditional Confucian values—the Confucian dynamism dimension. Hong Kong and Taiwan ranked 2, and 3, respectively on long-term orientation. The U.S., in contrast, ranked 27." *Id.*

42. FAIRBANK & GOLDMAN, *supra* note 19, at 17. Professors Fairbank and Goldman add that "one generalization in the lore about China is the absorption of the individual not only in the world of nature but also in the social collectivity." *Id.* See also *id.* at 258 ("Individualism and liberalism in Chinese thinking were strictly limited parts of a larger collectivity. The Chinese individual was subordinate to the group.")

43. Lucian W. Pye, *The State and the Individual: An Overview Interpretation*, 127 THE CHINA Q. 443, 444 (1991) [hereinafter Pye, *The State and the Individual*]. Pye further notes that "[t]he Chinese instinct has indeed been to see individualism as nothing more than self-centeredness." *Id.* at 447.

44. FITZGERALD & KOTKER, *supra* note 20, at 116. The authors further observe that "[t]he Chinese are not a religious people. The bent of their minds has always been humanist." *Id.* at 127. American history, by

Conversely, some Chinese scholars have argued that the Western "culture of individualism is morally vacuous and socially irresponsible."⁴⁵

The Chinese concept of law also is "fundamentally different from legal conceptions in the West."⁴⁶ Unlike western laws, Chinese law draws heavily upon the legal philosophies of Confucianism.⁴⁷ In addition, the "regulatory culture in China tends to emphasize a dynamic by which governance is pursued by a sovereign political authority that remains largely immune to challenge."⁴⁸ Furthermore, "[t]he Chinese have a less clear and inflexible demarcation between right and wrong. There are no obviously wrong areas of life. . . . Moderation is the key, not prohibition."⁴⁹ In short, "the Chinese notion of the role of law differs from its western counterpart[s], based on two main factors: China's socialist experience and its unique history."⁵⁰

It is important for westerners to understand that China is intensely proud and protective of its unique cultural, social, and legal values and traditions. In pursuing its socialist market economy and "popular democracy," China does not want to be "the tail of someone else's dog."⁵¹ It has "never been easy" for foreigners to fully understand or work with

contrast, shows a deep religiosity and compunction for protecting the free exercise of religion. See, e.g., PERRY MILLER, *ERRAND INTO THE WILDERNESS* 142 (1956); MERLE CURTI, *THE GROWTH OF AMERICAN THOUGHT* 3 (3d ed. 1964) ("The Christian tradition, introduced by the first comers, reinforced by nearly all their European successors, and perpetuated by conscious effort, was the chief foundation stone of American intellectual development. No intellectual interest served so effectively as Christian thought to bring some degree of unity to the different classes, regions, and ethnic groups."); ANDREW DELBANCO, *THE PURITAN ORDEAL* 91 (1991) (describing the belief that "God had appointed America as the place where he would . . . establish the throne of David's kingdom") (quoting John Cotton, *God's Promise to His Plantation* 7 (1630); *THE SUPREME COURT ON CHURCH AND STATE* (Robert S. Alley, ed., 1988)).

45. Pye, *The State and the Individual*, *supra* note 43, at 447 (quoting Zhao Fusan, *Some Thoughts on Certain Aspects of Modern Western Culture: Reading Notes*, PEOPLE'S DAILY) (as quoted by Richard Madsen, *The Spiritual Crisis of China's Intellectuals*, in CHINESE SOCIETY ON THE EVE OF TIANANMEN: THE IMPACT OF REFORM 247 (D. Davis & E. Vogel, eds., 1990)).

46. FAIRBANK & GOLDMAN, *supra* note 19, at 183. The authors explain that in China, the laws "came from the moral character of the natural universe itself, from this world, not from another world beyond human ken. . . . So the breaking of such rules was a matter of practical expedience rather than of religious principle. Laws were subordinate to morality. Their sanction lay in reason or the common social experience that underlay morals. This system avoided the unhappy dualism that grew up in the West between the letter of the law and the dictates of commonsense morality." *Id.*

47. See, e.g., Jun Shzo & Ming Hu, *A Comparative Study of the Legal Education System in the United States and China and the Reform of Legal Education in China*, 35 SUFFOLK TRANSNAT'L L. REV. 329, 331 (2012).

48. Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119, 124 – 25 (2003); see also Castellucci, *supra* note 22, at 64 (observing that "[a] 'socialist' rule of law still implies the guiding role of a single, or preeminent, party over the political and legal system, as well as the prevalence of common interest over individual ones, and other fundamental [Chinese] values.").

49. Jatinder J. Singh, Scott J. ViteII, Jamal Al-Khatib & Irvine Clark III, *The Role of Moral Intensity and Personal Moral Philosophies in the Ethical Decision Making of Marketers: A Cross-Cultural Comparison of China and the United States*, 15 J. INT'L. MARKETING 86, 105 (2007).

50. Castellucci, *supra* note 22, at 36. Professor Castellucci further concludes that "China's popular democracy and Western liberal democracies [are] two different things." *Id.* at 64.

51. See FAIRBANK & GOLDMAN, *supra* note 19, at 322 ("The final factor making for sinification was the overriding sentiment of Chinese nationalism based on cultural and historical pride, which meant that China could not be the tail of someone else's dog. In effect, the Chinese people could accept only a Chinese Marxism.").

the Chinese Revolution.⁵² But there can be little doubt that China will work vigorously to protect its unique historical and cultural values despite often-strident criticism from the West.

2. *Western Criticisms and Pressures on China*

As China moves forward with its AML regulation, it faces no shortage of criticism from western antitrust practitioners and scholars, as well as its own growing body of competition scholars and practitioners. Generally, these criticisms can be lumped into three broad categories: (1) China's government and regulations tend to suppress individual rights and initiatives; (2) China's economy needs to be less state-driven; and (3) China's AML and its enforcers are driven less by a concern for protecting competition than by promoting various social policies and issues. These criticisms are discussed below.

a. China's Suppression of Individual Rights and Initiatives

Modern China and the CCP have been extensively criticized from within and without for suppressing and even destroying individual rights and initiatives. Such criticisms began shortly after Mao Zedong and the CCP's ascension to power. For example, Chinese intellectual writer Ding Ling wrote stories about how the CCP was "enforcing an ideological outlook that destroyed individual initiative and opinion."⁵³ Western critics followed Ding Ling by branding the Chinese as "robotlike followers."⁵⁴

Even more graphically, Professor Lucian W. Pye strongly questioned China's seeming belief that "economic growth can occur without the individualism associated with pluralistic democracy."⁵⁵ Professor Pye disputed the alleged superiority of Asian and Chinese "values [that] differ from Western ones in their emphasis on the community rather than the individual."⁵⁶ From Professor Pye's perspective, a "huge gap" exists in China between the community of citizens and the level of the state.⁵⁷ Professor Pye argued, "[t]he world of the citizen and that of the government remain far apart in a non-democratic Asia. To define the state as the only legitimate community, and thus deprive citizens of individual rights, comes close to advancing a fascist ideology."⁵⁸

Professor Pye concluded by questioning China's ability to "build a new 'spiritual civilization' and 'socialism with Chinese characteristics'" without increasing individual rights and freedoms, and accepting "the need for society as a whole to take a lead in this quest."⁵⁹

b. China's State-Driven Economy

A corollary criticism to the lack of individual rights in China is that China's economy is too state-driven and controlled. As an example, Chinese-law expert Donald C. Clarke wrote in 2007 "that China's path so far has been almost exclusively that of the model of

52. See *id.* at 327 ("For foreigners to work with the Chinese Revolution has never been easy.").

53. SPENCE, *supra* note 29, at 473.

54. *Id.* at 532.

55. Lucian W. Pye, *Civility, Social Capital, and Civil Society: Three Powerful Concepts for Explaining Asia*, 29 J. INTERDISCIPLINARY HISTORY 763 (1999) [hereinafter Pye, *Civility*].

56. *Id.* at 781.

57. *Id.*

58. *Id.*

59. *Id.*

state-driven development, and that more balance is desirable.”⁶⁰ Professor Clarke questions whether China will really succeed in creating a true market economy by stating,

Taken together, these developments hint that it is too early to assume that the path to further reform is clear and largely uncontested. Opposition to further reforms in the direction of markets and increased openings for the private sector may be more deep-rooted than hitherto supposed, and this opposition might be able to link up with the strain of economic nationalism demonstrated in the controversy over acquisitions of Chinese firms.⁶¹

Following Professor Clarke, other critics have raised questions concerning the independence of China’s new regulatory structure. For example, Professor Margaret M. Pearson argues that, “while impressive changes during the past decade have given the agencies that regulate China’s strategic industries the initial *appearance* of independent regulators, the actual *function* of an independent regulatory structure is far from established.”⁶² Professor Pearson adds that “the state has positioned itself as a crucial player at the commanding heights of China’s economy; in that realm, regulatory reform has sustained, rather than attenuated, government control.”⁶³

Criticisms of China’s repressive economic oversight recently crescendoed with Google’s drastic decision to withdraw from mainland China.⁶⁴ Google’s decision was catalyzed by Chinese government censorship.⁶⁵ Professors Justin and Ann E. Tan noted that “[b]oth Yahoo! and Microsoft faced similar scenarios in China when forced to choose between complying with the repressive censorship policies or defying the laws of the host country.”⁶⁶ Professors Tan and Tan conclude from Google’s travails that the “need to comply with and capitulate to state demands” in China “seems heightened, especially considering its increasing importance as an international market, but continued status as a repressive, authoritarian system of social control.”⁶⁷

3. *Criticisms of China’s AML and its Enforcement*

Numerous scholars and practitioners have criticized China’s AML and its first five years of enforcement. A leading criticism is that instead of focusing on simply increasing competition, China’s AML attempts to achieve too many social objectives that could be better

60. Donald C. Clarke, *Legislating for a Market Economy in China*, 191 THE CHINA Q. 567, 568 (2007).

61. *Id.* at 577.

62. Margaret M. Pearson, *The Business of Governing Business in China: Institutions and Norms of the Emerging Regulatory State*, 57 WORLD POL. 296, 297 (2005). In fairness, Professor Pearson points out that “[t]here is substantial evidence that Chinese reformers are striving to move toward the independent regulator model.” *Id.* at 301.

63. *Id.* at 321. Professor Pearson predicts a continued “reformulated role for strong state oversight at the highest levels.” *Id.* at 322.

64. Justin Tan & Anna E. Tan, *Business Under Threat, Technology Under Attack, Ethics Under Fire: The Experience of Google in China*, J. BUS. ETHICS (forthcoming), available at <http://ideas.repec.org/a/kap/jbuset/v111oy2012i4p469-479.html>.

65. *Id.*

66. *Id.*

67. *Id.* Professors Tan and Tan go on to brand China as a “repressive regime that simultaneously fosters and hinders [rapid economic development].” *Id.*

handled outside the AML's domain.⁶⁸ Even before the AML was passed in 2008, western critics—like Professor Clarke and the American Bar Association (ABA)—worried that China's AML was hoping to achieve such social objectives as fair prices.⁶⁹ Following this line, on May 3, 2013, Reuters reported criticisms that in enforcing its AML, China was “appearing to use industrial policy protection rather than consumer protection as a benchmark.”⁷⁰

A strong undercurrent of many of the western criticisms of China's AML and its enforcement is that China is not following the conservative economic agenda that has dominated American antitrust since the 1980s.⁷¹ As an example, Professor Wentong Zheng criticizes China for favoring “duplication of industries at the provincial level,” as well as for its “generally low market concentration ratios” and “low economies of scale.”⁷² On April 23, 2013, a Harvard Business Law Review article echoed Professor Zheng's concerns by blasting China for having too much production “from small companies that possessed no scale economies.”⁷³ Professor Zheng concluded that “in all three major areas of antitrust—cartels, abuse of dominant market position, and merger review—China's local conditions have prevented the AML from becoming an integral part of China's competition policy.”⁷⁴

China's objectives of promoting economic stability and fairness also have come under strong attack. Professor Benjamin van Rooij, for example, believes that China's economic regulation is too focused on stability.⁷⁵ Others question what they call “an infatuation, common in Asia, with ‘fairness.’”⁷⁶ Professor Liu believes that the “[l]ack of a strong

68. See Clarke, *supra* note 60, at 581.

69. See *id.*

70. Michael Martina, *Insight: Flexing Antitrust Muscle, China Is a New Merger Hurdle*, REUTERS (May 2, 2013, 5:10 PM), <http://www.reuters.com/article/2013/05/02/us-mergers-regulation-china-insight-idUSBRE94116920130502>. The article adds that China's merger enforcement agency (MOFCOM) is forced to heed powerful demands from above that are “less concerned with promoting competition and consumer welfare than with carving out space for domestic champions.” *Id.*

71. See, e.g., Horton, *Fairness and Antitrust*, *supra* note 9, at 825 – 26 (“Economics rules antitrust today. Jurists and scholars favoring economic ‘consumer welfare’ considerations and disfavoring fairness considerations in antitrust analyses are ascendant. Allocative efficiency is positively equated with consumer welfare.”); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 563–66 (2012) (discussing the ascendance of Chicago School's neoclassical theories in antitrust jurisprudence since the late 1970s); Jesse W. Markham, Jr., *Lessons for Competition Law From the Economic Crisis: The Prospect for Antitrust Responses to the ‘Too-Big-to-Fail’ Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 278–81 (2011) (“The current state of antitrust law is often referred to as embracing ‘Post-Chicago School’ economic theory. Post-Chicago School antitrust is the stepchild of Chicago School antitrust . . . post-Chicago antitrust theory departs from the Chicago School views mostly around the margins.”).

