

CULTURE, ECONOMICS, AND ANTITRUST: THE EXAMPLE OF TRUST
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What role do cultural dimensions of cooperation and competition play in economic life? Taking a multidisciplinary perspective, this essay uses the example of the concept of trust to consider some implications for competition policy. The author suggests that the field of competition policy is at core about the authoritative allocation of categories of economic activity along a spectrum with individualism and competition at one end and collectivism and cooperation at the other. The allocation is a function of the state, made on the basis of a variety of imprecise inputs—cultural, political, historic, economic, and institutional – and not merely neoclassical economic theory. Sensitivity to the cultural aspects of competition and cooperation places constraints on overly optimistic expectations for global harmonization of antitrust enforcement.

KEY WORDS: *culture, trust, competition, competition policy, individualism, collectivism, cooperation, social capital, global harmonization, convergence.*

I. INTRODUCTION

“Antitrust” is a word that confuses people. Most of the world prefers, quite understandably, to speak of “competition policy,” and I do, too.¹ The distinctly

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American word, “antitrust,” is an historical relic derived from the legalistic form that was used to create corporate holding companies, *e.g.*, the Standard Oil Trust or the Tobacco Trust, in the post-Civil War era. Sometimes it was spelled with a hyphen, “anti-trust,” clarifying that this was legislation in opposition to the large trusts that were then appearing on the scene. I will suggest, however, that the originally *unintended* meaning – treating “trust” as in “trustworthy” -- is actually quite useful in thinking about competition policy. Consider for a moment the most widely approved function of antitrust law today: stopping cartels. Cartels are based on trust among the conspirators that they will cooperate with each other rather than compete on certain key terms of trade such as price or output. The antitrust enterprise aims to deter and break down that trust. The extremely effective policy of granting leniency to whistle-blowing conspirators is specifically directed at causing distrust and defection. It is literally a policy of anti-trust.

Is this just word play? In this essay I will reflect upon the importance of trust, as an example of a cultural value, in the operations of economic institutions in which competition policy is embedded. This will entail recognizing the intertwining of competition and cooperation, which in turn will lead to a functional appreciation of antitrust as a state’s authoritative determination of the legitimate roles of both competition and cooperation in the economic realm. Recognition of the role of cultural values such as trust will be shown to modify the universalistic concepts of neoclassical economics based on the model of the rational self-interested man.

Curran, Arthur Durst, Eleanor Fox, Gregory Gundlach, Christopher Leslie, Mitsuo Matsushita, Julian Pena, Douglas Rosenthal, Christopher Sagers, Melissa Schilling, Robert Skitol, Randy Stutz, and Sandeep Vaheesan. Of course they bear no responsibility for my errors or wrongheadedness.

¹ In fact, in this paper, I will sometimes be using the word “antitrust” broadly to cover the wide range of laws and policies understood to constitute competition policy, such as sectoral regulation. At other times, the context will make clear that I am speaking only of the three basic U.S. antitrust laws, *i.e.*, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.

Sensitivity to the cultural aspects of competition and cooperation places constraints on overly optimistic expectations for global harmonization of antitrust enforcement.

Section two of this paper begins with a discussion of the meaning of trust as an aspect of culture and its importance in economic life. Section three, "From Darwinistic Competition to Cooperation," draws on a range of academic disciplines to introduce the relationship between competition and cooperation. Section four asks whether there can be too much of either competition or cooperation, concluding that some type of a balance is needed. In the following Section five, the paper reviews the concept of social capital, which includes trust, and its role in economic theory. The sixth section takes a short break from more theoretical considerations to illustrate ways in which the trust factor may be relevant to competition policy involving the Internet. Section seven discusses cross-cultural data, trust, and competition policy. Section eight — "trust and antitrust" -- identifies ways in which trust affects various aspects of competition policy: vertical integration, cartels, mergers and acquisitions, dominance and firm size, the role of the state and "the missing middle," growth orientation, and trade. Section nine provides the example of Abuse of Superior Bargaining Power ("ASBP"), an anticompetitive claim within a vertical buyer/supplier context that is recognized by some of our major trade partners but not by the U.S., to indicate how trust and other cultural values can influence the assignments of competition and cooperation. Section ten raises complexities that occur in thinking about the relationship between competition and cooperation. It proposes the heuristic value of a spectrum from individualism/competition toward collectivism/cooperation, onto which can be displayed a state's chosen treatment of various categories of economic behavior. Section eleven provides concluding remarks.

II. TRUST: MEANING AND IMPORTANCE

I was walking on a beach with an old friend about a dozen years ago and we were discussing our respective retirement plans. He had invested, through an intermediary, in a fund that was paying him a handsome ten percent annually, every year. “How could I get into this?” I asked somewhat greedily. “Not so easy. You have to know Someone.” A few years later it turned out that the Mr. Someone he knew was an acquaintance of one Bernie Madoff. My friend is still hoping to recover most of his initial investment. He had trusted his friend, who had what is known as *thick trust* in Bernie. That is, it was a situation of one individual evaluating the character of another, personally. My own friend’s knowledge of Bernie, however, was indirect, an example of comparatively *thin trust*. In both cases, however, the direct and indirect trust were misplaced. The problem: Madoff was not *trustworthy*.

The modern world would not function without high levels of trust, by which we must include not only trust in known individuals but also in systems and institutions. Consider the levels of trust required when one boards an airplane. Potential doubts abound. Will the pilot be a sober, well-trained and quick-witted hero in the image of the legendary Captain Sullenberger, who safely parked his engine-less plane on the Hudson River after flying into a flock of birds on take-off? Were the mechanics not only technically competent but also resolutely focused as they maintained the plane? Will the air traffic controllers not be distracted or tired? And so on. The levels of trust here, as in so much of modern society, are very *thin* indeed; some have even referred to this as *forced* or *coerced* trust.²

² See GEOFFREY HOSKING, *TRUST, A HISTORY*, 46-49 (2014). Others might argue that parts of this example are not about trust at all, following what is called the “encapsulated interest” model of trust, which says: “we trust you because we think you take our interests to heart and encapsulate our interests in your own.” KAREN S. COOK, RUSSELL HARDIN, AND MARGARET LEVI, *COOPERATION WITHOUT TRUST?* 5 (2005). I reply that we don’t know, for example, that an anonymous person -- airplane designer or technician necessarily has our interest in mind, or that the pilot of our plane, whom we have never met personally, is necessarily sober or non-suicidal. I believe the encapsulated interest model is too narrow, making it awkward if not

The efficient functioning of government and the economy often depends on trust, a major facet of the cooperation that underlies common undertakings of all sorts.³ Tax revenue, rather obviously, is essential to a government's ability to influence its economy and achieve the government's public purposes. Institutional factors such as law and its enforcement also clearly affect the collection of taxes, but without citizens' trust that most fellow citizens are also paying their share, how many would consistently make an effort to pay their own taxes honestly? The trusting assumptions also include that the government is trustworthy in its handling of your money and that the government will identify and prosecute those who cheat.⁴ Thus, the *rule of law*, the *absence of corruption*, the threat of *punishment*, and the concept of *free riders* are brought into play as influencers of what we would commonly speak of as trust. We need to admit at the outset that segregating trust from other motivations, aspects of culture, and various sorts of institutions is not always simple.

The very concept of money as a medium for exchange in a market economy depends on trust that a symbol will be backed by consistent value, requiring faith in the issuing authority and the general stability of the social order.⁵

impossible to speak of trust as we do colloquially, *e.g.* as having trust in an institution.

³ Using their narrow definition of trust as encapsulated interest, Cook, Hardin, and Levi argue that in the complex modern economy much, perhaps most, coordination occurs as a result of institutions rather than trust, such as externally regulated behavior. See COOK *et al.*, *supra* note 2, at 106. This is further addressed at note 41.

⁴ Trust alone is quite reasonably deemed an insufficient motivator of tax compliance. Thus in the U.S. we have withholding and the threat of audits and worse to complement general trust, but audits and penalties are widely known to be quite rare, yet compliance is the norm.

⁵ HOSKING, *supra* note 2, at 89 ("The power of money is derivative: money mediates power because in most times and places people trust it."). See YUVAL NOAH HARARI,

The social scientist Francis Fukuyama, in a fascinating book titled Trust: The Social Virtues and the Creation of Prosperity, recognizes that trust has been defined in many ways, but chooses the following definition, which can also serve our purposes:

Trust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms, on the part of other members of that community.⁶

Fukuyama places trust on a high pedestal in explaining economic phenomena. He summarizes:

One of the most important things we learn from an examination of economic life is that a nation's well-being, as well as its ability to compete, is conditioned by a single, pervasive, cultural characteristic: the level of trust inherent in the society.⁷

SAPIENS, A BRIEF HISTORY OF HUMANKIND, 180 (2016) ("money is the most universal and most efficient system of mutual trust ever devised").

⁶ FRANCES FUKUYAMA, *TRUST*, 26 (1995). I will come back to the significance of trust as both an input and result of cooperative behavior and the mystery of how homo sapiens came to be described as "a cooperative species" or indeed as "super-cooperators." See also Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX L. REV. 515, 529-36 (2004) (discussing the many definitions of trust and the relationship between trust and cooperation). The Russell Sage Foundation has published a series of more than ten books on trust, including Cook *et al.*, *supra* note 2.

⁷ FUKUYAMA, *supra* note 6, at 7. Cf. ROBERT PUTNAM, *BOWLING ALONE* (2000). The Cook, Hardin, and Levi book, *supra* note 2, seems to have been written in large part as a response to Fukuyama's book and another popular book which this paper discusses, *Bowling Alone* by Robert Putnam. Cook *et al.* believe that Fukuyama and Putnam define trust too broadly, mistakenly accept survey data based on a very generalized concept of trust, and consequently overstate the importance of trust in the economy, while understating the role of institutions. A not uncommon argument is that while levels of trust between humans in the U.S. may be at a low point historically or compared to other countries, the U.S. has succeeded economically because of strong

A major reason for the success of trusting societies, as documented in the Fukuyama volume, is that *trust reduces transaction costs*.⁸ It is difficult to exaggerate money's efficiency gains over barter, provided the money is trustworthy. In general, the alternatives to trust within an economy are many formal rules, enforced through heavy monitoring and costly institutions, or even coercion. In his essay on trust British historian Geoffrey Hosking commences with a tour of Russia under Stalin in the 1930's, "the land of maximum distrust."⁹ It is not a pretty landscape, *e.g.*, "As a result [of Stalin's creation of distrust throughout the Soviet society] the ordinary everyday exchange of thoughts, hopes, and feelings became virtually impossible."¹⁰

Economist Joel Mokyr recently observed, "[M]any mainstream economists are now committed to the significance of culture in the evolution of modern economics."¹¹ In a book focused on the cultural underpinnings of the Industrial Revolution, he argues that "culture" affected technology "both directly, by changing attitudes toward the natural world, and indirectly, by creating and nurturing institutions that stimulated and supported the accumulation and diffusion of 'useful

institutions such as the rule of law, the judiciary, and a central bank, which serve as proxies for trust. This begs the question of why the population trusts these institutions – a question of high current importance when, for example, the President refuses to give credit to the nation's intelligence community, its media, and the institutions of international alliance created by his predecessors.

⁸ See NIALL FERGUSON, *THE ASCENT OF MONEY*, 23 (2008) ("Money, it is conventional to argue, is a medium of exchange, which has the advantage of eliminating inefficiencies of barter..."). Also see Ilana E. Strauss, *The Myth of the Barter Economy*, www.theatlantic.com/business/archive/2016/02/barter-the-society-myth/471051/ (Feb. 26, 2016) (arguing that there is no evidence of a barter economy that existed prior to currency-based exchange).

⁹ HOSKING, *supra* note 2 at 10.

¹⁰ *Id.* at 15.

¹¹ JOEL MOKYR, *CULTURE OF GROWTH: THE ORIGINS OF THE MODERN ECONOMY*, 7 (2017).

knowledge.”¹² Mokyr adopts the following definition of culture, which I will also use:

Culture is a set of beliefs, values, and preferences, capable of affecting behavior, that are socially (not genetically) transmitted and that are shared by some subset of society.¹³

Mokyr sees trust as an aspect of culture. He says, for instance,

One mechanism through which culture is believed to have affected economic performance is through the idea that higher trust and cooperation reduce transaction costs, and thus facilitate exchange and emergence of well-functioning markets.¹⁴

Trust is so essential to economic institutions and indeed to the success of society precisely because it is an important component of cooperative behavior. Writes Joshua Greene, “[t]he problem of cooperation is the central problem of social existence.”¹⁵

¹² *Id.*

¹³ *Id.* at 8. Like “trust,” “culture” is the subject of a vast literature, including many different definitions. A recent and comprehensive book that gives careful consideration to the role of culture in human behavior uses the definition that culture is “how we do and think about things, transmitted by nongenetic means.” ROBERT M. SAPOLSKY, *BEHAVE, THE BIOLOGY OF HUMANS AT OUR BEST AND WORST*, 271 (2017).

¹⁴ MOKYR, *supra* note 11 at 13-14. (“Most research by economists on culture as they see it focuses primarily on social attitudes, beliefs, and preferences supporting informal and formal institutions that increase cooperation, reciprocity, trust, and the efficient operation of the economy.”)

¹⁵ JOSHUA GREENE, *MORAL TRIBES*, 9 (2013).