72. Zheng, *supra* note 18, at 659; see also *id.* at 658 (“The duplication of industries at the local level also led to loss of economies of scale . . . examples of low economies of scale abound in China's economy.”).

73. Ushua C.V. Haley & George T. Haley, *How Chinese Subsidies Changed the World*, HARV. BUS. REV. (Apr. 25, 2013, 8:00 AM), <http://blogs.hbr.org/2013/04/how-chinese-subsidies-changed/>.

74. Zheng, *supra* note 18, at 671. Professor Zheng also criticizes the “staggering levels” of excess capacity in many of China's industries. *Id.* at 675.

75. Benjamin Van Rooij, *The People's Regulation: Citizens and Implementation of Law in China*, 25 COLUM. J. ASIAN L. 116, 116 (2012) (“China's halfhearted approach to regulatory governance with its focus on stability may ultimately be destabilizing.”).

76. See, e.g., Lawrence S. Liu, *All About Fair Trade?—Competition Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 259, 259 (2012). Professor Liu warns China of the difficult road ahead “if the mandate in the competition law includes fairness-based goals.” *Id.* at 261.

political commitment to robust competition laws, while clinging to fuzzy notions of fairness, can reduce the predictability of [Chinese] law enforcement.”⁷⁷

Western antitrust practitioners have joined scholars in attacking China’s refusal to follow Western neoclassical economic thinking. As an example, in 2009, four American antitrust practitioners urged that “China’s AML frequently reflects principles similar to those once embedded in U.S. antitrust policy, but which have been abandoned or modified by U.S. policymakers and courts in a sustained process of policymaking through trial and error.”⁷⁸ The authors criticize China’s AML abuse of dominance provisions as “bear[ing] a closer resemblance to U.S. antitrust policies of the 1940s through the 1960s than to the current policy.”⁷⁹

Much of the western criticism of China’s AML and its ongoing enforcement reveals a fundamental lack of understanding of China’s history and culture. For example, many American commentators urge that “Chinese law suffers from excessive generality and vagueness.”⁸⁰ Yet, “[t]he Chinese language, itself an extension of the tenets and qualities of Confucianism, is heavily dependent on context.”⁸¹ Similarly, the Chinese idea of a moral community, which has its basis in Confucianism, is “often difficult for outsiders to grasp.”⁸²

B. CONFUCIANISM AND CHINESE LAW

An attempt to fully describe Chinese Confucianism is beyond the scope of this article. Nevertheless, enough generalizations can be safely drawn to begin appreciating the potential long-term impacts of Confucianism and Chinese culture on China’s AML and its future enforcement.

1. *Chinese Confucianism*

Modern China abounds with shrines to Confucius, the founding father of China’s ethical system.⁸³ Confucius lived in China between 551 and 479 B.C.⁸⁴ Confucius’s writings

77. *Id.* at 301. Professor Liu continues, “The tendency in large Asian economies to pursue fairness in designing or implementing a competition law regime could have profound—and not necessarily benign—ramifications across the region, around the world, and indeed for their own long-term development.” *Id.*

78. Howell et al., *supra* note 1, at 53. The authors add that “[t]he areas of divergence from U.S. antitrust practice recall an earlier era in the United States, when antitrust was an expression of popular anxieties, political and social values, and a system of economic regulation.” *Id.* at 95. They further urge China to avoid “what appear[s] to have been some wrong turns by U.S. antitrust policy in the past” *Id.*

79. *Id.* at 68. The authors proudly proclaim that “[i]n general, U.S. antitrust policy has evolved from a system of regulation based on political, social, and ideological considerations to one premised on modern economic principles.” *Id.* at 54. Not discussed is whether Chicago School economic principles themselves might be little more than political, social, and ideological considerations dressed up in pseudo-scientific garb. See, e.g., Horton, *Antitrust Double Helix*, *supra* note 9, at 670 (“The Chicago/Harvard antitrust double helix has provided the philosophical basis for the diminished enforcement of our antitrust law for more than thirty years.”).

80. Micaela Tucker, “Guanxi!”—“Gesundheit!” *An Alternative View of the “Rule of Law” Panacea in China*, 35 VT. L. REV. 689, 711 (2011) (citations omitted).

81. *Id.* The author adds that “[v]iewed from a Confucian perspective, this allows language and its referents to be flexible to the needs of the speaker.” *Id.*

82. See FAIRBANK & GOLDMAN, *supra* note 19, at 274.

83. See, e.g., SPENCE, *supra* note 29, at 8.

and works "have held a predominant role in Chinese culture for millennia."⁸⁵ Confucianism is not a religion, but a secular philosophy.⁸⁶ Buddhism, with its tenets of universal compassion and tolerance, has "been the religion of the majority of the Chinese people for centuries."⁸⁷ Buddhism does not conflict with Confucianism and its secular code of civic values, but instead complements it.⁸⁸

Confucius lived in a turbulent time of chaos, treachery, and corruption in China and "[h]is whole effort was directed toward trying to arrest a swift decline in political practice and public morality."⁸⁹ Through his own exemplary life and works, Confucius "left behind a new understanding of ethics, an ideal of the aristocrat as a man of morality: just, sincere, loyal, benevolent, and owing his high esteem to the possession and practice of these virtues, not to his birth or wealth."⁹⁰ "Man must be guided by morality, by virtues, and not just by the knowledge of how to perform rites."⁹¹ Harmony is a core principle of Confucianism, and secular ethics and morality are crucial to maintaining harmonious societal relationships.⁹² "As Confucius saw it, maintaining the harmonious functioning of the social order was—or ought to be—the supreme objective of any man's life."⁹³

84. *Id.* See also FITZGERALD & KOTKER, *supra* note 20, at 65.

85. FITZGERALD & KOTKER, *supra* note 20, at 65. Confucius's *The Analects* also known as *The Lun Yü*, "is a record of Confucius' personal teaching, compiled by his original disciples." *Id.* "Only the *Analects* can be said to be the work, albeit indirectly, of Confucius himself. It is a collection of his sayings and teaching, and is accepted as basically the work of his immediate disciples, although it was probably expanded in later times, perhaps from oral tradition. Almost all that is certain about Confucius' life and teaching comes from the *Analects*. The greatness of Confucius does not rest upon the attributed authorship or editorship of well-known works, but on his method and his approach to moral problems." *Id.*

86. See, e.g., *id.* at 183 ("Unlike China's two other great systems of thought—Buddhism and Taoism—which were essentially contemplative and largely mystical, Confucianism [is] profoundly activist and so secularly oriented that it can scarcely be described as a religion."). See also JAMES MANNION, *ESSENTIALS OF PHILOSOPHY: THE BASIC CONCEPTS OF THE WORLD'S GREATEST THINKERS* 178 (2006); and THOMAS FRONCEK, *THE HORIZON BOOK OF THE ARTS OF CHINA* 39 (1969) ("Confucianism, which dominated Chinese thought after the second century B.C., is more of a code of ethics than a religion. Its followers do without priests, images or deities—although Confucius himself is sometimes worshipped as a sage.").

87. GAVIN MENZIES, 1421: *THE YEAR CHINA DISCOVERED AMERICA* 39 (2002).

88. See *id.*

89. FITZGERALD & KOTKER, *supra* note 20, at 67; see also MANNION, *supra* note 86, at 177 ("[Confucius] lived in a time of chaos and corruption in ancient China, and his philosophy stressed the ethical in interpersonal and political relations and family values. . . . The leaders should be of exemplary moral fiber . . .").

90. FITZGERALD & KOTKER, *supra* note 20, at 20; see also MANNION, *supra* note 86, at 178 (Confucius "concluded that five virtues were what one needs to live a good life: compassion, decency, good manners, insight, and fidelity.").

91. FITZGERALD & KOTKER, *supra* note 20, at 65. See also Edward J. Romar, *Globalization, Ethics, and Opportunism: A Confucian View of Business Relationships*, 14 BUS. ETHICS Q. 663, 667 (2004) ("Confucianism is based upon the virtues of trust, honesty and benevolence and is relational and hierarchical."); and Shafer et al., *Values and the Perceived Importance of Ethics*, *supra* note 39, at 267 ("Several distinct values are associated with Confucian dynamism, including persistence (perseverance), personal steadiness (reliability), ordering relationships, thrift, a sense of shame, respect for tradition, protecting your face, and reciprocation.") (citations omitted).

92. See, e.g., Lei Wang & Heikki Juslin, *The Impact of Chinese Culture on Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 440–41 (2009) ("Harmony is [Confucianism's] central principle, the overall goal of ancient Confucianism being to focus on secular ethics and morality, and educate people to be self-motivated and self-controlled to assume responsibilities, which leads to self-cultivation and a harmonious society.").

93. FITZGERALD & KOTKER, *supra* note 20, at 183.

"As a virtue ethic, the Confucian Way governs all aspects of human behavior and ethics cannot be separated from any individual activity."⁹⁴ Reciprocity and reciprocal virtuous behavior are key virtues in Confucianism.⁹⁵ Through its concern with reciprocity and social harmony, "Confucianism focuse[s] on the structure and the needs of the society at large."⁹⁶

In looking out for the needs of the society at large, individuals following the Confucian way embrace "a deep moral concern and altruistic commitment towards others and society."⁹⁷ Included in this societal concern is a sense of "distributive justice," which "implies a fair acquisition and distribution of resources."⁹⁸ It also includes the principle of "non-maleficence."⁹⁹

After the firm establishment of the Han dynasty in 206 B.C., "Confucians won the leading place in the esteem of the new emperors, and Confucianism became the orthodox doctrine of the Chinese world."¹⁰⁰ Today, more than 2,000 years later, the traditional values of Confucianism still "are ingrained in the Chinese way of life and affect Chinese people's perceptions of what is important and what is not."¹⁰¹ Confucianism continues to be "a dominant and enduring influence on cultural values in China despite the economic

94. Romar, *supra* note 91, at 668.

95. See, e.g., Wang & Juslin, *supra* note 92, at 442 ("Confucianism believes that virtuous behavior towards others lies in reciprocity. . . . Confucius called reciprocity as 'shu,' which thought is the fundamental moral principle which could guide a person through life, saying: 'never impose on others what you would not choose for yourself'") (CONFUCIUS, ANALECTS 15:24); Gary Kok Yew Chan, *The Relevance and Value of Confucianism in Contemporary Business Ethics*, 77 J. BUS. ETHICS 347, 353 (2008) ("According to the ANALECTS (Book VI, Number 28), the person who abides by the principle of reciprocity is a man of humanity."); FITZGERALD & KOTKER, *supra* note 20, at 183 ("Every man was also under a moral, legal, and social obligation to practice *jên*, or 'human heartedness,' in his dealings with others. *Jên*—or 'virtue of the soul,' as it was also known—was the central concept of Confucianism."); and Joseph P. Schultz, *Reciprocity in Confucian and Rabbinic Ethics*, 2 J. RELIGIOUS ETHICS 143, 144 (1974) ("Reciprocity is the basis for all human relations in the Confucian social order . . . Confucius himself expressed the idea of mutuality in social relationships . . .").