III. FROM DARWINISTIC COMPETITION TO COOPERATION

The essential problem of cooperation is often depicted in narratives such as The Prisoner's Dilemma¹⁶ and the Tragedy of the Commons,¹⁷ showing (under selected conditions) that what is in each individual's interest may not be in their common interest. Charles Darwin's theory of evolution, stressing natural selection and survival of the fittest, assumed a starting point for all of nature, including homo sapiens, to be the competitiveness of all of life in the struggle for survival. And yet, as mathematician and game theorist Martin Nowack observes, "[h]uman society fizzes with cooperation."¹⁸

Before going further, we need to consider how cooperation is understood to arise from competition.

¹⁶ The Prisoner's Dilemma is "the textbook non-zero sum game." ROBERT WRIGHT, *NONZERO, THE LOGIC OF HUMAN DESTINY* 98 (2001). Prisoner's Dilemma describes the choices to be made by two partners in crime who are separately interrogated by police under conditions in which if they trust each other and act cooperatively, the overall outcome will be best; but if they defect in order to take the deal that offers individually better outcomes, their mutual interest in the best outcome will be thwarted. As Wright puts it, "[I]f you think your accomplice is going to renege on the deal, and rat on you after all, then you're better off copping a plea and ratting on him. Somehow this fear of being cheated must be overcome for things to work out." *Id.*

¹⁷ The Tragedy of the Commons was put forth by Garrett Hardin in 1968. Hardin used the metaphor of a pasture open to all, in which each herder is motivated to add more and more animals, thus serving his own interest, but with the result of overgrazing the pasture. It "has come to symbolize the degradation of the environment to be expected whenever many individuals use a scarce resource in common." ELINOR OLSTROM, *GOVERNING THE COMMONS* 2-3 (1990).

¹⁸ MARTIN NOWACK, *THE SUPERCOOPERATORS: ALTRUISM, EVOLUTION, AND WHY WE NEED EACH OTHER TO SUCCEED* xiii (2011).

A great deal of thought has gone into the origin of cooperation.¹⁹ Is it hard-wired into the brain? Did it evolve through experience? Is this about nature or nurture or some combination?

How do cultural traits like trust or cooperativeness come about? First, let's further develop what we mean by "culture." Fukuyama says that culture is "inherited ethical habit."²⁰ Put differently, it is a people's language of good and evil, right and wrong, fair and unfair. It is something that is acquired through education in the family, from friends and neighbors, or in school or religion. And because it is a matter of ethical habit, it generally changes very slowly, though it is critical to observe that not all such habits change at the same pace.

Is an affinity for competition or cooperation built into the human brain? The emerging science of neuroeconomics has identified a brain hormone called oxytocin, which seems to promote cooperation and trust, at least for the in-group. It may also promote aggression toward out-groups.²¹ As Joshua Greene puts it, our brains may be designed for in-group cooperation and between-group competition.²²

¹⁹ *E.g.* ASHLEY MONTAGU, *DARWIN, COMPETITION & COOPERATION* (1952); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); ROBERT WRIGHT, *THE MORAL ANIMAL, WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1995); MATT RIDLEY, *THE ORIGINS OF VIRTUE, HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* (1996); ROBERT WRIGHT, *NONZERO* (2001); GEERAT J. VERMEIJ, *NATURE, AN ECONOMIC HISTORY* 4-21 (2004); SAMUEL BOWLES & HERBERT GINTIS, *A COOPERATIVE SPECIES, HUMAN RECIPROCITY AND ITS EVOLUTION* (2011); SAPOLSKY, *supra* note 13 (2017).

²⁰ FUKUYAMA, *supra* note 6 at 34.

²¹ JONATHAN HAIDT, *THE RIGHTEOUS MIND, WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION*, 270-74 (2012) ("The men who received oxytocin [via nasal spray] made less selfish decisions—they cared more about helping their group, but they showed no concern at all for improving the outcomes of men in the other groups."); SAPOLSKY, *supra* note 13, at 108-117 summarized at 135 ("Oxytocin and vasopressin facilitate mother-infant bond formation and monogamous pair-bonding, decrease anxiety and stress, enhance trust and social affiliation, and make people more cooperative and generous. But this comes with a huge caveat—these hormones increase prosociality only toward an Us. When dealing with Them, they make us

Aside from our disappointment in recognizing that an oxytocin bomb will not solve the problems of the Korean peninsula, one difficulty with Greene's generalization is that most people today belong to multiple, overlapping groups and the priority they give to these groups for self-identification can change. Is my in-group defined by my religion, my race, my profession, my nation, or even my planet? As the particular definition of an in-group enlarges, what had at one time been competition between the in-group and an out-group may become cooperation within the larger group, with competition now aimed at a differently defined out-group. The opposite would also be true. In the world of antitrust, many mergers eliminate some competition by extinguishing a rival, but are defended in terms of enlarging the surviving firm to allow it to become a stronger competitor against the other remaining firms.

Study of the brain's connection to competition and cooperation is at an early stage. We might speculate on whether one day we will find that the presence of oxytocin or some other chemical or chemicals varies by society in a way that is correlated with more or less competitive behavior, but there will still be a challenge to demonstrate whether causation runs in a particular direction (*i.e.* would we be able to determine whether oxytocin is the cause of cooperative economic behavior or is oxytocin caused by a cooperative culture, or both?).

more ethnocentric and xenophobic. Oxytocin is not a universal love hormone. It's a parochial one."); *cf.*, Paul J. Zak, *Values and Value*, in *MORAL MARKETS, THE CRITICAL ROLE OF VALUES IN THE ECONOMY*, 266-68 (Paul J. Zak ed., 2008) ("[W]hen a person makes an intentional monetary sacrifice signifying that he or she trusts a stranger, the brain of the person being trusted produces a surge in the neuroactive hormone oxytocin.")

²² GREENE, *supra* note 15 at 54. This theme is developed in chapter eleven, "Us and Them," in SAPOLSKY, *supra* note 13.

For the present, whether cultural traits are biologically inheritable is a controversial topic.²³ Thus far, we have not found a gene that allows us to answer the question, but this does not mean that a cultural trait cannot evolve and in a social sense, at least, be inherited via collective learning. Darwin himself suggested that the most cohesive and cooperative groups generally beat the groups of selfish individualists.²⁴ Evolutionary theories of cooperation tend to start with the selfish individual, and move outward to the family, kinship, lineage, clans, tribes, and nations. The engines for this outward movement are reciprocity and reputation.

The evolutionary view of cooperation begins with the individual and the individual's genes. The individual is assumed to behave in ways calculated to enhance survival, and this is often explained in terms of the individual's genes

²³ Anthropologist Ashley Montague wrote in 1952: “[W]e can safely interpret Darwin to mean that natural selection, the struggle for existence, has been the supreme arbiter in determining the evolution of man’s physical characters, as well as his ‘social instinct,’ but that once he arrived at a high stage of moral development, cultural factors assumed the supreme place in determining his social development...The high stage of moral development once being reached, cultural factors take over the function of natural selection.” MONTAGUE, *supra* note 19 at 94.

Many writers have recognized the intimate interactions (co-evolution) between genes and culture in humans. *See e.g.*, BOWLES & GINTIS, *supra* note 19 at 14-16 (“No ‘gene for cooperation’ has been discovered. Nor is it likely that one will ever be found, for the idea of a one-to-one mapping between genes and behavior is unlikely given what is now known about gene expression, and is implausible in light of the complexity and cultural variation of cooperative behaviors.”)

²⁴ CHARLES DARWIN, *THE DESCENT OF MAN* 134-35, quoted in BOWLES AND GINTIS, *supra* note 19 at 46. Complexity economics expert Eric Beinhocker writes, “Over time, societies that are better able to organize themselves will socially, economically, and militarily dominate societies that are less successful at creating cooperative structures. Thus, it is *the competition to cooperate* that drives social innovation.” ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS* 266 (2006). [My italics. This is the only time I’ve seen this expression of a relationship between competition and cooperation.]

seeking to survive through their own replication.²⁵ In the case of the individual, the initial principle might be *direct reciprocity*: “I’ll scratch your back and you scratch mine,” which assumes expectation of repeating interactions.²⁶

A nuclear family of at least two parents and their children contributes to the sustenance of life and provides social comfort. In the long era of foraging, it became habitual for the family members to work closely together to provide food and shelter. Thus, the members count on each other to function interdependently as a team. To do this, each must sacrifice some aspect of independence in return for the indefinite but anticipated reciprocity of the others. The sacrifice is also referred to in the cooperation literature as altruism.

Summarizing, cooperation would seem to have first arisen within the nuclear family in the context of providing a survival advantage in the hunting and gathering of food and provision of shelter, leading to the recognition that the reciprocity expected of family members in repeated interactions justifies the sacrifice of some degree of individual independence. Perhaps this also involved the development of emotional attachments in which the individual comes to care for and love the other members of the family.²⁷

From a genetic perspective, the story seems to be that the individual’s genes want to replicate, and the best strategy for achieving that is for the parent to help the children who carry the genes to survive, thus generating a special protective relationship from parents toward children. The parents would naturally try to

²⁵ RICHARD DAWKINS, *THE SELFISH GENE 2* (1976) (“[A] predominant quality to be expected in a successful gene is ruthless selfishness. This gene for selfishness will usually give rise to selfishness in individual behavior.”).

²⁶ NOWACK, *supra* note 18 at 270.

²⁷ WRIGHT, *supra* note 19 (2001) at 324.

inculcate the teamwork approach in the children, passing on the habitual ethic that appears successful.

This can explain how cooperation is generated within a nuclear family and to a lesser extent to near relatives who share a smaller portion of the genes. But how does it spread beyond the family, so that the in-group can be enlarged to incorporate clusters and networks? (Why do soldiers willingly sacrifice their lives for their country or their buddies?) Probably at first, families grew larger, into kinship groups, living together or nearby, sharing some genetic material. As Darwin suggested, when these groups worked together cooperatively they had a better chance at surviving. For example, hunting larger animals required more hunters cooperating in the capture or killing, and also the sharing of the meat. This process probably evolved to include non-relatives. In addition, when out-groups and in-groups became confrontational, the size of the group and its ability to coordinate and cooperate would determine who came out on top, which often meant survival.

As the group became larger—lineage groupings, clans, tribes, nations-- the expectations of direct reciprocity become smaller, but the payoff in terms of competitive potential (*e.g.*, more hunters, more warriors) is greater.²⁸ Greater size and division of labor as civilization moved into agriculture and urbanization—increased complexity—would entail more social norms, and this would increase the altruistic sacrifices that individuals need to make to conform to the enlarged social norms. Why make these sacrifices? In Yogi Berra’s memorable formulation, “Always go to other people’s funerals, otherwise they won’t come to yours.” This sentiment

²⁸ Of course the history of cooperation could be taken back to animal life prior to homo sapiens. Matt Ridley’s book, for instance, includes a chapter on tribal primates, where he talks about animals cooperating in order to compete against others. RIDLEY, *supra* note 19 at 151-69. The dynamics described in the text would continue to apply as human social and economic organization evolved from foraging to agriculture and eventually to industry. See DAVID CHRISTIAN, MAPS OF TIME, AN INTRODUCTION TO BIG HISTORY (2004). I write this paper in the spirit of Christian’s Big History.

contains a self-interested basis that operates over a long period, even beyond a lifetime. It assumes repeated interactions in small groups of people who know each other. The fact that “diverse faiths are united by the reciprocity of the Golden Rule” suggests that reciprocity has proven to be a powerful impulse indeed.²⁹

Trust may have been thick when the community was quite small and people not only knew each other personally, but also interacted repeatedly. The emergence of more complex societies raises this key question: What motivated altruism toward unknown outsiders with whom (a) repeated engagements and the opportunity for receiving a reciprocal favor would be relatively small, and (b) the genetic payoff for survival would be attenuated?

Enter the importance of reputation (also known in the literature as reciprocal altruism or indirect reciprocity), to complement thick trust when the personal relationships are not present. It is said, perhaps contemplating the example of Glaucon’s metaphor of the ring of invisibility in Plato’s *Republic*, that man doesn’t care so much about being good, as that other people should perceive him as good.³⁰ We act as if we are being watched because if we happen to be detected defecting from the social norms, we will be talked about and gossip may lead to some form of disadvantage or punishment.³¹ People may shun us or refuse to do business with us, or perhaps punish us through stoning, imprisonment, exile, or worse. Haidt praises Glaucon as “the guy who got it right—the guy who realized that

²⁹ NOWACK, *supra* note 18 at 273; PUTNAM, *supra* note 7 at 135.

³⁰ In *THE REPUBLIC* Glaucon tells Socrates about a ring that makes its possessor invisible, such that he can engage in unjust acts without being observed. The ring was found by an ancestor of Gyges, who used its powers for his own advantage. Glaucon asserts that if there were two such rings, one owned by an unjust man and the other by a just man, the just man would soon be acting as unjustly as the first.