96. FITZGERALD & KOTKER, *supra* note 20, at 183.

97. D. F-C. Tsai, *The Bioethical Principles and Confucius' Moral Philosophy*, 31 J. MED. ETHICS 159, 161 (2005). The Confucian also "values his relatedness, mutuality, and communion with others more than his own separateness, individuality, and distinctiveness." *Id.* Indeed, "[w]hen there are conflicts between public interest and self interest, individual benefits and moral principles, *yi* as justice maintains the prioritization of: first, justice; second, profit (first, the public interest; second, the self interest) according to Confucius." *Id.* See also Karyn Lai, *Understanding Confucian Ethics: Reflections on Moral Development*, 9 AUSTL. J. PROF. & APPLIED ETHICS 21, 24 (2007) ("Confucian moral development involves the cultivation of a deep commitment to human welfare.").

98. Tsai, *supra* note 97, at 161. Confucian values required that "[r]elieving people's poverty ought to be handled as though one were rescuing them from fire or saving them from drowning. One cannot hesitate." THE DICTIONARY OF MING BIOGRAPHY 338 (L. Carrington Goodrich ed., 1976). For several excellent critiques of how far modern America has fallen from such an idea, see JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012); see also KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1991).

99. Tsai, *supra* note 97, at 161. "[N]on-maleficence is a perfect duty that everyone should not transgress, while beneficence is a moral ideal . . ." *Id.*

100. KOTKER & FITZGERALD, *supra* note 20, at 75.

101. George Lan, Zhenzhong Ma, JianAn Cao & He Zhang, *A Comparison of Personal Values of Chinese Accounting Practitioners and Students*, 88 J. BUS. ETHICS 59, 62 (2009).

and political upheavals in the last two centuries."¹⁰² As an example, in the 1990s, when "a small number of older [Communist] ideologues [sought] to resuscitate Mao's ideas," a larger group of Chinese scholars and young individuals instead turned back to the shared Confucian values they credited for the Asian economic miracles of the 1980s and 1990s.¹⁰³

Western philosophies long have admired and praised Chinese Confucian morality and ethics. For example, the eighteenth century French Jesuits urged "that the ethical content of the Confucian Classics proved the Chinese were a deeply moral nation."¹⁰⁴ Voltaire even went so far as to assert that the morality and ethics of the Chinese showed "it was obviously possible for a country to get along admirably without the presence of Catholic clerical power."¹⁰⁵ Even earlier, in 1699, the German mathematician and philosopher Gottfried William Leibniz asserted the superiority of the Chinese and their Confucian culture and ideals to western ethics and politics.¹⁰⁶ The Dutch scholar Isaac Vossius and the Flemish Jesuit Father Nicholas Trigault similarly praised the Chinese for their peacefulness and their conduct toward neighboring countries.¹⁰⁷

In understanding and assessing the current western criticisms of China's AML and its enforcement, it is crucial to appreciate how different Chinese Confucianism and morals are from the current American neoclassical economic and individualistic philosophies that largely have driven American antitrust enforcement since the 1980s.¹⁰⁸ In the United States, some scholars have argued that antitrust should have no ethical or moral compo-

102. *Id.*

103. FAIRBANK & GOLDMAN, *supra* note 19, at 441.

104. SPENCE, *supra* note 29, at 133.

105. *Id.*

106. See ARTHUR O. LOVEJOY, *ESSAYS IN THE HISTORY OF IDEAS* 105 (Capricorn Books ed. 1960). Leibniz wrote in part, "we now experience in the case of the Chinese . . . be it said almost with shame—we are beaten by them—that is, in the principles of Ethics and Politics. For it is impossible to describe how beautifully everything in the laws of the Chinese, more than in those of other peoples, is directed to the achievement of public tranquility, to that good order in the relations of men to one another whereby each is in the least degree injurious to the others." *Id.* at 105–06 (quoting GOTTFRIED WILLIAM LIEBNIZ, *NOVISSIMA SINICA* (trans., 2d ed., 1724)). Leibniz went on to recommend and promote the project of a joint Chinese-European Academy of Science, in which Western philosophies would be compared to Chinese Confucianism. He urged, "If this should be carried out, I fear lest we soon be inferior to the Chinese in everything that is deserving of praise. I say this, not because I envy them any new light—on that I should rather congratulate them—but because it is to be desired that we, on our side, should learn from them those things which hitherto have, rather, been lacking in our affairs, especially the use of practical philosophy and an improved understanding of how to live. . . . I believe that if a wise man were chosen to pass judgment, not upon the shapes of goddesses, but upon the excellence of peoples, he would award the golden apple to the Chinese" *Id.* at 126.

107. LOVEJOY, *supra* note 106, at 104–05 (quoting ISAAC VOSSIUS, *VARIARUM OBSERVATIONUM LIBER* (1685)); NICOLAS TRIGAULT, *PURCHAS HIS PILGRIMES* (1625). Father Trigault wrote, "neither the [Chinese] king nor his subjects ever think of conquering other nations. They are content with what is theirs and do not covet what belongs to others." *Id.* at 104.

108. See, Lan et al., *supra* note 101, at 62 ("[Confucianism] differs substantially from Western philosophical ways of thinking and behaving and is at the philosophical basis for the collectivist and power distance values prevalent in China.").

nent.¹⁰⁹ Neoclassical economists believe that society is best served by each individual and corporation acting in his or her own selfish interests.¹¹⁰

Such western neoclassical economic thinking is diametrically opposed to Chinese Confucianism and China's historical social values and morals. Consequently, Chinese regulators are unlikely to build their AML enforcement activities around conservative neoclassical economic theories. The Chinese long have feared the breakdown of general ethical standards and the dangers of "unbridled individualization."¹¹¹ Quite simply, the Chinese Confucian Way views ethics and morals as intrinsic to all human behavior, including economic and competitive endeavors.¹¹²

Many Chinese rightfully fear and believe "that the transition to a market-based economy has been characterized by behavior that is less than ethical and socially irresponsible."¹¹³ Such fears and tensions epitomize a longstanding Chinese fear of "spiritual pollution," a term designed to suggest the extent of the damage wrought by decadent influences from the West."¹¹⁴ In response to such insecurities, fears, and tensions, in 2005, Premier Hu Jintao "launched a nationwide campaign to promote a 'harmonious society,' stressing the traditional Confucian values of moderation, benevolence, and balance, in an apparent effort to counter the sharpening social tensions caused by the economic reforms."¹¹⁵ In light of such ongoing developments, it seems safe to assume and predict that China is unlikely to renounce its historic Confucian values and ideals in favor of conservative neoclassical economic theories in interpreting and enforcing its AML.

2. *Virtue, Morality, and Law in Chinese Culture*

Since the firm and deep establishment of Confucianism more than 2,000 years ago, the Chinese have strongly believed in the importance of morality and virtue in all walks of life, including the political and social. China long has been "under the sway of the great Confucian myth of the state, government by virtue."¹¹⁶ Since a Confucian leader rules by

109. See Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) ("[A]ntitrust has no moral content . . ."); see also Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 989 (2008).

110. See Horton, *Coming Extinction*, *supra* note 9, at 506 ("utility-maximizing consumers interacting amorally with profit-maximizing businesses will lead to the promised land of allocative efficiency."). Interestingly, Adam Smith did not share the neoclassical economists' views that competition should be unfettered and follow the maxims of Social Darwinism. Smith believed that "people are naturally cooperative and sympathetic, and that their self-interest naturally includes concern for others and their opinions." ROBERT C. SOLOMAN, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* 86 (R. Edward Freeman ed., 1992). For Smith, "self-interest must always be kept in balance with benevolence and other moral sentiments." *Id.* at 87.

111. See, e.g., SPENCE, *supra* note 29, at 17 (describing how Chinese scholars during the Ming Dynasty "concluded that the corruption sprang from a breakdown of the general ethical standards . . . and from the growth of an unbridled individualism.").

112. See, e.g., Romar, *supra* note 91, at 668 ("As a virtue ethic, the Confucian Way governs all aspects of human behavior and ethics cannot be separated from any individual activity.").

113. Shafer et al., *supra* note 39, at 268.

114. SPENCE, *supra* note 29, at 699.

115. FAIRBANK & GOLDMAN, *supra* note 19, at 468.

116. See *id.* at 109. The authors add, "The central myth of the Confucian state was that the ruler's exemplary and benevolent conduct manifesting his personal virtue (*de*) drew the people to him and gave him the Mandate." *Id.* at 111.

virtue of moral goodness, he or she must continually seek the moral approval of the Chinese people.¹¹⁷ Confucius's emphasis on the moral and ethical conduct of the ruler and his government was "different from anything in the West."¹¹⁸

Over the course of China's history, the rule of Confucian virtue and ethics has tended to trump the rule of law in Chinese political thought.¹¹⁹ In the early years of Confucianism, the rule of virtue was opposed by "The School of the Law" philosophy and its followers, the "Legists."¹²⁰ The Legists taught that strict laws rather than Confucian virtue should control the people.¹²¹ Intense opposition to the Legist philosophy helped bring the Han dynasty to power "and forever discredited the School of Law."¹²²

Under the Confucian rule of virtue, right conduct, not the law, allowed a Chinese ruler to maintain power.¹²³ The Chinese ruler was accountable "to a supreme moral force that guides the human community."¹²⁴ Thus, when China's last great dynasty, the Qing, came to power in the mid-seventeenth century, they recognized the need to "preserve the social and political order of imperial Confucianism," and "integrate [their] rule with Chinese culture in mutual dependence."¹²⁵ As described by noted historians Susan Naquin and Evelyn Rawski, "[L]uan was the disorder that could arise within the state, the community, the household or the individual when ethical norms and correct ritual were not followed. The desire to promote order and prevent luan permeated Chinese society from top to bottom."¹²⁶

Following Confucian virtue and moral precepts, the Chinese have written their history for thousands of years with "a moral purpose—to warn contemporaries by holding up the

117. *Id.* at 154 ("Another strength of Confucian government lay in its constantly seeking the moral approval of the people governed."); *id.* at 52 ("Right conduct gave the ruler power.").

118. *Id.* at 52. Many Chinese scholars blamed the collapse of the Ming dynasty in the mid-seventeenth century on "the extreme individualism and belief in innate moral knowledge that had been so popular in the late Ming." SPENCE, *supra* note 29, at 102.

119. See, e.g., Castellucci, *supra* note 22, at 48 (arguing that the "rule of virtue" "is an important concept in the Confucian tradition of the art of government, as opposed to ruling by the force of the law"); *id.* at 48, n.59 ("[I]n the general principles contained in the T'ang Imperial Code of Laws of year 624, a fundamental rule of government is that virtue and rites are the basis for the government, law and punishment are its instruments, in a typical rule-by-law conception." (internal quotation marks omitted)).

120. See KOTKER & FITZGERALD, *supra* note 20, at 71.

121. See *id.* at 71-72.

122. See *id.* at 72. Although the teaching of the Legist School was eventually repudiated, "[l]egist thought remained an influence in Chinese society. It made the law a hated word, and as a result, China developed no civil law. Law was confined to the criminal branch, where it retained much of the severity and cruelty of Legist practice It can be said that while later China adopted Confucianism as the ethical and moral basis of society, it retained some Legist concepts in the actual practice of government." *Id.*

123. See *id.* at 52. Confucius is quoted as saying, "[w]hen a prince's personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed." CONFUCIUS, ANALECTS, *supra* note 95, at 13.6. More recently, in 2002, in a Resolution adopted in the Sixteenth National Congress of the CCP, the Constitution of the CCP was amended to include a reference to "combining the rule of law with the rule of virtue." See Castellucci, *supra* note 22, at 47.

124. FAIRBANK & GOLDMAN, *supra* note 19, at 40. "Unlike a Western ruler's accession . . . the Chinese theory of Heaven's mandate set up moral criteria for holding power." *Id.*

125. *Id.* at 154.