³¹ For a quick insight into the important role of gossip, see David Dobbs, *Gossip, Grooming, and Your Dunbar Number*, <https://www.wired.com/2011/06/gossip-grooming-and-your-dunbar-number>.

the most important principle for designing an ethical society is to make sure that everyone's reputation is on the line all the time, so that bad behavior will always bring bad consequences."³²

The story of the development of cooperation is now fairly complete. It is supported by field evidence from cultural anthropology and microhistories of social movements, all pointing away from the Prisoner's Dilemma and the Tragedy of the Commons in the direction of cooperation.³³ The components of the story – family, reciprocity, reputation (with gossip and punishment)—have been modeled by game theorists like Martin Nowack, a professor of mathematics and biology at Harvard and director of the Program for Evolutionary Dynamics, who have developed formulae to express these mechanisms and then demonstrate how they could evolve by computer simulations of evolution.³⁴ Nowack concludes,

Thanks to these mechanisms, the essentially competitive drive of evolution can, in many circumstances, give rise to cooperation. Because our instincts have been shaped in this way over the generations, it is no surprise that one

³² HAIDT, *supra* note 21 at 86.

³³ The evidence relating to trust in social dilemma games ("situations in which groups of individuals find themselves facing incentives identical to those presented in the familiar prisoner's dilemma of game theory") is explored in Margaret M. Blair & Lynn A. Stout, *Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1761 (2001). They conclude that the experimental evidence indicates that people shift between at least two preference functions or modes of behavior, depending on the social context. One might be described as a "competitive" or "self-regarding" personality; the other is a "cooperative" or "other-regarding" personality. Social context, tempered by consideration of personal cost, determines when the cooperative personality emerges. *Id.* at 1761-2.

³⁴ NOWAK, *supra* note 18. See also see Albert. A. Foer, *Book Review: Competition, Cooperation, and Martin Nowak's SuperCooperators*, AM. ANTITRUST INST., (July 28, 2015) <http://www.antitrustinstitute.org/sites/default/files/FoerBookReview.7.28.152.pdf>.

corollary of this is that universal behaviors—such as love, friendship, jealousy, and team spirit—are seen across all human societies.³⁵

Economics texts often begin with the assumption of a world of limited resources in which competition to acquire and hold resources is the key to survival. Yet human society, including its economic manifestations, is remarkably replete with cooperation. Competition and cooperation coexist. The question is, how is this coexistence to be managed?

IV. BALANCING COMPETITION AND COOPERATION

If it sometimes sounds as if cooperation is the final teleological objective of evolution and that what must sooner or later come next is an all-inclusive global in-group (the party of All) that would eliminate war and other harmful manifestations of competition, this would be a gross misunderstanding. It is widely recognized that in the absence of an important role for competition, evolution itself would no longer have an engine. Of course there are some who don't credit the concept of biological evolution or who are sufficiently satisfied with the *status quo* that they oppose all change as threatening. So let me approach the question from another direction.

From a social, political, or economic point of view, too much or too little cooperation can be as damaging as too much or too little competition. It all depends on context and objectives. Competition in its most extreme form is “every man for himself” as summarized in Hobbes' famous description of life in the state of nature as “solitary, poor, nasty, brutish, and short.” Cooperation in its most extreme form is the total eclipse of competition, whether political or economic.³⁶ Monopoly might be

³⁵ NOWACK, *supra* note 18 at 272.

³⁶ Everyone within an organization need not agree in order for an undertaking to be considered cooperative, although the purest form of cooperation would exclude all competition. This applies to every organization, where the fundamental cooperative act is to participate in the organization, or at least not to exit. The state itself can be viewed as the most collectivist, *i.e.*, cooperative, of units, representing something

thought of as the private mode of maximum cooperation. The state, Hobbes' Leviathan, represents the public mode of maximum cooperation, although it can take many forms, including democratic, autocratic, and totalitarian. To the extent that a state eliminates all opposition, one could say it represents a coercive form of cooperation, just as certain kinds of trust (where there is no practical choice not to trust) have been described as coerced. To help visualize what I am trying to depict, if a completely fragmented society of individuals is pictured at the competitive pole of a spectrum, then a completely collectivist society would be at the cooperative end. I return to and modify this visualization in the penultimate section of this paper.

In the economic realm, the arguments against monopoly, where there is virtually no meaningful competition, are well-known, ranging from the "dead weight loss" resulting from underproduction of goods and services to misallocating wealth, excluding rivals, and abusing employees, consumers, and suppliers.³⁷ Economic monopoly may on occasion be beneficent in certain respects. For instance, the market may not support more than one efficient firm. The prospect of at least a short-term monopoly may inspire investment in new products. Two common misunderstandings about monopolies also should be mentioned. A monopolist is not compelled to charge the profit-maximizing price, though it has the power to cause damage by virtue of control over price. Also, a monopoly does not necessarily bring all innovation to a halt and may indeed use its surplus to engage in research, but it generally channels innovation into what is best for the monopolist. The absence of competitors therefore deprives the society of new ways of adjusting to changing consumer demand and technology change, thereby restricting the public's economic potential.³⁸

like the general will of the community or the social contract, or democratic supremacy.

³⁷ See, e.g., HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY*, ch. 1 (1994).

³⁸ See Jonathan B. Baker, *Evaluating Appropriability Defenses for the Exclusionary Conduct of Dominant Firms in Innovative Industries*, 80 *ANTITRUST L.J.* 431 (2016);

With monopoly, life can be very easy for the insiders and less convenient and more expensive for such out-groups as the firm's consumers or suppliers. Moreover, monopoly power may give the firm resources to influence or capture relevant parts of the government, thereby raising entry barriers even higher and making avoidance of efficient performance easier, as well as undermining democracy.

Perfect monopoly appears to be extremely rare. There are typically potential rivals lurking just outside the monopoly zone and new technology can especially threaten to undermine the basis of the monopoly. Powerful buyers or sellers may reduce a monopoly's discretion. Once there are such threats, it can be useful to think of the monopoly as just another firm consisting of an in-group community with cooperation operating inside its boundaries and bias operating against out-groups, in contrast to which it defines itself. Internal cooperation is often inspired by the objective of competing more successfully against the outsiders. The individuals and divisions within a firm likely have their own internal aggressive tendencies but the successful firm channels this factor into a desired level of cooperation so that the firm itself can compete more successfully against rivals, thereby facilitating both the firm's survival and the income and easier life potentially available to the individuals and units within the firm and the firm's ownership.³⁹

Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575 (2007).

³⁹ As Judge Frank Easterbrook wrote, "Every market entails substantial cooperation over some domain in order to facilitate competition elsewhere...Antitrust law permits, even encourages, cooperation within a 'firm,' for such cooperation is the basis of economic productivity." Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984). See also his opinion in *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) ("Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.").

From a genetic perspective, monopolistic cooperation brings an end to competition, which means that successful evolution becomes less likely. I suppose the selfish gene could view this as a victory, but society should not. The society that permits excessive political and economic cooperation to minimize competition may gain some near-term benefits and stability at the expense of longer-term dynamism.

This logic suggests that some balancing of competition and cooperation is both essential and desirable. This observation, indeed, should define the fundamental function of competition policy: to determine, whether by positive action or passive acceptance of custom, what the mix of competition and cooperation shall be for various patterns of behavior.

V. SOCIAL CAPITAL, TRUST, AND ECONOMIC THOUGHT

I have been writing in the belief that culture and especially a particular aspect of culture –namely, trust-- influences economics.⁴⁰ The question of causation requires some comment. Consider the debate on why some poor countries stubbornly remain poor. One institutionalist view holds that at least when focusing on the causes of global inequality, the most influential driver is not cultural but institutional. The debate is highlighted by institutionalist economists Daron Acemoglu and James A. Robinson.⁴¹ In considering the origins of power, prosperity,

⁴⁰ See generally Albert A. Foer, *Competition Culture and the Cultural Dimensions of Competition*, in *COMPETITION POLICY AT THE INTERSECTION OF EQUITY AND EFFICIENCY* (Damien Gerard & Ioannis Lianos eds. forthcoming 2018) (describing how culture influences antitrust).

⁴¹ DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL* 45-69 (2012). More generally, consider the institutionalist explanation of the process of economic change presented in DOUGLASS C. NORTH, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 2* (2005): “The dominant beliefs—those of political and economic entrepreneurs in a position to make policies—over time result in the accretion of an elaborate structure of institutions that determine economic and political performance. The resultant institutional matrix imposes severe constraints on the

and poverty, they discuss why three received theories do not work. First, they say, theories resting on *geographical differences* fail as an explanation of the causes of world inequality because “[h]istory illustrates that there is no simple or enduring connection between climate or geography and economic success.”⁴² Second, the *ignorance* hypothesis is also examined and rejected. It asserts that world inequality exists “because we or our rulers do not know how to make poor countries rich. This idea is the one held by most economists.”⁴³ Ignorance, the authors conclude, can explain, at best, only a small part of world inequality.

Alternatively, the *culture* hypothesis posits that religion and other types of beliefs, values, and ethics help in the understanding of world inequality. The authors say it is useful in the sense that social norms, which are related to culture, do matter and can be hard to change, and they also sometimes support institutional differences,

But...those aspects of culture often emphasized—religion, national ethics, African or Latin values—are just not important for understanding how we got here and why the inequalities in the world persist. *Other aspects, such as the extent to which people trust each other or are able to cooperate, are important but they are mostly an outcome of institutions, not an independent cause.*⁴⁴

choice set of entrepreneurs when they seek to innovate or modify institutions in order to improve their economic or political positions.” North further notes, “The intimate interrelationship of beliefs and institutions, while evident in the formal rules of a society, is most clearly articulated in the informal institutions – norms, conventions, and internally held codes of conduct. These informal institutions not only embody the moral codes of the belief system, which tend to have common characteristics across cultures, but also embody the norms particular to individual societies, which are very diverse across cultures.” *Id.* at 50. Furthermore, “To understand the human condition it is essential to focus on the intentionality of the players. Economists have the correct insight that economics is a theory of choice. But to improve the human prospect we must understand the sources of human decision making.” *Id.* at 170.

⁴² ACEMOGLU & ROBINSON, *Id.* at 49-50.

⁴³ *Id.* at 63.

⁴⁴ *Id.* at 57. (emphasis added.) Compare to COOK ET AL., *supra* note 18.

This appropriately treats culture and institutional causes of economic change as often inter-related rather than completely separate factors, but it undervalues the causal role that culture may play in making institutional changes possible. Here are two reasons for saying this: First, in his context of explaining technological change, Mokyr observes, “[O]nce the possibility and desirability of economic progress has been accepted, a concrete *agenda* of policy measures and institutional change had to be formulated, elaborated, proposed, and implemented for long-term progress to take place.”⁴⁵ In other words, the attitude toward progress (a cultural manifestation) comes before a concrete agenda (the institutions).

Second, in their discussion of how China switched from a failed communist economy to a much more successful market economy, Acemoglu and Robinson conclude, “It was politics that determined the switch...not better advice or a better understanding of how the economy worked.”⁴⁶ My question (and perhaps Mokyr’s)

⁴⁵ Mokyr, *supra* note, 11 (emphasis in original). Mokyr suggests that a culture’s high value on individualism stimulates innovation. *Id.* at 18.

In the overview and synthesis of an important study of experimental games played by twelve diverse groups in small-scale societies, the editors point out “the institutions that define feasible actions may also alter beliefs about consequences of actions and the evaluation of these consequences. For example, a market-oriented society may develop distinct cognitive capacities and habits. The fact that almost everything has a price in market-oriented societies provides a cognitive simplification not available to people in societies where money plays a lesser role...To take another example, extensive market interactions may accustom individuals to the idea that interactions with strangers may be mutually beneficial. By contrast, those who do not customarily deal with strangers in mutually advantageous ways may be more likely to treat anonymous interactions as hostile or threatening, or as occasions for the opportunistic pursuit of self-interest.” JOSEPH HENRICH, ROBERT BOYD, SAMUEL BOWLES, COLIN CAMERER, ERNST FEHR, AND HERBERT GINTIS (EDS), FOUNDATIONS OF HUMAN SOCIALITY: ECONOMIC EXPERIMENTS AND ETHNOGRAPHIC EVIDENCE FROM FIFTEEN SMALL-SCALE SOCIETIES 46 (2004).

⁴⁶ ACEMOGLU & ROBINSON, *supra* note 41 at 68.

is, why did the politics happen to move in the same direction as was suggested by a better understanding of markets? What values and beliefs, within the elite community that made the critical political decisions in China, were drawn upon, and what values within the larger community were understood to be available to support the decisions?

The relationship between culture and institutions is so close that the details of the relationship and the direction of causation are difficult to specify and may very well depend on whether one is talking about the causes of the Industrial Revolution or the replacement of communism by relatively free markets in China. In some contexts, culture may simply be an informal institution. I am satisfied to explore how aspects of culture, here focusing mainly on trust, *influence* (rather than *cause*) the institutional context of economics generally and antitrust more specifically. I don't dispute that institutions can help shape culture, as well.

Economics normally focuses on three forms of capital (*i.e.*, assets): financial (*e.g.*, the resources needed to invest in projects), physical (*e.g.*, tools and machinery), and human (*e.g.*, primarily skills and education). A fourth form, of more recent vintage, is *social capital*, which captures the idea that there is value in the social ties among individuals and the norms of reciprocity and trustworthiness that arise from those ties.⁴⁷ The concept of social capital had been mentioned at various times in the

⁴⁷ HAITT, *supra* note 21, at 338. See THE WORLD BANK, WHERE IS THE WEALTH OF NATIONS? MEASURING CAPITAL FOR THE 21ST CENTURY xvii (2006) ("By construction, the intangible capital variable captures all those assets that are unaccounted for in the estimates of produced and natural capital. Intangible assets include the skills and know-how embodied in the labor force. The category also includes social capital, that is, the trust among people in a society and their ability to work together for a common purpose. The residual also accounts for all those governance elements that boost the productivity of labor. For example, if an economy has a very efficient judicial system, clear property rights, and an effective government, the effects will result in a higher total wealth and thus a higher *intangible capital* residual. The regression analysis in this chapter shows that human capital and rule of law account for the majority of the variation in the residual. Investments in education, the functioning of the justice

past, but was popularized in the 1990's by Robert Putnam, especially in a bestselling book about the collapse and revival (mostly the former) of American community.⁴⁸ Social capital reflects the observation that we are not merely individuals but members of groups and organizations where we work together for common purposes. "The core idea of social capital theory," said Putnam, "is that social networks have value."⁴⁹

Should trust be included in the category of social capital? Cook, Hardin, and Levi say that would be a mistake:⁵⁰ "Your trusting does not do much for you when you need to call on a network of associates to help you resolve some family or broader social problem."⁵¹ What is at stake, they say, is not trust, but the trustworthiness of the people in your network. On the other hand, they say that social capital may be taken to mean the social value that inheres in the connections within groups. In this sense, too, they say, the issue is not one of trust. Social capital is "merely a means to do things" which can be beneficial or the opposite. Discussions of declining social capital must be wrong, they say, because individual access to social capital in general is increasing for many people in modern societies, not decreasing. Despite these caveats, based on a narrow definition of trust as "embedded interest," the concept of social capital makes little sense without the culture's level of trust being centrally included.

system, and policies aimed at attracting remittances are the most important means of increasing the intangible components of total wealth.")

<http://siteresources.worldbank.org/INTEEI/214578-1110886258964/20744844/Introduction.pdf> (last visited May 22, 2017).

⁴⁸ BOWLING ALONE, *supra* note 7 at 22-24.

⁴⁹ *Id.* at 18-19. SAPOLSKY, *supra* note 13 at 292 ("Social capital is the collective quantity of resources such as trust, reciprocity, and cooperation....Put simply, cultures with more income inequality have less social capital.").

⁵⁰ COOK ET AL., *supra* note 2 at 88.

⁵¹ *Id.* at 88.

Putnam and others in his wake argue that individualism began to eclipse community in the U.S. during the 1960's, and the system has been increasingly out of balance ever since.⁵² Fukuyama, for example, points to the rise of violent crimes, breakdown of family structure, decline of churches and neighborhoods, unions, clubs and charities, and a general sense of a lack of shared values and community.⁵³ He points to surveys that trace questions like "Do you agree that most people can be trusted?"-- to which the "yes" response in 1960 was 58% but only 37% in 1993.⁵⁴ A more recent Pew Research Center survey (prior to the presidency of Donald Trump, incidentally) reported that only 19% of Americans trust the government "always or most of the time." Pew notes that current trust levels are among the lowest in surveys of the past 50 years. In 2016, Pew said, "[t]he trust level today is a big change from 15 years ago, right after the terrorist attacks of Sept. 11, 2001. At that time, 60 percent of Americans said they trusted the government."⁵⁵

Cook, Hardin and Levi report studies that suggest that the generality of these survey measures of trust is problematic for predicting actual behavior.⁵⁶ Trust, in

⁵² For an earlier exposition of the argument that things are out of balance, see ALFIE KOHN, *NO CONTEST: THE CASE AGAINST COMPETITION* (1986, rev. 1992). For a critique of "culturalist theories," see HA-JOON CHANG, *BAD SAMARITANS, THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* ch. 9 (2008).

⁵³ FUKUYAMA, *supra* note 6 at 11.

⁵⁴ *Id.* at 314.

⁵⁵ *Poll: Americans Distrust Their Government*, VOA NEWS (Nov. 27, 2015), <http://learningenglish.voanews.com/a/americans-distrust-their-government-poll-says/3077692.html> (Nov. 27, 2015).

⁵⁶ COOK, *ET AL.*, *supra* note 2 at 24. See SAPOLSKY, *supra* note 13 at 292, to the contrary ("You can learn a ton about a community's social capital with two simple questions. First, 'Can people usually be trusted?' ...The second question is how many organizations someone participates in...")

their view, involves power relationships, which can only be understood in the context of specifics:

It is hard to say what could be the cooperative endeavors that a whole society wishes to share in—perhaps winning a war. Hence, some of the concern with so-called social or generalized trust—meaning universal trust in the random other person in our society—is surely misplaced. It would be pointless for us even to assess the trustworthiness of most people, and it often clearly would not benefit us to trust the general other. It is only beneficial for us to trust those who are trustworthy in their interactions with us, and these people constitute nowhere near all of the society.⁵⁷

Some skepticism is indeed warranted toward the highly generalized surveys of trust. (I have no idea how I would answer, yes or no, whether I generally trust other people. Which other people? Trust them to babysit, to not talk behind my back, to not mug me? Trust when my stomach is full or empty? After a taxi driver overcharged me, after an act of terrorism?) Apart from these limitations on highly generalized questions, however, a substantial literature focuses persuasively on more specific measures of trust, demonstrating persuasive cross-cultural differences in levels of trust.⁵⁸

While political conservatives tend to blame the turn from community in the U.S. on hippies and individualistic liberalism that seemed to permeate the 1960's and 70's, the focus on social capital since the 1990's may instead reflect an under-recognized dissatisfaction with the neoclassical economists' model of the greedy, self-interested and coldly rational economic man—often referred to as “The Chicago School” model--, which came into a dominance over national policies along with the election of Ronald Reagan in the 1980's. In any event, the world of economic thinking has not been standing still since the '80's. Increasingly recognized specialties within or touching the field of economics brought forth thinking about the role of institutions (including culture), psychology (behavioral economics),

⁵⁷ *Id.* at 68.

⁵⁸ See Section VII *infra*.

evolution, game theory, and strategic management. Five Nobel Prizes were awarded to institutional or behavioral economists – Elinor Ostrom⁵⁹, Daniel Kahneman⁶⁰, Ronald Coase⁶¹, Oliver Williamson⁶², and Robert J. Shiller.⁶³ Some of the newer economic thinking questioned the neo-classical model’s underlying assumption of rational economic behavior. Authors such as the neo-conservative Francis Fukuyama who have given special attention to “trust” recognize explicitly that economics cannot be divorced from culture.⁶⁴ Geoffrey Hosking says the rational choice model of trust itself is inadequate: we must include a moral element that cannot be deduced from rational choice alone.⁶⁵

⁵⁹ See ELINOR OSTROM, *GOVERNING THE COMMONS, THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

⁶⁰ See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011). Kahneman and Amos Tversky introduced psychology into economic thinking. The story of their friendship and the development of behavioral economics is told in MICHAEL LEWIS, *THE UNDOING PROJECT* (2017).

⁶¹ See R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* (1988). Coase introduced the importance of transaction costs in market economics.

⁶² See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); OLIVER E. WILLIAMSON, *ANTITRUST ECONOMICS* (1987). Williamson further developed Coase’s transaction cost focus into the world of antitrust analysis. Coase and Williamson did not question the rationality assumption of neoclassicism, but relaxed the assumption of zero transaction costs and perfect information. However, when there are positive transaction costs and imperfect information, mutual trust is difficult and distrust must be overcome through institutional means.

⁶³ See GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* 25 (2009) (“We have shown that a great deal of what makes people happy is living up to what they think they should be doing. In this sense most of the time people want to be fair [and they get upset when they think others are not being fair.] Fairness then involves bringing into economics these concepts of how people think they and others should or should not behave.”).

⁶⁴ FUKUYAMA, *supra* note 6 at 13.

⁶⁵ HOSKING, *supra* note 2 at 34 describes the “encapsulated interest” view of trust as an example of rational choice theory based on calculated self-interest. He says that

For the fields of antitrust and economic regulation, the defection from the model of rational economic man is important because it undercuts the Chicago School's⁶⁶ fundamental footing that was established in antitrust policy during the Reagan Revolution in the early 1980's, and in the so-called Washington Consensus⁶⁷ and its projection of universalistic rules for national economic development. A more culturally attentive learning opens the way for alternative models that legitimize deviations based in cultural heritage, including ethical aspects of social capital.⁶⁸ For example, Section 5 of the Federal Trade Commission Act⁶⁹ prohibits "unfair methods of competition" but the neoclassical world has essentially pressed the delete button

this can only be a part, not the whole, of any satisfactory theory of trust, because "Without positing that human beings seek trusting interactions out of moral considerations, we will not understand the full potentiality of trust." *Id.* at 37.

In explaining the neo-classic view of price theory, a standard text puts forth that the assumption that man is greedy "means solely that he wants *command over more* rather than less goods...It is not assumed that he is oblivious to other people or not solicitous of other people's welfare...What is meant by 'selfish' man is that he wants the right to choose among options that will affect his ensuing affairs." ARMEN A. ALCHIAN & WILLIAM R. ALLEN, *EXCHANGE AND PRODUCTION: THEORY IN USE* 26 (1964, 1969 ed.)

⁶⁶ The Chicago School focused on achieving economic efficiency as the highest value, to be obtained through minimal governmental intervention in freely operating markets. On the history of the Chicago School, including its earlier pre-Friedman versions, see JOHAN VAN OVERTVELDT, *THE CHICAGO SCHOOL*, especially 287 *et seq.* (2007); KENNETH M. DAVIDSON, *REALITY IGNORED, HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY* (2011); and Robert Pitofsky (ed.), *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* (2008). Although some have argued that trust is a rational activity, it is also tied into emotional, non-rational aspects of human behavior. See AKERLOF AND ROBERT J. SHILLER, *supra* note 63.

⁶⁷ See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

⁶⁸ As Roscoe Pound wrote, "In general law cannot depart far from ethical custom nor lag far behind it." ROSCOE POUND, *LAW AND MORALS* 122 (1924).

⁶⁹ 15 U.S.C. sec. 45.

on “unfair,” in effect substituting the idea that efficiency-producing methods of competition are—or at least should be-- legal. But fairness is a meaningful concept, albeit difficult to quantify with precision, which grows out of a society’s cultural values. Arguably, it deserves an explicit place in the determination of what types of competition or cooperation are to be bolstered or prohibited by government intervention in the market.

In the next section, to further illustrate the relationship between culture and economics, I will describe several current industrial organization issues that will be particularly influenced by the role of a particular cultural value, trust.

VI. THE INTERNET AND TRUST: THREE EXAMPLES

Changes in technology interact with culture, economics, and regulatory policies. Trust will likely play a central role as we develop antitrust and regulatory policies toward the Internet generally. Here are three illustrations (B2C retailing systems, the emerging “sharing economy” and blockchain technology)— of ways in which trust affects economic policies toward the Internet.

The Internet has changed so much of modern social and economic life that it is difficult to overestimate our dependence on it.⁷⁰ Business-to-Consumer (“B2C”) commercial interactions on the Internet depend on the consumer’s trust that goods and services promised will be delivered in accordance with the agreement and that the payment system will function correctly. As a retail jeweler in the early 1990’s, I couldn’t imagine that people would actually buy on the Internet something as small,

⁷⁰ FERGUSON, *supra* note 8 at 28-31 (We still trust in paper money and coins as ancient symbolic stores of value. What’s new? “ Even more amazingly, we are happy with money we cannot even see. Today’s electronic money can be moved from our employer, to our bank account, to our favourite retail outlets without ever physically materializing. It is this ‘virtual’ money that now dominates what economists call the money supply... [What must be understood] is that money is a matter of belief, even faith...It is trust inscribed.”)

expensive, or subject to fraud as diamonds; today, however, they do (in still modest numbers) and apparently do it with a high degree of trust based on a familiarity with the Internet and a variety of institutional inventions or adaptations of brick-and-mortar promises, such as insured and free secure shipping, discreet packaging, free returns, competitive price guarantees, professional appraisals, lifetime warranties, etc. Diamond merchants as well as their customers need to have trust in the absence of face-to-face dealings. How can they make their customers feel comfortable that they are making the right purchase? How can they minimize rip-offs? Insurance is a large part of the answer, but that merely pushes trust questions back onto the insurers. How secure is all this trust to attack?

In all on-line transactions trust is increasingly vulnerable. The Internet is highly dependent on a network of users and operators, any one of whom can potentially create scams, viruses, privacy breaches and payment abuses that challenge the trustworthiness of the entire system. Whether security and privacy can be protected and fraud deterred will affect peoples' willingness to utilize the web for commercial transactions, and thus have a large impact on the Internet's ability to continue to reshape our economy.

With these concerns, companies are hard at work trying to build and establish trust for Internet-based commercial activities that create new efficiencies and threaten the status quo. Antitrust issues could potentially arise depending on how Internet Service Organizations (ISO's) and others in the industry attempt to work together—through standard-setting, joint ventures, or other alliances-- to fashion effective cybersecurity standards or practices to build or preserve the public's trust in the system.