126. *Id.* (quoting SUSAN NAQUIN & EVELYN RAWSKI, CHINESE SOCIETY IN THE EIGHTEENTH CENTURY 92 (1987)); see also KOTKER & FITZGERALD, *supra* note 20, at 78 ("The reward of moral virtue was prosperity; the penalty for vice was disaster.").

sad example of past follies and vices and to encourage them with examples of virtue and wisdom.”¹²⁷ Even today, “legitimacy in China is still tied to the idea that the government should be the defender of a moral order.”¹²⁸

China’s modern legal system today is still “a work in progress.”¹²⁹ Over the past thirty-five years, “China has engaged in what is perhaps the most rapid development of any legal system in the history of the world.”¹³⁰ China amended its Constitution in 1993 as part of its economic reform process and declared, “[t]he State practices a socialist market economy.”¹³¹ To help expedite its development as a global market player, “China has been making efforts to build itself into a country under laws that fit into the global market.”¹³²

In creating its modern legal system, China and its government understand that they must not lose sight of China’s long history and culture. Within China today, therefore, “[i]ncreased commitment to the regularization that law brings exists side by side with a system that remains susceptible to popular demands and appeals to popular morality and local custom.”¹³³ In other words, Confucian morals and ethics continue to be as valid and important as ever to China’s rulers and their legal and regulatory systems.

The Chinese long have believed that honoring and adhering to Confucian ethics and morals will lead to a better and more harmonious society. Chinese core Confucian values, such as fairness and justice in economic competition, while currently considered mushy

127. KOTKER & FITZGERALD, *supra* note 20, at 12. (“All history depended on the moral qualities of the monarch. . . . [i]f there were calamities, they resulted from the moral defects of the king or emperor. If there was a recovery, it could be traced to the merit of the ruler, inspired by the teaching of the Sages. The result of this moral preoccupation in presenting historical record was to view the processes of human affairs as a series of cycles: rise, splendor, decline, and fall.”) *Id.* at 14.

128. Pye, *The State and the Individual*, *supra* note 43, at 461. “[I]f there is a decline in moral standards, the state is directly at fault.” *Id.*

129. Pittman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 L. & SOC. INQUIRY 465, 486 (2004).

130. Liebman, *supra* note 15, at 18. Professor Liebman further notes, “[t]he Chinese legal system has been fundamentally transformed since 1978. At the beginning of the reform era there were few laws or trained personnel. Today, China has sophisticated legal institutions, thousands of laws and regulations, and the third largest number of lawyers in the world. Law has begun to regulate both state and individual behavior in ways that were inconceivable in 1978. Commitment to the rule of law has become an important part of state ideology and state legitimacy. Popular understanding of law has expanded dramatically and the legal system has become an important route for addressing grievances and resolving disputes.” *Id.*

131. Wang, *supra* note 13, at 133.

132. *Id.* “China’s law reform program began in late 1978, at the Third Plenum of the Eleventh Central Committee of the [CCP]. The plenum reflected a tentative policy consensus about the need to reform the state-planned economy and build a legal system that would support economic growth” Potter, *supra* note 129, at 465. “The study of Chinese law has recovered and flourished since the advent of reform in 1978, aided substantially by rapidly legislating and the increasing use of law and courts as political forums.” Jonathon Kinkel & William Hurst, *Review Essay—Access to Justice in Post-Mao China: Assessing the Politics of Criminal and Administrative Law*, 11 J. E. ASIAN STUDS. 467, 468 (2011).

133. Liebman, *supra* note 15, at 32.

and soft by some American antitrust practitioners, scholars, and jurists,¹³⁴ are therefore seen as non-negotiable cultural and social bedrocks for China's future.¹³⁵

C. WHY CHINA IS LIKELY TO BE GUIDED BY ITS UNIQUE CONFUCIAN HISTORY AND CULTURE IN INTERPRETING AND ENFORCING ITS AML

Western scholars and critics today are urging China to follow conservative American neoclassical economics in interpreting and enforcing its AML. In the words of former U.S. Antitrust AAG Hewitt Pate, "U.S. and European officials have often approached China like a recruiting prospect—as a new player to be won over to the U.S. or European styles of antitrust."¹³⁶ China's long and impressive history and culture, however, ensure that China will do what it has done throughout its long history—chart its own course.¹³⁷ The proud Chinese will never allow themselves to become "the tail of someone else's dog."¹³⁸

This does not mean that China will stop studying and adopting western competition regulation theories and ideas. It must be recognized that the western values of individualism and materialism "have recently penetrated Chinese society and are having a great influence on Chinese people's everyday life, in particular, for the young generation."¹³⁹ Imported western values vie every day with traditional Chinese Confucian values for the attention of the Chinese populace.¹⁴⁰ It also is true that "the issue of individualism has yet to be resolved in Chinese culture."¹⁴¹ China's youth continue to demand greater rights and freedoms.¹⁴² Consequently, as the world continues to flatten, there can be little doubt that China will continue to assimilate numerous aspects of Western culture.¹⁴³

134. See, e.g., Horton, *Coming Extinction*, *supra* note 9, at 505–507; Horton, *Fairness and Antitrust*, *supra* note 9, at 831–37. Again, it is important to recognize that Adam Smith did not view such concepts as mushy. "In 1759, Smith began his book *The Theory of Moral Sentiments* by pointing to the natural human capacity for sympathy as the rule of all morality. . . . From [our] moral sentiments, we derive the general rules of justice and injustice." Larry Arnhart, *Darwinian Conservatism*, in *PHILOSOPHY AFTER DARWIN: CLASSIC AND CONTEMPORARY READINGS* 349, 350 (Michael Ruse ed., 2008).

135. China's CCP recognizes how critical the ideals of fairness and justice, among others, are to building a successful Socialist economy with Chinese characteristics. In May 2008, China's State Council Information Office publicly released a government white paper describing "the Chinese people's struggles for democracy, freedom, equality, and the building of a country under the rule of law." The State Council Info. Office, China, *China's Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT'L LAW 513, 513 (2008). The government listed "fairness and justice" as critical to China's future, as well as "safeguarding market order and achieving social fairness and justice [in] establish[ing] an initial law regime for the socialist market economy." *Id.* at 514, 517.

136. Pate, *supra* note 18, at 195.

137. See, e.g., FAIRBANK & GOLDMAN, *supra* note 19, at 164 ("China's modern economy when it did develop would be to a large extent in Chinese hands").

138. *Id.* at 322.

139. Lan et al., *supra* note 101, at 62.

140. *Id.*

141. Pye, *The State and the Individual*, *supra* note 43, at 466. Professor Pye believed that in China, "[t]he process of working toward a new equilibrium in state-individual relations is certain to be filled with tensions, especially as officials sense the weakening of state authority and the increasing role of the people." *Id.*

142. Lan et al., *supra* note 101, at 62.

143. Some commentators have gone so far as to say, "[i]t seems that while the West is experiencing a transformation in values from a self-oriented focus to a community-oriented focus. . . the reverse appears to be

One must also consider China's reputation for carefully analyzing all sides of an issue and being ready to compromise to promote social harmony.¹⁴⁴ A relevant example of such flexibility "is reflected in the compromises regularly found in the laws and regulations that govern competition and pricing in China."¹⁴⁵ Throughout their history, the Chinese have "preserve[d] the most cherished aspects of their traditional culture by selectively adapting elements of Western learning and technology to China's needs."¹⁴⁶ Therefore, it is likely that China's AML interpretation and enforcement in the coming decades will include a blend of western and Chinese philosophies and approaches.

Whatever ultimate philosophical blend China chooses, China will be guided heavily by its Confucian traditions. Consequently, China's future AML enforcement is likely to be based on social, moral, and political, as well as economic, considerations.¹⁴⁷ These considerations are likely to include a heavy dose of Confucian morals and ethics, as well as broad social concerns.

As a starting point, China's leaders believe that economic and social responsibilities exist together and cannot meaningfully be separated.¹⁴⁸ On September 15, 2006, then Chinese President Hu Jintao described a harmonious Chinese society as one that "gives full play to modern ideas like democracy, rule of law, fairness, justice, [and other social objectives]."¹⁴⁹ Under this Harmonious Society policy, economic growth must be balanced with tackling serious social and economic dislocations, including income inequality between regions and within social groups, and potentially widespread corruption.¹⁵⁰ Rec-

true for China, where greater emphasis is now being placed on the Western values of individualism and self-awareness." *Id.* at 72-73.

144. See, e.g., FAIRBANK & GOLDMAN, *supra* note 19, at 107 ("Unlike the philosopher's ideal of absolute adherence to principle, the master of a gentry household is advised to think ahead, consider all sides, and be ever ready to compromise."); FITZGERALD & KOTKER, *supra* note 20, at 116 ("There arose that peculiarly Chinese phenomenon, the ability to hold two opposing theologies at the same time on the grounds that both might be partly right. In any case, to the Chinese practice was much more important than theory.").

145. Kennedy, *supra* note 27, at 8.

146. SPENCE, *supra* note 29, at 216. Chinese respect for Western technological power always has blended "with a yearning to retain some essence of Chinese culture." *Id.* at 313. See also *id.* at 224, "[i]n the years after the Sino-Japanese War, a formulation became widespread that gave philosophical reassurance to those worried about the value of 'self-strengthening': 'Chinese learning should remain the essence, but Western learning be used for practical development . . . It affirmed that there was indeed a fundamental structure of Chinese moral and philosophical values that gave continuity and meaning to civilization. Holding onto that belief, China could then afford to adapt quickly and dramatically all sorts of Western practices, and to hire Western advisors.'"

147. In the words of former Antitrust AAG Pate, "we should not be surprised if *non-antitrust values* find expression in Chinese antitrust outcomes to a greater degree than is the case in the United States or Europe." Pate, *supra* note 18, at 196 (emphasis added). Missing from Pate's characterization of Chinese "non-antitrust values" is that "[t]he history of the continuing debates as to antitrust legislation and regulation reveals that how people think about antitrust issues is generally tied to their underlying assumptions and premises, as well as their implied values." Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195, 201 (2006); see also Michael S. Jacobs, *An Essay in the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 265 (1995) ("Choosing between economic theories is as much an act of politics as of science.").

148. See, e.g., See *supra* note 33, at 1.

149. See *Harmonious Society*, THE 17TH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA, (Sept. 30, 2007, 9:14 AM), <http://english.peopledaily.com.cn/90002/92169/92211/6274973.html>.

150. See, *supra* note 33, at 2. In 2004, when then Assistant AAG Pate visited China, he recalled being told by his hosts, "[y]ou cannot understand China by visiting modern Beijing. You must see more rural areas where many people are poor and need the benefits of economic growth." Pate, *supra* note 18, at 197.

ognizing this, the CCP also issued a list of “Disharmonious elements in China (relevant to corporations),” including the need for moral progress and “unequal income distribution pattern[s].”¹⁵¹

In addition, China aspires to create a unique humanistic legal system. “China’s legal reforms aim to create a fair system that serves both to further economic development and to address the rights and grievances of those left behind by such development. Ensuring social stability requires that the legal system accomplish both tasks.”¹⁵²

The Chinese government, as well as Chinese businesses and citizens, recognize that Corporate Social Responsibility (CSR) will be critical to building a harmonious society and will therefore continue to promote its development in China.¹⁵³ The hope is that “Confucian reciprocity can lead to a win-win business relationship and fair competition.”¹⁵⁴ Completely antithetical to western ideas of aggressive and even cutthroat competition, fair competition in China assumes a harmonious business relationship between competitors, as well as suppliers, customers, and partners.¹⁵⁵

China is likely to continue honoring and following its Confucian traditions and morals in building its modern legal system and in interpreting and enforcing its AML. China therefore will continue to encourage its business organizations to adopt and follow Confucian moral and ethical principles. “Business organizations can benefit from Confucian ethics and Confucianism can provide the moral guideposts necessary to overcome opportunism.”¹⁵⁶ This Confucian approach will attempt to harmoniously balance the strive for human virtue and profits, respectively.¹⁵⁷

151. See, *supra* note 33, at 3. “Selected proposed actions (relevant to corporations)” also were set forth, including “social equity and justice as a basic condition of social harmony.” *Id.* In China, the terms equity and justice are an important aspect of socialist ideals. Indeed, Karl Marx’s original focus on poverty as the driving force for revolutionary dynamism ultimately shifted “from poverty to an equally objective desire for equality and justice.” Kikhu Parekh, *Hannah Arendt’s Critique of Marx*, in HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 67, 93 (Melvyn A. Hill, ed., 1979). China’s leaders have not forgotten that a primary reason Mao Zedong and the CCP ascended to power was that China’s economic growth “had failed to reach hundreds of millions of people.” See SPENCE, *supra* note 29, at 431.