Many of the Internet's potential efficiencies can be found in what is called the sharing economy. Consider the role of trust in determining Uber's future by comparing with taxi service the customer's choice between hailing an Uber—that is, a privately owned car operated part-time for a fee by its owner, who is generating

income by sharing what would otherwise be an underutilized asset (both time and car). (Keep in mind that in former times the taxi driver had an advantage over other car drivers because of superior knowledge of the urban map. This advantage disappeared with the advent of GPS and Internet traffic and navigation applications such as Waze.) Trust plays a role on both the demand and supply sides. From the passenger's perspective, trust is gained in the standard taxi because the taxi company is heavily regulated, resulting in what is probably perceived, rightly or wrongly, as carefully screened, experienced professional drivers who are typically employed by companies that must provide insurance and have an obvious investment in reputation to protect. On the supply side, the taxi driver must trust a stranger picked up on the street to pay, add a tip, and not commit a crime against the driver or harm the car.

The Uber company, on the other hand, has a business model that assumes minimal, if any, government regulation. Its drivers may or may not be less expert than standard taxi drivers. Their cars are privately owned and maintained. The putative passenger contemplating stepping into a stranger's car may worry about a fraudulent charge or an unsafe, perhaps criminally dangerous driver. The driver may worry about passengers who are unknown and possibly criminals, whether a passenger might damage the car, whether the trip will be paid for and whether there will be a tip. The business model thus far could involve a large trust deficit on both sides of the transaction.

Uber's trust-building strategy on the supply side is (1) to use pre-committed payment via the Internet to assure the driver of payment ⁷¹ without risk to either party of money physically changing hands in the car; and (2) to assure that the passenger will be rated by the driver, providing the passenger with an incentive to behave, at the risk of not being picked up by Uber drivers in the future. To develop

⁷¹ Whether Uber drivers receive (or are allowed to receive) tips, is controversial. Stephanie Rosenbloom, *To Tip or Not to Tip Your Uber Driver*, N.Y. TIMES https://www.nytimes.com/2016/05/22/travel/uber-taxi-tipping.html?_r=0

the passenger's trust, Uber (1) notifies the customer of the price in advance; (2) provides the description of the car and its license number to relieve anxiety about who the driver may be; (3) specifies almost to the minute when the car will arrive, with the driver's progress to the pickup point tracked on a cell phone application; and (4) requests the passenger to rate the driver, giving the passenger some additional leverage over the service. The model rests on the Internet in many respects. The entire system is designed to establish mutual trust of driver and passenger in ways that Uber hopes will prove sufficiently trustworthy that passengers will return and, perhaps more immediately important to Uber's business model, local taxi cab regulation will be avoided or minimized. (The minimal regulation model provides a price advantage over standard taxis, but taxi companies can replicate the convenience advantages of the Internet.)

Central to Uber's strategy is the mutual creation of reputations through the feedback mechanism, which is used similarly by Airbnb, in a business where mutual mistrust may prevent people who have excess residential space to rent from sharing their space with potential renters. Says the owner: "Here is a photo of my available space that you can view on the Web and you can see how other visitors have rated my offering." Replies the renter: "You can see how other hosts have rated me as a guest and be comfortable that I am not a home-wrecker." None of this is foolproof, of course, but it is likely that mutual rating systems will only improve with experience. Welcome to the emergent world of Internet-based trust building.⁷²

⁷² There is nothing new about businesses inventing ways to promote the public's trust. When I was a retail jeweler, we offered extensive warranties as a way of guaranteeing that our watches and gems were what we purported them to be. For watches, we promised free lifetime replacement of batteries—a potentially valuable addition that reduced the need for discounting watch prices. These types of trust-builders are especially important where there is an informational asymmetry between buyer and seller. Additionally, they may offer competitive alternatives to a singular strategic focus on price.

It comes as no surprise that the established taxi and hotel industries see these sharing economy entrants as competitors who ought to be regulated to the same degree that the incumbents are regulated. In this regard, Section 1 of the Sherman Act could possibly be invoked in at least two different ways. Uber's system might be considered a form of price fixing if their drivers (Uber argues they are independent contractors rather than employees) are disabled by the business model to compete with each other on price. Additionally, if taxi companies or hotel groups were to create some type of boycott aimed at excluding their emerging on-line rivals, this could be an unreasonable restraint of trade under Section 1.

Note that antitrust authorities function as competition advocates as well as law enforcers and thereby become involved in ways other than litigation. For example, although the members of an industry have the First Amendment right to work jointly to lobby regulators for regulatory decisions that are anticompetitive, the FTC or the DOJ as well as state antitrust officials may try to influence the competition policies of state regulators. Generally, the federal authorities have advocated that taxi regulators and hotel regulators should not side with incumbents against innovations, provided the public safety can be adequately protected. In the competition policy process of balancing between the value of competition and the value of cooperation, the effectiveness of the private trust-inducing mechanisms may be a determining factor on how much regulation is required.

Next consider a cutting-edge computer software advancement that can transform many parts of the economy, starting with the financial sector. Blockchain technology underlies the Bitcoin phenomenon. Blockchain is a distributed ledger, an online record of transactions that is shared and authenticated through a series of cryptographic steps. The Economist calls blockchain "the trust machine"⁷³ because of its potential for fixing some economic inefficiencies that

⁷³ *The Technology Behind Bitcoin Could Transform How the Economy Works*, THE ECONOMIST, Dec. 3, 2015, available at <http://www.economist.com/news/leaders/21677198-technology-behind-bitcoin->

respond to the absence of trust. A trusted register has the potential to cut fraud by verifying who actually owns an asset, whether it be a “wodge” of digital currency (as in Bitcoin) or a plot of land or luxury goods or works of art. The Economist reports that 80% of banks will have started work on blockchain-related projects in 2017.⁷⁴

Blockchain has the potential of revolutionizing industries that created institutions for the purpose of establishing mutual levels of trust (e.g. banks, clearing houses, governmental units). The creation of blockchains within industries will likely require coalitions within an industry or industry-wide standard-setting to agree upon the necessary rules for cooperation, raising antitrust questions about the extent to which there should be limits on such cooperation.⁷⁵

In a globalized world, some countries will adopt sharing economies and blockchain technology more or less quickly and extensively than others, as a result

[could-transform-how-economy-works-trust-machine](#) (“The blockchain lets people who have no particular confidence in each other collaborate without having to go through a neutral central authority. Simply put, it is a machine for creating trust.”)

⁷⁴ THE ECONOMIST, THE WORLD IN 2017 126 (2017).

⁷⁵ Foreword by Vitalik Buterin, in WILLIAM MOUGAYAR, THE BUSINESS BLOCKCHAIN: PROMISE, PRACTICE, AND APPLICATIONS OF THE NEXT INTERNET TECHNOLOGY (“[M]any industries ...are decentralized in an inefficient way—a way that requires each company to maintain its own infrastructure around managing users, transactions, and data, and to reconcile with the systems of other companies every time it needs to interact. Consolidation around a single market leader would, in fact, make these industries more efficient. But neither the competitors of the likely leader nor antitrust regulators are willing to accept that outcome, leading to a stalemate. Until now. With the advent of decentralized databases that can technologically replicate the network effect gains of a single monopoly, everyone can join and align for their benefit, without actually creating a monopoly with all the negative consequences that it brings.”)

<https://books.google.com/books?hl=en&lr=&id=X8oXDAAAQBAJ&oi=fnd&pg=PR9&dq=blockchain+and+antitrust&ots=jd-w-0P2D&sig=sIFc31xsLqnAmKalvrrRj-PT06U#v=onepage&q=blockchain%20and%20antitrust&f=false>.

of cultural variations reflected in attitudes toward cooperation and competition. The next section explores what we know about such variations.

VII. CROSS-CULTURAL DATA, TRUST, AND COMPETITION POLICIES

When it comes to how a nation decides to strike the appropriate balance between competition and cooperation, cross-cultural surveys reveal the range of attitudes on various factors that may enter that calculus. Unlike some of the surveys about trust that directly questioned how much people trusted the government or each other,⁷⁶ this type of cross-national reporting is indirect. It would be interesting to have cross-national surveys that ask direct questions such as, “On a scale of one to ten, rate how favorably disposed are you to monopoly/oligopoly/cartels/mergers, etc.” I haven’t come across such a survey and would hardly know how to evaluate the responses if they came from non-experts. Rather, available materials tend to seek out attitudes toward certain cultural value dimensions that may, in varying ways, relate to the competition/cooperation scale.

One possible source is the advice that international businesses are given on how to negotiate in various cultural contexts. For instance, here are international business consultant David Livermore’s seven cultural dimension scales for clusters of states demonstrating similar profiles:⁷⁷

*Individualism/Collectivism: **Individualism** (“Individual goals and rights are more important than personal relationship”); **Collectivism** (“Personal

⁷⁶ FUKUYAMA, *supra*, notes 53,54 and accompanying text.

⁷⁷ DAVID LIVERMORE, *EXPAND YOUR BORDERS* (2013) (describing ten different cultural clusters, e.g., Nordic Europe, Anglo, Latin Europe, etc. for business executives encountering international markets); RICHARD D. LEWIS, *WHEN CULTURES COLLIDE, LEADING ACROSS CULTURES* (3rd ed. 2006). *See also* GERT HOFSTEDE, *CULTURE’S CONSEQUENCES* (1980) (Anthropologist Gert Hofstede’s initial influential contribution to the culture dimensions model).

relationships and benefiting the group are more important than individual goals”).

*Low Power Distance/High Power Distance: **Low Power Distance** (“Status differences are of little importance; empowered decision-making is expected across all levels”); **High Power Distance** (“Status differences should shape social interactions; those with authority should make decisions”).

*Low Uncertainty Avoidance/High Uncertainty Avoidance: **Low Uncertainty Avoidance** (“Focus on flexibility and adaptability; tolerant of unstructured and unpredictable situations”); **High Uncertainty Avoidance** (“Focus on planning and reliability; uncomfortable with unstructured or unpredictable situations”).

*Cooperative/Competitive: **Cooperative** (“Emphasis upon cooperation and nurturing behavior; high value placed upon relationships and family”); **Competitive** (“Emphasis upon assertive behavior and competition; high value placed upon work, task accomplishment, and achievement”).

*Short Term Time Orientation/Long Term Time Orientation: **Short Term** (“Values immediate outcomes more than long-term benefits (success now)”); **Long Term** (“Values long term planning; willing to sacrifice short term outcomes for long-term benefits (success later)”).

*Low Context/High Context: **Low Context** (“Values direct communication. Emphasis on explicit words”); **High Context** (“Values indirect communication. Emphasis on implicit understanding”).

*Being/Doing: **Being** (“Social Commitments and task completion are equally important; diffuse boundaries between personal and work activities”); **Doing** (“Task completion takes precedence over social commitments; clear separation of personal and work activities”).⁷⁸

Although the concept of trust is not directly addressed, it seems possible to extrapolate cultural dimensions in which high levels of trust would be more likely to be found. For instance, in cultures characterized by *Collectivism*, trust in the group would probably be high. In cultures characterized by *Cooperation*, there would be high levels of trust within the in-group. Where there is *Low Uncertainty Avoidance*, risk-taking would be relatively low, because choosing risk tends to require trust.

⁷⁸ LIVERMORE, *supra* note 77 at 101. A nation may be characterized by multiple cultural dimensions.

Where High Power Distance characterizes a culture, a high level of trust in those with authority would be expected. If the culture were characterized by *Long Term Orientation*, it would manifest trust in the future.

To what extent can we generalize from trust to cultural effects on competition and cooperation? It can be argued that markets will likely be more popular in cultures associated with *Individualism* in that individualism suggests that individual competitive advantage must be sought. *Competitive cultures* are by definition more competitive. Cultures characterized by *Long Term Time Orientation* would probably be more favorably disposed to patient investment and to more speculative predictions of competitive effects in antitrust cases, both of which requires trust in the ability to forecast the future. Aggressive governmental intervention in markets may reflect *High Power Distance*, which implies trust in governmental authority. *High Uncertainty Avoidance* would indicate a competition policy that is predictable, with rules one could trust.

As enticing as these speculations may be, they leave too many questions unanswered. First, of course, there are questions about the validity of national stereotypes. While stereotypes usually contain at least some truth, the types of generalizations discussed above tend to be more subjective than objective. Moreover, they assume that nations have one culture, whereas most nations are composed of diverse populations with a mixture of cultural backgrounds. Are all Americans equally competitive? Would they all want the same degree of competition to apply in education and recreation as well as in commercial markets? Would they all have similar opinions about regulatory policies aimed at monopolies and research joint ventures? No. And given the prevalence of subgroups with varying interests within a nation, which subgroups' opinions would we consider most relevant in characterizing a national culture?

Second, these are only generalizations, polar scales, whereas in the real world cultures will normally be somewhere between the poles, not "either/or".

There may be inconsistencies in how national cultures are placed within the various scales. We've already seen, for instance, that competition and cooperation co-exist within the firm and within markets, making it difficult to stereotype even a highly capitalistic economy. Americans are remarkable joiners who are characterized by their eagerness to participate in community endeavors, but they also believe that businesses should compete aggressively -- that Macy shouldn't talk to Gimbels (at least prior to 1987 when Gimbels passed away). Does this make Americans more competitive or more cooperative? (Does Ben Franklin, the iconic entrepreneur and creator of projects to benefit the commons, stand for competition or for cooperation?) *We need to think of competition and cooperation less as opposites and more as simultaneously present but in varying proportions.*

In this regard, note that individualism may be typical of market-driven economies, but individualism can also characterize a highly cooperative culture. For example, Livermore places the Nordic cluster of nations within the extreme Individualism end of the Individualism/Collectivism scale alongside the Anglo and Germanic cultures, but he also places the Nordic cluster within the extreme Cooperative dimension and the extreme Being Orientation dimension, whereas the Anglo and Germanic clusters are not only located within the extreme Competitive end of the Cooperative/Competition scale, but also in the Doing extreme of the Being Orientation/Doing Orientation scale. The interplay of value dimensions is complex, at best.

Third, while cultural values are generally slow to change, they do change and not all values change at the same pace. Generations may grow up wanting to purchase a car "that is not your father's Oldsmobile." Change in one area may impact on other areas. Lawrence Rosen argues that law is a cultural domain.⁷⁹ Law is

⁷⁹ LAWRENCE ROSEN, *LAW AS CULTURE*, 4-5 (2006). See COLIN WOODARD, *AMERICAN CHARACTER, A HISTORY OF THE EPIC STRUGGLE BETWEEN INDIVIDUAL LIBERTY AND THE COMMON GOOD* (2016) for a treatment of the rise and fall of dominant cultural values through American history. SAPOLSKY, *supra* note 13, at 266-77, provides a useful

enacted through politics and political power can shift rather swiftly, through election, coup, or conquest. Law also affects other cultural values. Placing nations on cross-cultural scales must keep pace with changing values and their changing interactions.

Where does this take us? First, when nations are grouped into cultural clusters (*e.g.*, Germanic), the cross-cultural methodology is premised on the idea that cultural dimensions (*e.g.*, individualism) vary from one cultural cluster to another. Second, placing a given country (or, even worse, its cultural cluster) on a given cultural dimension scale is highly subjective. Third, when applied to a particular country, different cultural dimensions may point in contrary directions, making it difficult to ascertain which dimension prevails in the battle of multiple aspects of culture to influence a nation's institutions. Fourth, because trust is not broken out as a cultural dimension in the Livermore approach, its role in any of his seven dimensions can only be speculated. Fifth, it would appear that trust can be an aspect of each of the seven categories, and thus not easily assignable as a cause of any particular policies toward competition or cooperation, much less toward antitrust policy. And finally, it is not clear that the role of trust in a given society is the same when one focuses on education, recreation or the economy, so how trust would be ranked in a cross-cultural context will require specification of how it is being defined and measured. All in all, a very tall order.

Can we come closer to describing a relationship between trust and various manifestations of antitrust policy?

discussion of cross-national data on differences between individualistic and collectivist cultures. He sees nothing resembling genetic destiny here and emphasizes that cultures change over time (*e.g.*, "In general, it takes about a generation for the descendants of East Asian immigrants to America [representing collectivist cultures] to be as individualist as European Americans." 277).

VIII. TRUST AND ANTITRUST

It is a truism that “business relationships are built on a foundation of trust.”⁸⁰ Market exchange is typically viewed as a widespread form of voluntary cooperation among more-or-less self-regarding individuals that provides mutual benefits. Market exchange is governed by a variety of institutional forms in the world, such as antitrust and sectoral regulation laws, which reflect political, historical and cultural factors. Trust is only one of the cultural factors tracked by cultural anthropologists that contribute to these institutional forms,⁸¹ but it nevertheless plays a role in competition policy. The following discussions highlight trust within several areas of competition policy: vertical integration, cartels, mergers and acquisitions, dominance and firm size, role of the state and the “missing middle,” orientation toward growth, and trade.

A. Vertical Integration

Let’s start with the question of whether an economic entity should manufacture an input or purchase it in the market—the “make or buy” decision that helps determine the size and scope of a firm and the range of independent players in the market. Led by Nobel-winning economists Ronald Coase⁸² and Oliver

⁸⁰ Leslie, *supra* note 6 at 547. Leslie recognizes that trust, though generally seen as a virtue, can also serve evil ends. “The issue, then, is when should society encourage trust and when should it foster distrust.” *Id.*

⁸¹ See generally, GEERT HOFSTEDÉ, GERT JAN HOFSTEDÉ, & MICHAEL MINKOV, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND: INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL (2010).

⁸² See COASE, *supra* note 61.

Williamson,⁸³ the strictly micro-economic analysis tends to answer on “make or buy” question on the basis of transaction costs.⁸⁴ The analysis goes: if a commercial entity can trust the market to provide the desired input reliably at a reasonable price, without undue costs of contract negotiation, monitoring, or enforcement, and the risks of a unilateral “holdup” are not a concern, it will likely contract to buy the input in the marketplace.⁸⁵ If this level of trust in suppliers is not present (for example because there is only one supplier or a small number of suppliers who are perceived to be capable of colluding), the entity may choose to make the product in-house, where it can reduce or eliminate the costs and risks of transactions. A firm is composed of those functions that an entity performs by itself.

The underlying assumption in this theory of the firm is that vertical integration occurs when the firm’s management has a higher level of trust in its own future, via more internal cooperation and overall efficiency, by imposing its hierarchical and corporate cultural influences on those who become part of its in-group. Since most functions associated with a firm’s business can be purchased outside or incorporated inside, government regulation can tilt the buy-or-make decision through its impact on transaction costs. To the extent government

⁸³ See WILLIAMSON, *supra* note 62.

⁸⁴ Transaction costs have been summarized as “search and information costs, bargaining and decision costs, policing and enforcing costs.” COASE, *supra* note 61 at 6.

⁸⁵ One might question whether it is a proper usage of the word ‘trust’ to say someone can ‘trust the market’. I think one can trust an institution in the same sense that one can trust the sun to rise in the east. It is a matter of confidence in a prediction of how a person, a group, an organization, an institution—will behave under certain circumstances. In the case of “the market,” we are really talking about confidence in how a number of individual persons whom we may but more likely do not know personally will act in a given situation. A business, however, may have substantial experience with how the most relevant others, such as a limited group of suppliers, tend to act in similar circumstances. It routinely makes decisions based on whether someone, some group, or some institution is worthy of trust. Trust of individuals and/or institutions may be fully rational or be based on considerations that include values and emotions.

increases transaction costs, it probably contributes to the size of firms and the reduction of the number of independent firms within a product market.

An additional light is thrown on vertical integration by the late Robert L. Steiner, who persuasively argued that the out-group supplier and the firm to which it wants to sell in-puts are not only cooperators within the supply chain, but they are also “vertical competitors” who are competing for the share of profit that can be derived from the ultimate consumer to whom the firms jointly expect to sell their product.⁸⁶ I have never understood why this well-documented insight has received so little recognition in the U.S. antitrust world. By showing that competition can occur in a vertical as well as horizontal plane, it raises the relevance of vertical transactions to a higher level than the Chicago School paradigm has permitted.⁸⁷

I had an illustrative experience when I was CEO of a chain of retail jewelry stores. We typically hired an outside company to supply special “re-mounting” events within our stores. A re-mount event is intended to be a trust-building tactic. The specialty company would provide a stock of blank rings and diamonds that can be selected to fit into the blank or upgrade an old ring provided by the customer. Many customers are afraid that if their diamond leaves their sight, the jeweler will substitute a lower quality gem—or non-gem. Being able to watch the re-mount

⁸⁶ See Gregory T. Gundlach & Albert A. Foer, *Combining Horizontal and Vertical Analysis in Antitrust: The American Antitrust Institute’s Roundtable on the Implications of the Work of Robert L. Steiner*, 49 THE ANTITRUST BULL. 821 (winter 2004).

⁸⁷ Apparently, East Asians process information differently from Westerners. The former have a more holistic as opposed to focused manner. *E.g.*, typically Westerners’ eyes first look at a picture’s center, while East Asians scan the overall scene. SAPOLSKY, *supra* note 13, at 276 (Sapolsky invites us to consider a monkey, a bear, and a banana. Which two go together? “Westerners think categorically and choose the monkey and bear—they’re both animals. East Asians think relationally and link the monkey and banana—if you’re thinking of a monkey, also think of food it will need.”) This distinction may be useful in our discussion of different ways antitrust enforcers view vertical relations. A specific example will be explored in my discussion of Abuse of Superior Bargaining Power, *infra* text at note 123.

specialist and the ring at the same time is designed to eliminate this mistrust and thereby to encourage customers to upgrade that which they already own.

The contracting re-mount company also provided an experienced re-mount jeweler, appropriate equipment, secure transportation for the jeweler and equipment, and insurance for the event. We worked the numbers and determined we could more profitably run our own re-mounting events in-house. Could we go into competition with our supplier through vertical integration of the re-mount function?

It all sounded good. After substantial planning, we searched for and employed a re-mount specialist, purchased an unmarked van truck to travel from our secure central office to the stores, plus stock, equipment, and insurance. We advertised scheduled proprietary re-mounting events in our stores. At first this was a success story, but problems soon emerged. The in-house expert we hired turned out to have a difficult personality that clashed with other employees who reported she couldn't be fully trusted in her interactions with our customers. She couldn't be replaced when she was sick. Security proved much more difficult than we had anticipated. We realized that at our scale we did not have the back-up resources to keep available a replacement re-mount jeweler when problems arose. The incremental profits were less than anticipated and not worth the extra aggravation we were experiencing. After a year we decided to give up on vertically integrating and returned to contracting re-mounting events with an outside specialist company. The trust factor particularly manifested itself in the larger scale of the outside company, which allowed it to execute its commitments reliably and to replace expert re-mounters whenever necessary and on short notice. In this vertical competition between retailer and re-mount supplier, the supplier was somewhat chastened by our temporary revolt, but nonetheless victorious.⁸⁸

⁸⁸ Retailers often compete against their suppliers by using their own proprietary brands for insight into the costs of their suppliers and as a lever to help keep supply prices as competitive as possible.

When antitrust policymakers consider vertical relationships, it is assumed that the relationship between buyer and supplier is in fact primarily voluntary and cooperative and does not foreclose a substantial amount of commerce by precluding a downstream buyer or dealer from dealing in the products of a rival to the supplier imposing the restraint. By ignoring the competitive struggle between levels in the supply chain, U.S. antitrust enforcers can be viewed as overly-trusting of the cooperative motivations and behavior of buyer and supplier. In a later section I will focus on problems that arise in the absence of an antitrust doctrine for dealing with, “abuse of superior bargaining power”.⁸⁹

B. Cartels

An obvious issue of trust arises in the nature and operation of cartels, which may be formed by explicit collusion or tacit collusion.⁹⁰ A cartel can be viewed as a limited form of horizontal integration in which independent competitors agree with each other to fix price, allocate output, or otherwise move important elements of trade from the competition zone into the cooperation zone, for the purpose of maximizing the joint profits of its members.⁹¹ Today most of the world’s market-based nations take it for granted that cartel behavior is undesirable for the society, but one student of cartel history reminds us,

⁸⁹ See text at note 123 *infra*.

⁹⁰ Explicit collusion is “an agreement among competitors that relies on interfirm communication and/or transfers to suppress rivalry.” ROBERT C. MARSHALL & LESLIE M. MARX, *THE ECONOMICS OF COLLUSION, CARTELS AND BIDDING RINGS*, ix (2012). No fans of collusion, the economist authors nevertheless rhapsodize, “The successful suppression of competition is a thing of economic beauty.” *Id.*

⁹¹ JOHN M. CONNOR, *GLOBAL PRICE FIXING*, 21(2d ed.,2007).

In the fifty years before World War II, the world backed away from the idea that economic competition necessarily promoted the common good. The retreat, although gradual at first, became headlong with the outbreak of World War I in 1914. Among the chief manifestations of this trend was the expansion of cartels, which played an ever-growing role in domestic and international trade and by 1939 had become a major factor in the world economy.⁹²

During this period, Wyatt Wells points out, “Some observers even saw international cartels as the basis for a new world order, offering an institutional framework for cooperation that by-passed governments...”⁹³ Put another way, at various times and in various places, the problem has not been perceived by many as one of too little competition, but rather of too much “cutthroat competition” whose proper medicine was prescribed to be more cooperation among rivals. Indeed, until the era after World War II, cartels were probably the default mechanism in capitalist countries other than the U.S., and even the outlier U.S. succumbed to the cooperation solution during the first New Deal.⁹⁴

⁹² WYATT WELLS, *ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD*, 4 (2002). *See also* Connor, *supra* note 90 at 46-51 (providing information on the early history of cartels, going back to 17th century Holland.) “Before 1914, effective international cartels existed in the steel rail (for railways), explosive, and synthetic alkali industries, among other sectors.” Wells, *supra* at 5. Between the world wars, the League of Nations endorsed cartels and “governments around the world actually organized some international cartels themselves, most notably for sugar, rubber, and wheat.” *Id.* at 10-11.

⁹³WELLS, *id.* at 10.

⁹⁴ ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966); RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA*, 115-144 (1996); ALAN BRINKLEY, *THE END OF REFORM*, 31-47 (1996). Section 1 of the National Industrial Recovery Act of 1933 included this language: “It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups...”

Cooperation is the *sine qua non* for cartel success because each member has to overcome an incentive to cheat on the cartel by selling below the fixed price or producing more than its allotted share, in order to gain advantage over its non-defecting rivals.⁹⁵ The cartel therefore tries to erect deterrence strategies for detecting and punishing its own cheaters.⁹⁶ The government, understanding the dynamics that can lead to cheating, tries to undermine the trust of the cooperating community by promoting the process of whistleblowing. Through its Corporate Leniency Policy, the Department of Justice since 1993 has offered full amnesty on fines for companies that are the first to alert the agency about a cartel.⁹⁷ This highly successful policy has been revised from time to time and is now popular in enforcement regimes around the world, but it always relies on a Prisoner's Dilemma dynamic of *intentionally generating distrust* within the trusting cartel community by providing the earliest confessors strong incentives to "turn state's evidence."