152. Liebman, *supra* note 15, at 31.

153. For an excellent discussion of the history of CSR in China, see Wang & Juslin, *supra* note 92, at 433–47. The authors argue that “the Western CSR concepts cannot fit the Chinese market well, and CSR concepts have to take Chinese cultural contexts into consideration to be widely disseminated in China and understand better by Chinese corporations and society.” *Id.* at 435.

154. *Id.* at 443.

155. *Id.* at 444.

156. Romar, *supra* note 91, at 672. Romar adds: “Confucianism provides the guidance necessary to manage ethically the tension between self-interest and cooperation so necessary to the development and maintenance of successful and moral organizations.” *Id.*

157. See Chan, *supra* note 95, at 351. It is important to recognize that Confucianism does not attack profit-making unless it is “for selfish purposes and not for the good of the community.” *Id.* at 350. Neoclassical American economics conversely follows conservative economist Milton Friedman’s view that the only societal responsibility is to maximize efficiencies and to earn profits (subject to compliance with the rule of law). See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–36 (40th anniversary ed. 2002). For several recent Western scholarly opinions differing with Friedman’s view, see LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2013); Justin Fox & Jay W. Lorsch, *What Good are Shareholders?* HARV. BUS. REV., July–Aug. 2012.

III. China's Emerging Approach to Interpreting and Enforcing China's AML

Slowly but surely, American antitrust seems to be moving in the direction of more aggressive antitrust enforcement¹⁵⁸ and away from the neoclassical Chicago School economic theories that have dominated American antitrust enforcement since the 1980s.¹⁵⁹ Welcome developments include, among others, influential American antitrust scholars mounting aggressive attacks against exclusionary conduct by dominant firms;¹⁶⁰ questioning the current delineation of relevant markets in antitrust cases;¹⁶¹ recommending the fostering of a moral component to antitrust crimes;¹⁶² arguing for more aggressive regulation of monopolies;¹⁶³ urging an increase in our shared moral outrage over antitrust violations;¹⁶⁴ applying truly conservative economic models to limit the growth of concentrated private economic power;¹⁶⁵ and proposing dramatically increased fines for cartel violations.¹⁶⁶

This author previously has proposed applying evolutionary theories to structural and behavioral antitrust issues.¹⁶⁷ This part discusses how China's obeisance to traditional Confucian morals, ethics, and ideals is consistent with the evolutionary theory. Looking at both behavioral (III.A.) and structural competition (III.B.) issues, it is recommended that China continue to follow and apply evolutionary principles in interpreting and enforcing its AML.

158. See, e.g., Thomas J. Horton, *The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?* 2 J. EUR. COMPETITION L. & PRACT. 158, 158 (2011) (contending that the 2010 revisions to the United States' 1992 Horizontal Merger Guidelines "portend a potentially dramatic and perhaps even counterrevolutionary shift in the enforcement visions and goals of the current [U.S. antitrust] Agencies, and a pronounced convergence towards the EC's Guidelines on the assessment of horizontal mergers.").

159. See, e.g., Horton, *Fairness and Antitrust*, *supra* note 9, at 825 ("Economics rules antitrust today. Jurists and scholars favoring 'consumer welfare' considerations and disfavoring fairness considerations in antitrust are ascendant."); Stucke, *Reconsidering Antitrust's Goals*, *supra* note 68, at 563–66 (discussing ascendance of Chicago School's neoclassical economic theories in American antitrust jurisprudence since the late 1970s); Markham, *supra* note 68, at 281 ("Post-Chicago antitrust theory departs from the Chicago School views mostly around the margins."); Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 385 (2009) ("[M]any commentators urge we are all Chicago School now and that the Chicago School has absorbed most of the competing approaches.").

160. See, e.g., Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L. J. 527 (2013); C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013).

161. See, e.g., Louis Kaplow, *Why (Ever) Define Markets?* 124 HARV. L. REV. 437 (2010).

162. See, e.g., Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443 (2006) [hereinafter Stucke, *Morality and Antitrust*].

163. See, e.g., Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L. J. 1509 (2013).

164. See, e.g., D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Antitrust*, 78 ANTITRUST L. J. 201, 216–19 (2012).

165. See, e.g., James W. Brock, *Economic Power, Henry Simons and a Lost Antitrust Vision of Economic Conservatism*, 58 S.D. L. REV. 443 (2013).

166. See, e.g., John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy*, 34 CARDOZO L. REV. 427 (2012).

167. See Horton, *Fairness and Antitrust*, *supra* note 9, at 823; Horton, *Antitrust Double Helix*, *supra* note 9, at 615; Horton, *Coming Extinction*, *supra* note 9, at 469.

A. CHINA'S EMERGING EVOLUTIONARY APPROACH TO BEHAVIORAL COMPETITION ISSUES

1. *Confucianism and Fair Market Competition*

Although Confucianism “has had to weather [an] onslaught of criticisms,” many Chinese believe that Confucianism has played a key role in helping China achieve its global economic successes.¹⁶⁸ Today, China and the CCP believe that “fair market competition” is essential in “protecting the consumer and public interests, [and] promoting the healthy development of the socialist market economy.”¹⁶⁹ The CCP consistently has emphasized “fairness and justice” as keys to a successful socialist society.¹⁷⁰ Consequently, “[a] major concern for Chinese competition policymakers has been the potential for ‘excessive’ or ‘malignant’ competition.”¹⁷¹ Confucian morality traditionally has decried selfishness and greed “as an antisocial evil.”¹⁷² “Unbridled individualism” and a “breakdown of the general ethical standards” have been viewed as a recipe for corruption and chaos.¹⁷³ Many Chinese intellectuals long have been “appalled by the social evils of unbridled capitalism and extreme individualism in the West.”¹⁷⁴ Such fears and concerns have catalyzed calls for “policies that ensure all market participants have a level competitive field.”¹⁷⁵

Both Articles 1 and 5 of the 2008 AML specifically highlight and emphasize the need for fair competition.¹⁷⁶ Such pronouncements are consistent with “[t]he Confucian ap-

168. See, e.g., Chan, *supra* note 95, at 347.

169. See Zhōnghuá rénmin gònghéguó fǎnlǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 1 (China).

170. See The State Council Info. Office, *supra* note 135, at 2.

171. HORTON & HUANG, *supra* note 1, at 10. See also Bruce M. Owen, Su Wen & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 247 (2008) (discussing the widespread fear of excessive competition in China).

172. FAIRBANK & GOLDMAN, *supra* note 19, at 258–59. The authors explain, “[w]estern political thought had built up the concept of interests—the personal desires and goals of individuals and groups in their inevitable competition with one another. . . . Not so in China. Interests were by definition selfish, and Confucian morality decried selfishness as an antisocial evil.” *Id.* One of China's greatest novels, *Golden Lotus*, which was published anonymously in the early 1600s, can be read “as a moral fable of the way greed and selfishness destroy those with the richest opportunities for happiness” SPENCE, *supra* note 29, at 10.

173. See, e.g., SPENCE, *supra* note 29, at 17.

174. Fung, *State Building*, *supra* note 35, at 320; see also Chan, *supra* note 95, at 350 (arguing that “[t]he dangers of extreme capitalism riding roughshod over ethics are real.”); Thomas B. Edsall, *Our Broken Social Contract*, N.Y. TIMES (June 19, 2013, 10:05 PM), http://opinionator.blogs.nytimes.com/2013/06/19/our-broken-social-contract/?_r=0 (discussing the view that “[c]orporate America has abandoned its commitment to the commonwealth over the past three decades. It no longer honors norms of fairness and equality . . . it is in the economic sphere that American integrity has been eroded and its ideals corrupted.”).

175. Hongbin Cai & Qiao Liu, *Competition and Corporate Tax Avoidance: Evidence from Chinese Industrial Firms*, 119 ECON. J. 764, 794 (2009).

176. See Zhōnghuá rénmin gònghéguó fǎnlǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 1, 5 (China). (Anti-Monopoly Law of the People's Republic of China Article 5 states, “Undertakings may, through fair competition and voluntary alliance, implement concentration, expand business scale and improve their market competitiveness according to law.”).

proach, [which] suggests that one should adopt a proper focus towards the striving for human virtue and profits, respectively.”¹⁷⁷

On December 1, 1993, approximately fifteen years before the implementation of its AML, China passed its Anti-Unfair Competition Law (AUCL).¹⁷⁸ Enacted to help the transition from a state-planned to a socialist market economy, the AUCL “was the first landmark legislation regulating competition in China.”¹⁷⁹ “The stated purpose of the AUCL is to encourage and protect fair competition, prevent unfair competition practices, and protect the legal rights and interests of business operators and consumers.”¹⁸⁰ The express and unequivocal language in both the AUCL and the AML shows how serious China is about ensuring “fair competition.” A review of China’s recent China Competition Bulletins (CCB), published by China’s Competition Research Center, further drives this home.¹⁸¹

China’s objectives of competitive fairness on a level, competitive playing field are fully consistent with evolutionary norms of fairness. Today, “evolutionary biologists, behavioral economists, and legal and business scholars are coming to appreciate how fundamental and critical humans’ innate sense of fairness has been to our long-term evolutionary and economic success.”¹⁸² We have evolved to care deeply about the fairness of exchange

177. Chan, *supra* note 95, at 351.

178. HARRIS ET AL., *supra* note 1, at 331.

179. *Id.*

180. *Id.* Article 1 of the AUCL states, “[t]his Law is formulated with a view to safeguarding the healthy development of [the] socialist market economy, encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers.” Zhōnghuá rénmin gònghéguó fǎn bù zhèngdàng jìngzhēng fǎ (中华人民共和国反不正当竞争法) [Anti Unfair Competition Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Dec. 1, 1993) 1993 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 92, art. 1 (China). Article 2 (AUCL) adds in part, “[a] business operator shall, in his market transactions, follow the principles of voluntariness, equality, fairness, honesty, and credibility and observe the generally recognized business ethics.” *Id.* art. 2.

181. See, e.g., CHINA COMPETITION BULL. 1 (25th ed. 2013) (“The principles of openness and transparency, fair competition, impartiality, and good faith are to be observed in government procurement. China’s government procurement system provides general rules on competition, transparency, and fairness.”); CHINA COMPETITION BULL. 2 (17th ed. 2012) (discussing how the new Rules on Retailing Fees were promulgated “for the purpose of maintaining market order and fair trading and promoting the healthy development of the retail industry”); CHINA COMPETITION BULL. 1 (12th ed. 2011) (“The draft Internet Information Service Rules contain 22 articles and prohibit Internet information services from engaging in conduct that may damage the legal rights of their competitors and consumers.”); CHINA COMPETITION BULL. 1 (8th ed. 2011) (The Service Codes for E-Commerce Third Party Transaction Platforms forbid “imped[ing] the legitimate interests of other business operators and consumers.”); CHINA COMPETITION BULL. 5 (7th ed. 2011) (discussing the State-Owned Enterprises Research Project Conference and Academic Seminar, and observing that Chinese Competition Professor Xiaoye Wang “noted that the AML should be equally applied to SOEs, private enterprises, and multinational companies to promote fair competition and improve the market economy system in China”); see also CHINA COMPETITION BULL. 4–5 (20th ed. 2012) (discussing MOFCOM’s conditional approval of Google’s acquisition of Motorola Mobility with the requirement that “Google must honour Motorola Mobility’s existing commitment to license its patents on fair, reasonable, and non-discriminatory terms”).

182. Horton, *Fairness and Antitrust*, *supra* note 9, at 839–40; see also EDWARD O. WILSON, CONSCIENCE: THE UNITY OF KNOWLEDGE 325 (1998) (“we are learning the fundamental principle that ethics is everything”); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND CREATION OF PROSPERITY 152 (1995) (“We often take a minimal level of trust and honesty for granted and forget that they pervade economic life and are crucial to its smooth functioning.”); MARK BEKOFF & JESSICA PIERCE, WILD JUSTICE: THE MORAL

relationships,¹⁸³ and a moral sense of fairness is hard-wired into our brains.¹⁸⁴ “Multidisciplinary studies confirm ‘that most of us do have a bias toward cooperation and a readiness to reciprocate—a sense of fairness.’”¹⁸⁵

China’s focus on fair competition dramatically distinguishes it from the United States. In the United States today, “[f]or many American jurists and scholars, the notion that antitrust and competition law should incorporate moral norms of fairness is anathema.”¹⁸⁶ Many American competition lawyers and economists today view fairness as a “non-antitrust value.”¹⁸⁷ The Chinese disagree.¹⁸⁸ Ironically, while most commentators see China as racing to struggle and catch the United States in competition law, China has the potential to set a progressive leadership tone for antitrust and fairness in the twenty-first century.

What are some of the practical implications of China following evolutionary norms of fairness in interpreting and enforcing its AML in the coming years? The first is that China is likely to be much more aggressive in addressing exclusionary competitive behavior than the United States has been over the last forty years.¹⁸⁹

In the United States, “[a]ntitrust commentators associated with the Chicago School have long expressed deep skepticism about exclusion as an antitrust theory, particularly as applied to dominant firm conduct.”¹⁹⁰ In modern American jurisprudence, “[i]t is axiomatic that predatory pricing cases are highly disfavored in antitrust . . . [and] it has become virtually impossible for a plaintiff to win a predatory pricing case.”¹⁹¹

Following Confucian ideals and evolutionary theory, China is likely to choose a different path from the United States in regulating exclusionary competitive behavior. Both China’s AUCL and AML take dim views of predatory pricing. As an example, Article 11 of China’s AUCL prohibits businesses from selling goods below cost for the purpose of forcing out competitors, except in severely limited circumstances.¹⁹² Article 11 applies

LIVES OF ANIMALS xii (2009) (“Cooperation, fairness, and justice have to be factored into the evolutionary equation in order to understand the evolution of social behavior in diverse species.”).

183. See, e.g., MICHAEL SHERMER, *THE MIND OF THE MARKET: COMPASSIONATE APES, COMPETITIVE HUMANS, AND OTHER TALES FROM EVOLUTIONARY ECONOMICS* 176 (2008); BEKOFF & PIERCE, *supra* note 182, at 134 (“Our informed guess would be that justice and a sense of fairness have evolved out of the more basic repertoire of cooperative and altruistic behavior.”).

184. See, e.g., SHERMER, *supra* note 183, at 113 (“The moral sense of fairness is hardwired into our brains and is an emotion shared by all people and primates tested for it.”).

185. Horton, *Fairness and Antitrust*, *supra* note 9, at 841 (quoting PETER CORNING, *THE FAIR SOCIETY AND THE PURSUIT OF SOCIAL JUSTICE* 196 (2011)).

186. Horton, *Fairness and Antitrust*, *supra* note 9, at 823–24.

187. See Pate, *supra* note 18, at 196.

188. Seventh Circuit Judge and former academic Frank Easterbrook has asked, “[w]ho says that competition is supposed to be fair?” *Fishman v. Estate of Wirtz*, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., concurring in part and dissenting in part). The simple answer to Judge Easterbrook’s question may be more than a billion Chinese.

189. Exclusion “encompass[es] both the complete foreclosure of rivals or potential entrants and conduct that disadvantages rivals without necessarily inducing them to exit.” Baker, *supra* note 160, at 527 n.1.

190. *Id.* at 528. Professor Baker adds, “[e]xclusionary conduct is commonly relegated to the periphery in contemporary antitrust discourse, while price fixing, market division, and other forms of collusion are placed at the core of competition policy.” *Id.* at 527.

191. Horton, *Fairness and Antitrust*, *supra* note 9, at 853.

192. Zhōnghuá rénmin gònghégúo fǎn bù zhèngdǎng jìngzhēng fǎ (中华人民共和国反不正当竞争法) [Anti Unfair Competition Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l Peo-

even where “the undertaking in question does not have a dominant position.”¹⁹³ Nor does Article 11 require “the existence of negative effects on competition.”¹⁹⁴

Similarly, China’s National Development and Reform Commission (NDRC) Anti-Price Monopoly Laws, promulgated in accordance with China’s AML, have the goals of protecting fair market competition, and safeguarding the interests of the consumers and the public.¹⁹⁵ The Rules forbid “price monopoly conduct,” including any use of pricing means by an undertaking with a dominant market position to eliminate or restrict market competition.¹⁹⁶

Importantly, neither the AUCL nor the AML and its accompanying rules appear to require a showing of anticompetitive intent in carrying out exclusionary pricing or other conduct.¹⁹⁷ Nevertheless, proof of anticompetitive intent is likely to carry great weight with China’s AML regulators and courts, as such intent is inconsistent with the overall tenor of the AML and China’s Confucian traditions. Such a policy accords with evolutionary theory and economics, which urges that antitrust regulators should pay increased attention to both evolutionary norms of fairness and anticompetitive intent in exclusionary cases.¹⁹⁸

Western critics undoubtedly will argue that China is jumping onto a slippery slope in seeking to evaluate such subjective factors as competitive fairness and anticompetitive intent in interpreting and enforcing its AML.¹⁹⁹ They will characterize such notions as hopelessly subjective and lacking any meaningful economic guidance.²⁰⁰

The Chinese, as they have done to date, should resist such criticisms. Through their long history, which has included numerous invasions and intrusions by outsiders, China has learned that human predatory behavior can be shockingly and unconscionably real and dangerous.²⁰¹ In the words of Harvard psychology Professor Steven Pinker, “[h]uman nature accommodates motives that impel us to violence, like predation, dominance, and

ple’s Cong., Sep. 2, 1993, effective Dec. 1, 1993) 1993 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 92, art. 11 (China).

193. HARRIS ET AL., *supra* note 1, at 339.

194. *Id.*

195. See Zhōnghuá rénmin gònghéguó fān lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 68, ch. II, art. 1 (China).

196. *Id.* art. 3. See also *id.* art. 6 (“Undertakings with dominant market positions shall not abuse their dominant provisions to eliminate or restrict competition.”); *id.* art. 17(2) (“Undertakings [with] dominant market positions are prohibited from . . . [s]elling products at prices below cost without any justification.”)

197. See, e.g., HARRIS ET AL., *supra* note 1, at 339 (“Article 11 [of the AUCL] does not require the existence of negative effects on competition. In addition, the ‘purpose of forcing out competitors’ may be implied from the conduct of below-cost selling.”).

198. See Horton, *Fairness and Antitrust*, *supra* note 9, at 845–51; Horton, *Antitrust Double Helix*, *supra* note 9, at 654–55; Maurice E. Stucke, *Is Intent Relevant?*, 8 J. L. ECON. & POL’Y 801 (2012) [hereinafter Stucke, *Is Intent Relevant?*].

199. For a detailed discussion of “the case against fairness” in antitrust, see Horton, *Fairness and Antitrust*, *supra* note 9, at 829–35.

200. See *id.* at 831.

201. In Nanjing, for example, during the Japanese invasion in World War II, “there was no transcendental moral code . . . [and] Chinese were killed in every conceivable manner, including being crucified, savaged by dogs, bayoneted to save ammunition or beheaded.” BURLEIGH, *supra* note 36, at 19.

vengeance. . . . When an opportunity does arise to eliminate a hated opponent with little danger of reprisal, a Darwinian creature will seize on it.”²⁰²

Unlike America’s Chicago School, the Chinese do not accept that a rational competitor will never engage in predatory economic conduct against a rival unless it can receive full recoupment of its costs later on.²⁰³ Evolutionary theory provides support for such a view. Professor Pinker has pointed out how predatory violence in human societies is often irrational.²⁰⁴

In his seminal article on social norms and roles,²⁰⁵ Professor Cass R. Sunstein explained how “[a] good deal of governmental action is self-consciously designed to change norms, meanings, and or roles, and in that way to increase the individual benefits or decrease the individual costs associated with certain acts.”²⁰⁶ Governments and regulators often employ euphemisms, such as “the reframing of a harm in words that somehow make [a harmful act] feel less immoral.”²⁰⁷ Displacement of responsibility, derogating the victim, and moral distancing additionally can be employed to justify harmful acts.²⁰⁸

Employing economic terms and phrases like consumer welfare, efficiencies, recoupment, and “protecting competition—not competitors,” America’s Chicago School has successfully established amoral norms justifying and encouraging dangerous predatory and exclusionary economic conduct.²⁰⁹ In changing America’s moral norms, Chicagoans have

202. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 483, 487 (2011).

203. *E.g.*, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993) (No recovery for predatory pricing under Section 2 of the Sherman Act on primary-line price discrimination under the Robinson-Patman Act without a showing “that the competitor had a reasonable prospect, or under § 2 of the Sherman Act, a dangerous probability of recouping its investment in below-cost prices.”).

204. *See* PINKER, *supra* note 202, at 511. Professor Pinker explains, “[t]hrough predatory violence is purely practical, the human mind does not stick to abstract reasoning for long. . . . As soon as the objects being preyed upon take protective measures in response, emotions are likely to run high. . . . In these cases the predator’s state of mind may shift from dispassionate means-ends analysis to disgust, hatred, and anger. As we have seen, perpetrators commonly analogize their victims to vermin and treat them with moralized disgust. Or they may see them as existential threats and treat them with hatred, the emotion that, as Aristotle noted, consists of a desire not to punish an adversary but to end its existence.” *Id.* Professor Pinker continues, “[t]here is a second way self-serving biases can fan a small flame of predatory violence into an inferno. People exaggerate not just their moral rectitude but their power and prospects, a sub-type of self-serving bias called positive illusions.” *Id.*

205. Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903 (1996).

206. *Id.* Professor Sunstein adds, “[t]hus government might try to inculcate or to remove shame, fear of which can be a powerful deterrent to behavior. The inculcation of shame operates as a kind of tax; the removal of shame might be seen as the elimination of a tax or even as a kind of subsidy.” *Id.*

207. PINKER, *supra* note 202, at 565 – 66. *See also* George Orwell, *Politics and the English Language*, *HORIZON*, Apr. 1946, at 252 (describing how governments can cloak atrocities in bureaucratese).

208. *See* PINKER, *supra* note 202, at 566–68.

209. *Antitrust Double Helix*, *supra* note 9, at 622, 669; *see Coming Extinction*, *supra* note 9, at 517–21; John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 *FORDHAM L. REV.* 2425, 2469 (2013); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349, 2402 – 2403 (2013).

allowed dominant firms and monopolies to behave unfairly while taking “detached, amoral stance[s] towards [their] harmful act[s].”²¹⁰

To their credit, the Chinese are choosing an evolutionary path, rather than a neoclassical economic one, in seeking to instill and promote evolutionary norms of fairness in economic competition. The Chinese are to be applauded for following their noble Confucian traditions in seeking to discourage anticompetitive exclusionary and unfair conduct by competitors.

2. Confucian Ethics and Morals and Corporate Social Responsibility

Recent antitrust scholarship has addressed the evolutionary importance of morals and ethics and their importance to future antitrust enforcement.²¹¹ Morality and ethics are crucial to our ability to build and maintain exchange markets.²¹² Recent anthropological research shows that “moral norms across the world cluster around a small number of themes.”²¹³ In the simple words of noted evolutionary biologist Edward O. Wilson, “we are learning the fundamental principle that ethics is everything.”²¹⁴

While Chicago School adherents in the United States believe that antitrust is amoral and should include no moral components,²¹⁵ recent scholarship has urged that it is time to reincorporate morality into America’s antitrust laws.²¹⁶ Fortunately, societal concern for ethical behavior appears to be on the rise today.²¹⁷ “Over the past fifteen to twenty years, there has been increased academic and practitioner interest in and concern with ethical

210. PINKER, *supra* note 202, at 495. “Even in matters when no reasonable third party can doubt who’s right and who’s wrong, we have to be prepared, when putting on psychological spectacles, to see that evildoers always think they are acting morally.” *Id.* at 494.

211. See, e.g., *Coming Extinction*, *supra* note 9, at 508–14; *Morality and Antitrust*, *supra* note 162, at 505–23.

212. See *Coming Extinction*, *supra* note 9, at 510; RICHARD LEAKEY & ROGER LEWIN, ORIGINS RECONSIDERED: IN SEARCH OF WHAT MAKES US HUMAN 350 (1992) (discussing how the social skill of cooperation evolved into “a set of rule of conduct, or morals, an understanding of right and wrong in a complex social system”); Joseph Heinrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, *SCI.*, Mar. 19, 2010, at 1484 (discussing the importance of ethical norms in building societies).