While price-fixing ("collusion") is deemed *per se* illegal in the U.S., there are other types of horizontal "collaboration" that are permitted and even encouraged, whether by statute or policy. These are evaluated under a more defendant-friendly "rule of reason" test. For example, because it is so valuable for advancing new technologies, industry-wide standard-setting is encouraged by statute and limited

⁹⁵ Leslie, *supra* note 6 (describing how trust is built up within cartels).

⁹⁶ Leslie, *supra* note 6 at 622 ("Although antitrust law is not generally thought of as a method of sowing the seeds of distrust, it often succeeds by doing just that.") Leslie discusses various techniques for curtailing trust-facilitating devices, as well as leniency programs in which the rewards structure of the government's program creates a race to confess. *Id.* at 640. The latter he describes as creating distrust about confessing. Leslie recommended increasing use of what he called The Distrust Model throughout antitrust, especially with regard to trade associations and joint ventures. Today, the distrust strategy, although still not often recognized as such, has grown in importance.

⁹⁷ The DOJ program began in 1978. Leniency is conditioned on the company not having initiated the cartel and that no government investigation was already in progress. CONNOR *supra* note 91 at 71. Most of the economically significant market economies in the world have adopted similar leniency programs.

by antitrust enforcers only in the face of extraordinary abuses.⁹⁸ Unless companies with a stake in a new technology are permitted to meet, communicate, and formally agree on common standards, they may individually lack the incentive to invest in the development of the new technology, so that the common interest of the stakeholders (and, presumably, the public) will be thwarted. On the other hand, trust has its limits. A governmental competition policy encouraging competitors to meet, share information, and reach agreements on common interests can be dangerous to society—an abuse of the public’s trust-- so antitrust occasionally intervenes in standard-setting to deter it from being used for fixing prices, allocating market shares, or eliminating future competitors.

C. Mergers and Acquisitions

Facing a government’s strong and consistent opposition to cartels, companies often look to other means for cooperating with their rivals. The simplest means, at least in some respects, is to acquire or merge with the rival, thereby converting an “out-group” into a constituent of the “in-group”. Those who formerly competed will now cooperate; by the magic of M&A, trusting cooperation that would have once been illegal becomes blessed by competition policy.⁹⁹ Sometimes this is easier said than done. Governmental regulation over mergers can stand in the way, usually in the form of a Clayton Act antitrust intervention if the effects of the merger are likely to be anticompetitive.¹⁰⁰ In recent U.S. policy, antitrust intervention has been most probable if the transaction will reduce the number of active rivals in the relevant geographic and product market to three or fewer significant players.

⁹⁸ See generally MICHAEL A. CARRIER, *INNOVATION FOR THE 21ST CENTURY, HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW*, 323-44 (2009).

⁹⁹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)(holding that a parent company cannot collude with a wholly owned subsidiary because they are not separate economic entities).

¹⁰⁰ 15 U.S.C. sec. 18.

An issue of economic importance is whether the two corporate cultures of merging firms can actually be melded efficiently. Antitrust analysis of a merger's legality (including the government's discretionary determination of whether to issue a complaint) often includes evaluating predictions of efficiency gains that might offset any harm due to the post-merger reduced number of competitors. I doubt that the following questions relating to culture and trust are considered, but on occasion perhaps they should be: How difficult will it be for the employees who are brought together under one legal roof to develop trust for one another, to adopt common attitudes toward both fellow insiders and outsiders, to accept common procedures and strategies? This can be particularly difficult where employees of the two formerly independent companies do not share the same linguistic, religious, or other cultural heritages such as attitudes toward hierarchy, although the largest cultural divergence is typically different customary practices, which is a thinner and more changeable aspect of culture.¹⁰¹ Trust, as one reflection of culture, therefore plays a role in whether or how soon projected efficiency gains actually occur. It is conceivable that an efficiency defense could fail because a court discredits on cultural divergence grounds the merging parties' argument that the merger will produce a particular magnitude of future efficiencies within a reasonable timeframe.

A merger may also have interesting implications for the level of trust that will affect the entire industry after the merger, if for example the merger eliminates a

¹⁰¹ HOFSTEDE, HOFSTEDE, & MINKOV, *supra* note 81 at 341-77. This work differentiates national cultures from organizational cultures (e.g., "*National cultures* are part of the mental software we acquired during the first ten years of our lives, in the family, in the living environment, and in school, and they contain most of our basic values. *Organizational cultures* are acquired when we enter a work organization as young or not-so-young adults, with our values firmly in place, and they consist mainly of the organization's practices—they are more superficial." *Id.* at 346). See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. Pa. L. Rev. 1735, 1738 (2001) ("In particular, we argue that the behavioral phenomena of internalized *trust* and *trustworthiness* play important roles in discouraging opportunistic behavior among corporate participants.").

maverick, *i.e.* a firm that tends to deviate from the norms of the industry, tacit collusion may be easier to accomplish.¹⁰²

When agreements to limit competition are not made explicitly, typically in highly concentrated markets, collusion may nevertheless occur tacitly; *i.e.*, the competitors come to understand and trust each other sufficiently that explicit agreement is simply not necessary. In cases of parallel behavior by firms, the law requires that “plus” factors indicative of an agreement must be present. This requirement is vague and controversial in application. Richard Posner has suggested that explicit agreement need not be proved, but should be found based on certain observable economic characteristics of the industry that make collusion likely.¹⁰³ Christopher Leslie has gone nearly as far, advocating that the presence of trust-facilitating devices should be considered as plus factors, thereby making it easier to prove agreement.¹⁰⁴ These structurally-oriented proposals have not generally been followed but whether the competitors are acting independently or interdependently may be easier to determine if the dynamics of trusting relationships is considered. For now, tacit collusion among oligopolists remains a difficult nut for antitrust to crack.

¹⁰² See Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV 135 (2002) (“The concept of a maverick is not new to antitrust law; it appears in the government's Merger Guidelines, where a maverick firm is described as one with ‘a greater economic incentive to deviate from the terms of coordination than do most of [its]rivals.’” The Merger Guidelines provide as an example a firm that has an ‘unusually disruptive and competitive’ influence in the market, but the concept of maverick also encompasses firms that constrain coordination from becoming more likely or more effective without necessarily starting price wars or otherwise appearing observably disruptive.”)

¹⁰³ RICHARD A. POSNER, *ANTITRUST LAW* 69-100 (2ND ed 2001).

¹⁰⁴ Leslie, *supra* note 6 at 675.

Joint ventures are often thought of as incomplete or partial mergers. They may be horizontal, vertical, or conglomerate in nature. Like a merger, they facilitate cooperation within a limited area between companies that may presently or potentially compete. Because joint venturers know that the venture is neither a complete integration nor necessarily permanent, mutual trust must be established with regard to not taking advantage of information gained during the venture. The antitrust analysis of such collaborations is accomplished under the rule of reason; whether effects will be anticompetitive is complex, but generally biased in favor of permitting cooperation, if some specific benefits (often, the development of a new product or service not presently in the market) can be ascribed in the absence of identifiable anticompetitive effects.¹⁰⁵ As in most other areas of antitrust analysis, the outcome depends on a comparison of the benefit of cooperation against the loss of competition.

D. Dominance and Firm Size

Attitudes toward concentrated economic power and the size of firms vary, leading to different antitrust policies toward market dominance. Fukuyama pointed out that both Germany and the U.S. always had strong popular distrust of concentrated economic power, despite each having a proclivity for creating large private organizations. Germany, he says, did not tend to distrust size *per se*, in part because it was not as anti-statist as the U.S.¹⁰⁶ This type of generalization presents difficulties. On the U.S. side, for instance, Theodore Roosevelt was hardly anti-statist, believing that big corporations were inevitable and that government needed to be

¹⁰⁵ The National Cooperative Research Act, 15 U.S.C.A. sections 4301-4304, provides that research joint ventures should be evaluated under the rule of reason rather than the *per se* rule. On joint ventures generally, *see* of HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, CH. 5 (1994).

¹⁰⁶ FUKUYAMA, *supra* note 6 at 215.

bigger and stronger in order to regulate them. His statist view, it is true, did not prevail over the progressive Wilson/Brandeis idea that competition and antitrust rather than regulation should control big business, but state regulation did win the day in a number of key sectors of the American economy.¹⁰⁷ On the German side, the Ordo-Liberal view that favored decentralization of both economic and political power prevailed in the post-Hitler years and has at times strongly influenced the European Union's stand against abuse of dominance.¹⁰⁸

History and geography, which help define a nation's borders and internal regions, can be particularly important in explaining national attitudes toward firm size. For example, a small market may only have room for a single monopolist who can achieve minimum scale of efficiency, implying that there may be a choice to be made between high concentration and substantial inefficiency in a small market.¹⁰⁹

In both small and large nations, there is often a recognized linkage between economic power and political power, captured by the famous observation of Lord Acton that power tends to corrupt and absolute power corrupts absolutely. Corruption in its various forms undermines a market economy by producing allocation decisions that are not based on competitive supply-and-demand, making it difficult for both producers and consumers to trust the market mechanism or the people they deal with. In this context, consider three possible competition policies a

¹⁰⁷ JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY, 167 (2004)(reviewing the clash of views about how to control big business). An example of state regulation of a key sector was the railroad industry under the Interstate Commerce Act.

¹⁰⁸ See DAVID J. GERBER, GLOBAL COMPETITION 167-71(2010); Peter Behrens, *The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658045 (critiquing Gerber).

¹⁰⁹ MICHAL GAL, COMPETITION POLICY FOR SMALL MARKETS 27-35 (2003). WOODARD, *supra* note 79, chapter 5, describes the rise and fall of laissez faire in the U.S. between 1877 and 1930, as the economy and the government grew.

government might take. (1) A government might have self-preservation motives to keep private power fragmented, using competition policy as a shield against private concentration of countervailing political power within the economy. (2) A government may want to extend its political power through crony alliances by favoring selected private firms with opportunities for growth or profit, in which campaign contributions, inducement of employees to be voters and campaign workers, lending of corporate jets, and even outright bribes can be exchanged for special treatment such as approval of even the most highly concentrating mergers. Or (3) a more public-spirited government may want to operate in a scrupulously rule-based and neutral way, minimizing the role of politics.

The first policy could be corrupt if the government uses its political discretion to serve its own interests rather than the public interest; but if it follows universally applicable rules, the motivation would be less important than the economic and social effects. The second policy is plainly corrupt, based on quid pro quo bribery. Lacking objective and transparent standards, it could result in the creation of very large and powerful companies; however, it could also or alternatively include limitations on the size of rivals of cronies. The third policy would be transparent and universal. It could impose a limit on firm size without discrimination in favor or against any particular firm and presumably intend neutrally to maximize overall opportunities for competitive behavior. Here the question is not one of corruption but of a culture's attitude toward concentrations of power. Evaluation of such a policy would presumably recognize that large size creates certain inefficiencies and socially negative effects, the cost of which might be estimated and compared to some loss of efficiency that would arguably flow from size limitations.

Cultures vary in the regard with which they hold those with power as well as attitudes toward corruption, and therefore might vary in their attitudes toward large centers of power or whether they differentiate between power held privately and power held by the government. Cross-cultural surveys sometimes report on

attitudes toward hierarchy, often in terms of a power distance scale.¹¹⁰ Hofstede *et al.* conclude from these surveys, “In a society in which power distances are large, authority tends to be traditional, sometimes even rooted in religion...Might prevails over right...In such cultures the people who hold power are entitled to privileges and are expected to use their power to increase their wealth.”¹¹¹ In small-power-distance countries, by comparison, “The use of power should be subject to laws and to the judgment between good and evil...Power, wealth, and status need not go together—it is even considered a good thing if they do not.”¹¹² One might take from this that attitudes toward centralized and decentralized power are to some extent culturally based, with low-power-distance cultures more likely to support competition policies intended to foster decentralized economic power.

Size limitation requires substantial government intervention in the economy. A high level of trust in government and its civil servant employees is likely to be associated with a higher public regard for regulation of business. In 2001, both the U.S. and E.U. competition authorities reviewed a proposed merger between General Electric and Honeywell, coming, rather unusually, to blatantly different conclusions. The U.S. approved the merger, not finding a direct overlap of markets. The E.U. rejected the merger, focusing on what it saw as longer-term problems involving the financial advantages of the merged company that could later be used to consolidate

¹¹⁰ Power distance is defined as “the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally.” HOFSTEDE *ET AL.*, *supra* note 81 at 61. *E.g.*, LIVERMORE, *supra* note 77 at 101, makes the distinction between cultures that value “low power distance” (status differences are of little importance; empowered decision-making is expected across all levels) and those that value “high power distance” (status differences should shape social interactions; those with authority should make decisions).

¹¹¹ HOFSTEDE *ET AL.*, *supra* note 81 at 77.