213. PINKER, *supra* note 202, at 624.

214. WILSON, *supra* note 182, at 325. Wilson adds, “[h]uman social existence, unlike animal sociality, is based on the genetic propensity to form long-term contracts that evolve by culture into moral precepts and law. . . . We . . . have discovered which covenants are necessary for survival, and we have accepted the necessity of securing them by sacred oath.” *Id.* at 325 – 26.

215. See generally PINKER, *supra* note 202. Professor Pinker observes, “[t]he unease with which we read these rationalization [by wrongdoers] tells us something about the very act of donning psychological spectacles. . . . [I]n the attempt to understand harm-doing, the viewpoint of the scientist or scholar overlaps with the viewpoint of the perpetrator. Both take a detached, amoral stance toward the harmful act. . . . The viewpoint of the moralist, [however], is the viewpoint of the victim.” *Id.* at 495.

216. See, e.g., *Coming Extinction*, *supra* note 9, at 514 (“We need explicit ethical codes to rein in the inexorable temptations in business to win by any means possible. . . . Only through such a morals-based evolutionary biology and ethics approach can we hope to emphasize that we will not tolerate anticompetitive actions that trammel the competitive process.”); Sokol, *supra* note 164, at 216 – 219 (“Moral outrage and shame have a place in cartel enforcement as it creates its own form of deterrence.”); *Morality and Antitrust*, *supra* note 162, at 546–47 (“Although antitrust scholars, policymakers, enforcers, and courts have divorced morality from antitrust, . . . it is time to bring morality into the debate.”).

217. See, e.g., Ge & Thomas, *supra* note 30, at 190 (“Societal concern for ethical behavior is also on the rise.”).

issues in business.”²¹⁸ One advantage of such societal concerns is that “[a]lthough developing a moral norm and educating society about it may have high fixed costs, once that moral norm is internalized, self-policing reduces enforcement costs.”²¹⁹

The Chinese do not view competition or their AML as amoral. “Mandarins were steeped in Confucian ethics and a code of moral values intended to maintain order and hierarchy in society by eliminating the opportunity for people to disturb the *tao* (interaction of natural forces).”²²⁰ Indeed, many throughout China and Asia are proclaiming the importance of Asian values while seeking to resist “the moral failings of Western societies.”²²¹ While American antitrust regulators and courts simply have accepted and embraced the amorality of our antitrust laws, the Chinese have sought to “sharpen the rigor of the intellectual tools needed to analyze the efficacy and morality of political actions,”²²² including the interpretation and enforcement of their AML laws.

While neoclassical economists may cringe at the idea of a fair and orderly marketplace, the Chinese embrace such a concept as part of their Confucian moral traditions. Therefore, we should not be surprised to see repeated references in China’s AML and competition regulations to a “socialist market economy” that includes a “united, open, and orderly market system.”²²³ The AML also requires state-owned enterprises to act “in good faith, with strict self-discipline, [and] subject themselves to the supervision from the to public supervision.”²²⁴

Rather than viewing business and commercial morality and ethics as an impediment to creating consumer welfare, the Chinese believe that CSR can enhance the global competitiveness of China’s businesses.²²⁵ Today, “CSR is becoming a tool for improving the com-

218. Singh et al., *supra* note 49, at 86. The authors add, “[t]he number of journals and conferences related to ethics has also increased significantly, and ethics tracks are now common at most business conferences. Business ethics is a topic of concern to the general public as well. In the past few years, . . . the American public has become interested in and concerned with the condition of corporate ethics. This increased interest in ethics is a worldwide phenomenon.” *Id.*

219. *Morality and Antitrust*, *supra* note 162, at 514. See also *Fairness and Antitrust*, *supra* note 9, at 845 (“Our potential for intense shared moral outrage can encourage better behavior and fairness in social dealings.”).

220. MENZIES, *supra* note 87, at 50.

221. FAIRBANK & GOLDMAN, *supra* note 19, at 431. See also *Civility*, *supra* note 55, at 763 (Voices in China “now are proclaiming that ‘Asian values’ are different from Western ones, and that economic growth can occur without the individualism associated with pluralistic democracy.”).

222. SPENCE, *supra* note 29, at xx.

223. See Zhōnghuá rénmin gònghéguó fānlǒngduàn fǎ (中华人民共和国反垄断法) [Anti-Monopoly Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ 68, ch. II, art. 4 (China); see also *Id.* art. 11 (“Industry association shall improve self-discipline in the relevant industries, lead the undertakings in the relevant industries to compete in accordance with laws and maintain the orders of market competition”).

224. Anti-Monopoly Law of the People’s Republic of China, 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 68, art. 7; see also Pearson, *supra* note 62, at 312 (discussing China’s regulatory “preference for ‘orderly’ competition”); *Id.* at 314 (discussing how the Chinese “continued to regard unfettered competition as harmful and decided accordingly that competition in strategic, state-owned industries should be ‘orderly’”). Professor Pearson additionally observes, “[a] major CCP statement on the economy issued in 2003 reiterated that the state should ‘restrain disorderly competition,’ a goal voiced repeatedly in statements by regulators in both network industries and financial services.” *Id.*

225. *E.g.*, Wang & Juslin, *supra* note 92, at 437 (“The Chinese government, enterprises, and society have realized that developing CSR is an important contribution to building a harmonious society, and have taken a series of positive actions to promote its development in China”).

petitiveness of the Chinese enterprises in the global market.”²²⁶ Consistent with the morality requirements of China’s AML, China’s 2006 PRC Company Law similarly requires that “a company shall accept social responsibility, and not only comply with the laws and administrative regulations, but also observe social morality and business ethics.”²²⁷

The western proponents of neoclassical economics may belittle China’s efforts to impose morality and ethics upon its businesses. But in following evolutionary theory in drafting its AML’s requirements of fairness and ethical behavior, China may be onto something. Rather than turning a blind eye to predatory and exclusionary conduct by dominant firms, as the United States has done, it seems that China recognizes that monopolies and dominant firms can and must be controlled. In the words of Steven Pinker,

Dominance is an adaptation to anarchy, and it serves no purpose in a society that has undergone a civilizing process or in an international system regulated by agreements and norms. Anything that deflates the concept of dominance is likely to drive down the frequency of fights between individuals and wars between groups. That doesn’t mean that the emotions behind dominance will ever go away—they are very much a part of our biology—but they can be marginalized.²²⁸

China and its AML deserve substantial praise for seeking to marginalize economic dominance and unfair exclusionary and predatory behavior by adhering to Confucian ethical and moral norms.

B. CHINA’S EMERGING EVOLUTIONARY APPROACH TO STRUCTURAL COMPETITION ISSUES

China’s recent 2011 census estimated that China has approximately 1.34 billion people, or nearly 18 percent of the world’s population.²²⁹ This population is dispersed throughout a vast nation that is still far from being a fully integrated or homogeneous country.²³⁰ While many westerners may view China as fairly homogeneous, China actually is a nation of tremendous economic diversity and variation. “China’s vast expanses [have] allowed for endless variations in such areas as pace of economic change, types of lineage organization, efficiency of transportation, religious practices, sophistication of commerce, and patterns of land use and landholding.”²³¹

Economic scholars have identified nine historic economic regions within China, each embracing parts of several provinces, and having a core “defined by heightened economic activity in major cities, high population density, and comparatively sophisticated transpor-

226. *Id.*

227. *Id.* at 438. Cf. Eabrasu, *supra* note 30, page 437 (arguing that corporations should “differentiate themselves from their competitors on the complex map of morality by building their own moral identity”).

228. PINKER, *supra* note 202, at 528.

229. See NATIONAL BUREAU OF STATISTICS OF CHINA, COMMUNIQUE OF THE NATIONAL BUREAU OF STATISTICS OF PEOPLE’S REPUBLIC OF CHINA ON MAJOR FIGURES OF THE 2010 POPULATION CENSUS[1] (No. 1) (2011); NATIONAL BUREAU OF STATISTICS OF CHINA, COMMUNIQUE OF THE NATIONAL BUREAU OF STATISTICS OF PEOPLE’S REPUBLIC OF CHINA ON MAJOR FIGURES OF THE 2010 POPULATION CENSUS[1] (No. 2) (2011).

230. See, e.g., SPENCE, *supra* note 29, at 90.

231. *Id.*

tation networks.”²³² “[E]ach core was surrounded by a periphery of less populated and developed areas.”²³³ Historic tensions between regional and central authorities and of crosscutting bureaucratic lines has added to such regional economic diversity.²³⁴

China’s dazzling economic diversity is further fueled by the entrepreneurial spirit of its citizens. In China’s bustling cities, vast numbers of small businesses exist alongside the towers of industrial and corporate giants. The excitement of a thriving and diverse economy fills the air. In 2012, China overtook the United States to become the biggest trading nation in the world.²³⁵

Unlike the United States, where growing economic consolidation seems to be a general rule,²³⁶ Chinese economic reforms since the late 1970s have actually strengthened a trend in China towards economic decentralization.²³⁷ “Official statistics indicate that market concentration ratios in China have been unusually low when compared to both developed and developing countries.”²³⁸

A number of scholars credit China’s industrial decentralization “with creating the conditions for China’s economic success since the late 1970s.”²³⁹ Yet, many western critics heavily criticize China’s economic decentralization and low market concentration ratios. They decry Chinese industry as economically inefficient,²⁴⁰ lacking in scale economies,²⁴¹

232. *Id.* at 91.

233. *Id.*

234. *Id.* at 524 (Professor Spence adds that when the CCP took power, such tensions “which had in various ways plagued China since the late Ming dynasty, were not going to be eradicated in any simple way”).

235. Haley & Haley, *supra* note 73 (The authors additionally observe, “[s]ince 2000, the value of Chinese exports [have] more than quadrupled. In 2009, China surpassed Germany to become the world’s largest exporter. In 2010, it overtook Japan to become the second-largest manufacturer, and its foreign-exchange reserves became the largest in the world.”).

236. See generally WALTER A. ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* (2d ed. 2004); BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2010); TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* 100 (2005) (discussing the “rapidly accelerating trend to concentration” as a result of a “lenient policy on mergers”); KENNETH M. DAVIDSON, *MEGAMERGERS: CORPORATE AMERICA’S BILLION-DOLLAR TAKEOVERS* (2003).

237. See, e.g., Zheng, *supra* note 18, at 656; Yingyi Qian & Chenggang Xu, *Why China’s Economic Reforms Differ: The M-Form Hierarchy and Entry/Expansion of the Non-State Sector*, 1 *ECON. TRANSITION* 135, 145–47 (1993); YINGYI QIAN, TETSUYA KATAOKA & BARRY R. WEINGAST, *CHINA’S TRANSITION TO MARKETS: MARKET-PRESERVING FEDERALISM, CHINESE STYLE* 10–21 (1995).

238. Zheng, *supra* note 18, at 659, 710 (Professor Zheng adds, “[b]etween the mid-1980s and the mid-1990s, the average market concentration ratio for the largest one hundred firms in various sectors hovered between ten and sixteen percent. In the mid-1990s, in eighteen out of thirty-nine major sectors, the largest eight firms in each sector accounted for less than ten percent of the market share . . . [M]ost of China’s industries, with the exception of the monopoly industries, are characterized by small-scale firms and low market concentration ratios”); see also Kennedy, *supra* note 27, at 26–27 (discussing the low concentration “by international standards” for “many . . . industries in China”); MINXIN PEI, *CHINA’S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY* 258 n.148 (2006) (citing Qi LUDONG, *ECONOMIC STUDIES ON MONOPOLIES IN CONTEMPORARY CHINA* 146–48 (1999)).

239. Zheng, *supra* note 18, at 657; see also Qian & Xu, *supra* note 237, at 152–56 (arguing that China’s decentralized industrial structure allowed flexibility and opportunities for regional economic experiments, which helped spur the emergence of China’s thriving non-state economic section); Jean C. Oi, *Fiscal Reform and the Economic Foundation of Local State Cooperation in China*, 45 *WORLD POL.* 99, 102 (1992) (discussing how China’s economic reforms encouraged local development).

240. See, e.g., Haley & Haley, *supra* note 73 (“The state has willingly paid the price of economic inefficiency to accomplish political, social, economic, and diplomatic goals”); HOWELL ET AL., *supra* note 1, at 90 (“Chi-

and plagued by excess capacity.²⁴² One scholar even has argued that “a compelling explanation for the widespread failure of Chinese price cartels is the extremely low concentration of production in Chinese industries.”²⁴³

Industrial decentralization and deconcentration in China is not an accident. It is undoubtedly true that China is still plagued by concentrated SOEs,²⁴⁴ which it must continue to reform and deconcentrate. On the other hand, China continues to show a keen interest in protecting the long-term health and economic opportunities of smaller competitors.²⁴⁵ As an example, AML Article 15(3) expressly exempts from its coverage monopolistic agreements if their aim is “improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises.”²⁴⁶ Other sections of China’s AML show a similar solicitude for the health and well being of smaller Chinese business enterprises.²⁴⁷ While the United States during the 1980s was zealously implementing Chicago School economic theories allowing massive economic consolidations,²⁴⁸ the Chi-

nese policymakers have expressed concern that in many domestic industrial sectors, Chinese enterprises are too small to achieve the economies of scale necessary to compete internationally on an equal footing with large foreign enterprises”).

241. See, e.g., Haley & Haley, *supra* note 73 (“Production came mostly from small companies that possessed no scale economies”); ZHENG, *supra* note 18, at 659 (“The duplication of industries at the provincial level and the resulting low economies of scale led to generally low market concentration ratios in China”).

242. See, e.g., Haley & Haley, *supra* note 73.

243. Kennedy, *supra* note 27, at 26.

244. A discussion of China’s SOEs and China’s ongoing efforts to reform and rein them in is beyond the scope of this article.

245. See, e.g., Horton & Huang, *supra* note 6, at 101.

246. See Zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ (中华人民共和国反垄断法) [Anti-Monopoly Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ 68, ch. II, art. 15(3) (China).

247. See, e.g., *id.* arts. 1 (protecting fair market competition), 4 (protecting open and competitive markets), 5 (protecting fair competition), 6 (forbidding dominant undertakings from abusing their market positions “to eliminate or restrict competition”), 11 (allowing trade associations to “maintain the order of market competition”), and 17 (forbidding numerous specified abuses of dominant market positions). China is not alone in recognizing the importance of protecting competitive opportunities. South Africa’s Competition Act of 1998, for example, states that one of the purposes of its competition law is “to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.” Competition Act 89 of 1998 § 2(e) (S. Afr.). Ironically, in its Aid to Small Business Act, the United States Congress stated, “[t]he essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise.” 15 U.S.C. § 631 (2010).

248. See generally HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

nese were aggressively encouraging local government support of grass-roots enterprises²⁴⁹ and working to develop independent zones of enterprise.²⁵⁰

More recently, in 2010, former Premier Jiabao Wen announced that China was going to accelerate the reform of monopoly industries to further encourage and promote fair competition among private- and state-owned enterprises.²⁵¹ Indeed, “[p]ressure to increase market competition for China’s state-owned enterprises has come from the highest levels of government.”²⁵²

At the same time, however, the Chinese government has repeatedly made it clear that it does not wish to allow excessive, harmful, unfettered, or unfair competition.²⁵³ The Chinese government unashamedly and unabashedly has announced its intentions to “develop a united, open, competitive, and orderly market system.”²⁵⁴ A major CCP statement on the economy issued in 2003 reiterated that the state should restrain disorderly competition.²⁵⁵ As previously discussed, such objectives mesh with traditional Confucian notions of a harmonious and fair society.

Such policies and ideals deeply trouble some conservative competition scholars.²⁵⁶ They see China as following the “wrong turns by U.S. antitrust policy in the past.”²⁵⁷ Are the Chinese really so misguided in seeking to guard entrepreneurial opportunity and enhance fair competition on a level playing field? Maybe not. At least one study has positively shown “that for non-state-owned Chinese firms, corporate ownership dispersion is

249. See, e.g., FAIRBANK & GOLDMAN, *supra* note 19, at 408. (China’s then Premier Deng Xiaoping saw such encouragement of small business enterprises as part of a program of reforms called “Socialism with Chinese characteristics.”) A key goal was to adopt Western technologies and economic methods “while still maintaining the traditional Confucian state and values.” *Id.* Indeed, simultaneously with such economic reform programs, the CCP issued “a blanket condemnation of what was called ‘spiritual pollution; a term designed to suggest the extent of decadent influences from the West.” SPENCE, *supra* note 29, at 699.

250. See SPENCE, *supra* note 29, at 732. Gavin Menzies notes that “[t]he Chinese were always careful to respect local sensibilities[.]” MENZIES, *supra* note 87, at 133.

251. See Kexin Li, *Antitrust Compliance Programs in China: Experiences from Practice* 11 (Am. Antitrust Inst., Working Paper No. 13-5, 2013).

252. Pearson, *supra* note 62, at 314. Professor Pearson adds, “[c]ompetition, officials argue, will help firms to become more efficient and profitable.” *Id.* “To enhance competition in the last decade, the Chinese government [also] has spun-off state-owned monopolies from government industries and broken them up.” *Id.* at 315.

253. See, e.g., Pearson, *supra* note 62, at 314.

254. See, e.g., See Zhōnghuá rénmin gònghéguó fǎn lǒngduàn fǎ (中华人民共和国反垄断法) [Anti-Monopoly Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ 68, ch. II, art. 4 (China).

255. Pearson, *supra* note 62, at 314 (quoting Xinhua, Speech at the Third Plenum of the 16th Party Congress: Decision on Perfecting the Socialist Market Economic Decision (Oct. 2003)).

256. See, e.g., Liu, *supra* note 76, at 301 (“Lack of strong political commitment to robust competition laws, while clinging to fuzzy notions of fairness, can reduce the predictability of Asian competition law enforcement”); Zheng, *supra* note 18, at 720 (“In sum, despite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to these local conditions.”); Howell et al., *supra* note 1, at 95 (“The areas of divergence from U.S. antitrust practice recall an earlier era in the United States, when antitrust was an expression of popular anxieties, political and social values, and a system of economic regulation.”). Carl Riskin went so far as to describe China’s economic policies as a “crippled hybrid.” FAIRBANK & GOLDMAN, *supra* note 19, at 398.

257. Howell et al., *supra* note 1, at 95.

positively associated to CSR.”²⁵⁸ Thus, corporate power dispersion in China may well aid in achieving the Confucian ideal of a harmonious society.

In addition, modern evolutionary theory calls into question the current extreme American “judicial tolerance of monopolies and predatory conduct,” which “views monopolies as ‘an important element in the free market system,’ and believes that monopoly pricing allows dominant firms to engage in risk taking that produces innovation and economic growth.”²⁵⁹ Evolutionary theory counsels that competitive diversity enhances an ecosystem’s overall fitness and leads to increased overall adaptability, resilience, and stability.²⁶⁰ Therefore, evolutionary theory counsels that, “we should protect healthy and stable competition by guarding competitors against [predatory and exclusionary] antitrust violations, and by pursuing merger policies that promote and protect variation and diversity rather than concentration.”²⁶¹

In 1945, Judge Learned Hand boldly stated, “[i]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his skill and character, to one in which the greater mass of those engaged must accept the direction of a few.”²⁶² Five years later, the United States Senate observed in passing the 1950 Celler-Kefauver Amendments to the Clayton Act,

While there exist many differences of opinion on other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high . . . The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.²⁶³

The Chinese appear to be aspiring and attempting to follow more closely the admonitions of Judge Learned Hand and the 1950 United States Senate than the neoclassical economic theories of the Chicago School in their AML’s regulation of structural competi-

258. Wenjing Li & Ran Zhang, *Corporate Social Responsibility, Ownership Structure, and Political Interference: Evidence from China*, 96 J. BUS. ETHICS 631 (2010). The authors point to additional work documenting that Chinese firms “smaller in size, non-state-owned, producing traditional goods, and located in poorer regions are more likely to have managers who opt for a higher CSR rating in China.” *Id.* at 633.

259. Horton, *Antitrust Double Helix*, *supra* note 9, at 615–16 (quoting Rudolph J.R. Peritz, COMPETITION POLICY IN AMERICA: 1888-1992: HISTORY, RHETORIC, LAW 239 (1996) (quoting Richard A. Posner, ANTITRUST LAW 28 (2d ed. 2001))); Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

260. Horton, *Antitrust Double Helix*, *supra* note 9, at 644–45. See also SCOTT E. PAGE, DIVERSITY AND COMPLEXITY 8–10 (2011) (“First, diversity often enhances the robustness of complex systems . . . systems that lack diversity can lose functionality. . . . Second, diversity drives innovation and productivity . . . we should not be at all surprised that productivity correlates with diversity”); WILSON, *supra* note 182, at 322 (“The more species that live in an ecosystem, the higher its productivity and the greater its ability to withstand drought and other kinds of environmental stress”).

261. Horton, *Antitrust Double Helix*, *supra* note 9, at 646; see also HORTON, *Coming Extinction*, *supra* note 9, at 489 (“Therefore, it should not surprise us to find a positive correlation between economic diversity and overall economic growth”).

262. United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (Hand, J.).

263. S. REP. NO. 81-1775 (1950); see also Comment, *The Amendment to Section 7 of the Clayton Act*, 46 ILL. L. REV. 444, 445 (1951) (“It may be stated that the purpose of the Amendment’s proponents was clearly to halt what they considered to be a rising tide of economic concentration”); Thomas J. Horton, *Fixing Merger Litigation “Fixes”: Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 191–94 (2010) (discussing the passage of the 1950 Amendments to the Clayton Act).

tion issues. In so doing, they are following modern evolutionary theory and their own traditional Confucian values and norms. Rather than portraying their AML and early competition efforts as misguidedly pursuing “non-antitrust values,” perhaps we should begin seeing them as progressive and enlightened.²⁶⁴

IV. Conclusion

China today faces a daunting array of complex economic, social, and political issues. Critics will continue to question China’s ability to enjoy the economic fruits of capitalism through a “socialist market economy” dedicated to ensuring “fair market competition” and widespread economic opportunity. Furthermore, China will have to come to grips with pursuing such lofty goals while dealing with economic and political corruption in a one-party political system dominated by the CCP. No easy answers or solutions await China. As it has done for thousands of years, however, China will call on its long traditions of Confucian ethics and morals in seeking to build and sustain a harmonious society and economy.

China’s AML reveals China’s continuing commitment to honoring and following its traditional Confucian ethics and morals. Western critics have failed to appreciate that China’s AML purposely aspires to follow an evolutionary, rather than a western neoclassical economic approach, in regulating behavioral and structural competition issues in China. As a result, continuing cries for China to get in step with western neoclassical economic theory are likely to fall on deaf ears.

China should be commended for the courage and boldness of its emerging evolutionary approach to Anti-Monopoly Law. Rather than succumb to western neoclassical economic pressures and criticisms, China should continue to seek to instill and inspire evolutionary norms of Confucian morality, ethics, fairness, and reciprocity in economic competition. China also should continue to emphasize the importance of economic diversity, variation, and multiplicity in addressing structural competition issues. Should China continue following its emerging evolutionary approach to competition, China ironically may find itself in a leadership position in the global antitrust and competition law arena, as the founder of antitrust, the United States, struggles to overcome forty years of largely misguided neoclassical economics and regain its economic soul.

264. See Zinzho Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 J. COMPETITION L. & ECON. 477 (concluding that “[b]ased on the experience of the merger enforcement agency, it seems that China’s government is on its way to building a reputation for committing to a sound competition policy”); Adrian Emch, *Antitrust in China—The Brighter Spots*, 3 EUR. COMPETITION L. REV. 132, 138 (2011) (“While China clearly has a long way to head in its path to become a mature and globally-recognized antitrust jurisdiction, at least in a few of MOFCOM’s merger-control investigations and a number of court cases, the authority and courts have followed—to some extent—an internationally accepted framework for their analysis”); Xinzhu Zhang & Vanessa Yanhua Zhang, *China’s Merger Control Policy: Patterns of New Developments*, COMPETITION POL’Y INT’L: ASIA ANTITRUST COLUMN 3 (2011) (“Although it has received some criticism from scholars and practitioners, and has indeed much room for improvement, MOFCOM has been on the right track to build an independent and transparent merger review system”).