¹¹² *Id.* at 78. Would the U.S. be described as high power distance or low? At what point in time? Compare the administrations of presidents Trump and Obama. How quickly can this cultural dimension change?

control of certain markets. I believe the conflicting outcomes are founded in cultural differences: in the E.U. there is generally more trust in the institutions of government, lending the antitrust enforcers greater confidence for making predictions which in the U.S. are considered too speculative for a government enforcer. There may also be a greater concern about corporate size, *per se*, in the E.U., which results in a definition of dominance (as in “abuse of dominance”) that has a lower market share threshold than in the U.S. definition of monopoly.¹¹³ This statement assumes a relationship between market share and absolute size, which is only sometimes the case. Unfortunately, there is not much data available on either the effects of or survey attitudes toward aggregate concentration.

In fact, competition policy in the U.S. (and in most other countries) has not placed limits on firm size, apart from occasional explicit statutory and regulatory limitations within specific key sectors such as banking. While full-blown monopolies in identifiable “antitrust relevant” markets are rare in the U.S., markets characterized by small numbers of large oligopolists are common, as are huge conglomerates. To some extent this structure can be explained by observing that trust in government bureaucrats has tended to run low in the U.S., whereas trust in businesspeople has tended to be greater. For this and no doubt additional reasons, on questions of corporate size limitations, the U.S. generally gives the edge to size rather than governmentally-imposed limits.

¹¹³ Although there are no absolute threshold numbers in either jurisdiction, it is often said that a 40% market share in Europe can be enough for dominance, while a 60-70% share is needed in the U.S. See Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME, July 8, 2001, <http://content.time.com/time/business/article/0,8599,166732-2,00.html> (last visited May 3, 2017). The E.U.’s 2017 decision against Google may imply concern about size or power, but it can also reflect that Google was found to hold a much higher market share, 90%, in Europe than it held several years earlier in the U.S., when the FTC closed its investigation of Google. The decision of U.K. voters to leave the E.U. may have reflected distrust in the large and ever more powerful Brussels government or trust in Britain’s ability to go it alone, or a variety of motivations including strong anti-immigration sentiments.

E. Role of the State and the Missing Middle

Truly individualistic societies are believed by Fukuyama to have little capacity for associational development in the civil society “middle” space between the family and the state. If large private businesses are to have space to grow, it must be within this middle. Most cultures place a high value on family, although what this means in practice varies tremendously. In the category of so-called familist societies, trust is particularly strong within the family. There are only weak voluntary associations between unrelated people, hence there is little basis for trusting anyone outside of the immediate family. Economic entities in familist societies consequently tend to be owned and operated as small businesses. These businesses frequently have difficulty in making the transition from family to professional management, which limits their potential for durability and long-term growth. Small businesses can be very successful, as in Hong Kong, Taiwan, and Singapore, but being small they usually cannot compete well globally.¹¹⁴ Other Asian countries have developed networking methods of growing large private organizations, *e.g.*, the Keiretsu in Japan and Chaebol in South Korea, which have sometimes been plagued by family management succession problems but use idiosyncratic conglomerate forms to scale up to international size.

The “Missing Middle” is typical of Confucian societies that promote family bonds, leaving large-scale organization to the state. In China, for example, state intervention was often the only avenue by which the nation could build large industries. Was it familist culture, imperial politics, or Communist ideology that hollowed out the space between China’s families and the power of central and

¹¹⁴ Familist nations sometimes stipulate that on the business entrepreneur’s death, ownership shares will be divided equally among heirs, which also contributes to the “missing middle”.

peripheral governments? We will see whether the relatively recent advent of “socialist markets” and privatization overcomes the Confucian tradition.¹¹⁵

Italy is a non-Confucian society with similar familist limitations. Societies with a high degree of trust and social capital like Japan and Germany are reported to be better able to create large organizations without state support.¹¹⁶ Consideration of the Missing Middle helps us understand the dynamic interplay of culture, including trust, and economic organization.

F. Growth Orientation

It is often repeated that the goals of antitrust are competitive prices, choice, and innovation. Innovation produces growth so that an economy gains a larger pie that can in theory be distributed to the society, but innovation is all about change. Different cultural attitudes toward uncertainty would seem to influence outlooks toward change. Why is it that some nations, such as the United States and Israel, are characterized by innovation and growth, while others are essentially stagnant? Essentially, this difference is about trust in the future, which may also have religious and/or political aspects.

In Joel Mokyr’s study of the origins of the Industrial Revolution, he emphasizes that “cultures can be backward- or forward-looking in the sense that some may hold the knowledge and learning of previous generations in such high

¹¹⁵ See Thomas J. Horton, *Confuciansim and Antitrust: China’s Emerging Evolutionary Approach to Anti-Monopoly Law*, 47 *INTERNAT. LAWYER* 193 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488181.

¹¹⁶ FUKUYAMA, *supra* note 6 at 28-9,56. I find it difficult to say that the Japanese Keiretsu lacks state support, given the credit and other advantages that flowed from the government. Even a passive tolerance of cartels and keiretsus, however, would imply state support.

esteem that novel ideas run a serious risk of being viewed as apostasy.”¹¹⁷ He states, “A critical cultural belief that drives economic growth and complements the belief in the ‘virtuousness of technology’ is a belief in progress, and specifically in economic progress.”¹¹⁸

Negative attitudes toward progress may have cultural roots in uncertainty avoidance, defined by Hofstede *et al.* as “the extent to which the members of a culture feel threatened by ambiguous or unknown situations.”¹¹⁹ They differentiate this, a diffuse feeling, from risk avoidance, which relates to something specific. “The strong uncertainty-avoidance sentiment can be summarized by the credo of xenophobia: ‘What is different is dangerous’ ...the weak-uncertainty avoidance sentiment, on the contrary is: “What is different is curious.”¹²⁰

A vigorous, dynamic capitalist market system places a high value on innovation and the growth that innovation facilitates. More traditional cultures may be leery of growth because it generates uncertainty by upsetting the *status quo*, creating losers as well as winners.

¹¹⁷ MOKYR, *supra* note 11 at 19.

¹¹⁸ *Id.* Also see BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* (2005), which argues that economic growth makes a society more open, tolerant, and democratic. Friedman states, “It is not surprising that many cultures, especially Western societies in the modern era, have developed moral presumptions in favor of precisely those aspects of personal behavior that lead to greater productivity and economic growth,” i.e., hard work, diligence, patience, discipline and a sense of obligation to fulfill our commitments, as well as thriftiness and education. *Id.* 15-18.

¹¹⁹ HOFSTEDE *ET AL.*, *supra* note 81 at 191.

¹²⁰ *Id.* at 201. The difficulty in reaching such generalizations is pointed out in an email to the author by Thomas Cheng (May 16, 2017), who notes that as a society Japan cannot be more uncertainty avoiding, but it is also a very innovative country and the same may be said of Korea and Germany. Once again we have the problem of stereotyping cultures.

Capitalism in its various manifestations is now the principal economic structure of most of the world's countries, including some which had histories of communism, colonialism, or authoritarianism not so many years ago. Most of these market-oriented countries have antitrust laws, but because of their varying histories and cultural values, they do not necessarily share the same eagerness for innovation and growth. In short, they are not all equally dynamic. Schumpeter emphasized "gales of creative destruction"¹²¹ as the essence of a dynamic capitalism dedicated to creation of new products and services, including new jobs, even as it often displaces those who benefit from the *status quo*.

This stormy process creates *anxiety* not only in those who lose income and status; in dynamic capitalism nobody can be certain he or she will not become the next victim of change. The process can also cause *resentment* against the ones who benefit from change. On net, dynamic capitalism seems to benefit the society, but the inherent downside entailment of anxiety and resentment can generate political support for unduly anticompetitive policies aimed at protecting the *status quo* or restoring the *status quo ante*. Thus many capitalist states have developed at least some welfare and safety net components designed to ease the situation for losers and to help them transition into different jobs, while at the same time reducing the anxiety of everyone living in an economy that is understood to create losers as well as winners.

Finding the right balance between state-provided welfare and safety net on the one hand and incentives to work efficiently and take risks, on the other, is a political task of the first order. That balance affects and is affected by the levels of trust in the community's intention and ability to respond to individual distress.

¹²¹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY CH 7 (3d ed., 1950); THOMAS K. MC CRAW, PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION (2007). For an in-depth exploration of what makes the nation of Israel so remarkably innovative, see DAN SENOR & SAUL SINGER, START-UP NATION (2009).

G. Trade

As noted earlier in this essay, a functioning economy depends heavily on trust, particularly in regard to tax revenues and payment systems. Another aspect to consider is international trade. When trust is high between countries, trade is likely to flourish. In 2014, Hosking published this chilling description of what happens when a polity's trust is eroded:

When social trust breaks down, it tends to reconfigure at a lower level collective, which then erects rigid boundaries around itself. Thus when trust in the state is weakened, it tends to refocus on a political party, a religious movement, an ethnic group, a regional or tribal leader, a military strong man, or an economically powerful figure. In a crisis of trust, political leaders will often try to draw tighter boundaries around the community and project distrust across them.¹²²

As a nationalistic in-group redefines its economic community from global to national the result may be protection of domestic markets and a reduction of international trade and cross-border immigration. Barriers against trade likely decrease competition within the domestic market and immigration likely reduces competition for in-group jobs. Each of these policies diminishes a well-known contributor to economic growth. Another way of describing protectionist policies is that cooperation with out-groups is reduced in the name of protecting the in-group from outside competition.

The important thing to note about trade is that over time sovereign nations have adopted a whole range of policies, from completely open markets to completely closed markets, with many stopping points along the way, including tariffs, subsidies, quotas, biased enforcement of laws and regulations, and other forms of government intervention.¹²³ Each of these policies may be viewed as a

¹²² HOSKING, *supra* note 2 at 201.

¹²³ A history of governmental intervention in international trade is presented in CHANG, *supra* note 52. Economist Chang writes: “[H]istory tells us that, in the early

political assignment of how much competition or cooperation will occur at a given point in time with respect to a particular trade-related behavior.

IX. Importance of Trust in Assigning Roles to Competition and Cooperation: The Example of ASBP

How might the concept of trust fit into a nation's decision on whether a desired end result should be treated as subject to competition or cooperation? Let's examine the case of abuse of superior bargaining position ("ASBP").¹²⁴

Through most of America's antitrust history, retail companies were relatively small and their markets fragmented, whereas manufacturers tended to be much larger and more powerful. Consequently, it was the concept of manufacturer monopoly that received primary attention from antitrust theorists and enforcers. The growth of the power buyer, such as WalMart or Amazon, is of recent vintage, with the power buyer now frequently in the superior bargaining position.¹²⁵ While the concept of monopoly on the seller side has been applied to the buyer side through the concept of monopsony, which is usually portrayed as the buyer-side mirror image of monopoly, *a large buyer who does not qualify as having enough*

stages of their development, virtually all successful countries used some mixture of protection, subsidies and regulation in order to develop their economies.... Unfortunately, another lesson of history is that rich countries have 'kicked away the ladder' by forcing free-market, free-trade policies on poor countries." *Id.* at 61.

¹²⁴ See Albert A. Foer, *Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?*, AM. ANTITRUST INST. WORKING PAPER NO. 16-02 (2016), <http://www.antitrustinstitute.org/sites/default/files/AAI%20Working%20Paper%20No.%2016-02.pdf>. In this section I will often be quoting from or paraphrasing this paper.

¹²⁵ Chain stores are an intermediate development. Concern about the A & P Supermarket chain led to passage of the Robinson-Patman Act during the Great Depression, with certain parts of the Act aimed at controlling Buyer Power, but ultimately having relatively small impact in this regard.

market power to be deemed either a monopolist or a monopsonist can often have very substantial advantages over smaller suppliers, and there is ample reason to recognize that these advantages are often abused. The modern imbalance between non-monopsony power buyers and their suppliers has been recognized by law in Austria, Bulgaria, France, Germany, Italy, Japan, Korea, the Slovak Republic, and Taiwan, but not in the U.S.¹²⁶

The International Competition Network (ICN) issued a factual report on what is known as Abuse of Superior Bargaining Position in conjunction with its 2008 conference.¹²⁷ Of the 32 jurisdictions responding to a survey, seven reported specific legal provisions relevant to the questionnaire's definition of ASBP.¹²⁸ Our

¹²⁶ See Masako Wakui & Thomas K. Cheng, *Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?* J. ANTITRUST ENFORCEMENT, 2015, 1-32 (2015), 10.1093/jaenfo/jnv022; Mitsuo Matsushita, *Abuse of Superior Bargaining Position –in the Context of Different Antitrust Philosophies-*, presented to the 2015 ASCOLA conference in Tokyo, Japan, to be published in a forthcoming ASCOLA book (text in author's files), slide presentation at <http://ascola-tokyo-conference-2015.meiji.jp>; Yee Wah Chin, *What Role for Abuse of Superior Bargaining Position Laws?*, 256 N.Y.L.J. , July 6, 2016; Ioannis Lianos & Claudio Lombardi, *Superior Bargaining Power and the Global Food Value Chain. The Wuthering Heights of Holistic Competition Law?* <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-1-2016> (dealing with the food sector and also reviews how the authorities in the E.U., Italy, Germany, Spain, and the U.K. define bargaining power). Peter Carstensen devotes a chapter (six) to “market regulation and other strategies to remedy abuse of market power” in his forthcoming book, PETER CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE. The author thanks Thomas Cheng for pointing out that although ASBP most often arises in the context of buyer power, under some national statutes (*e.g.*, Japan and Korea) the abuse can also come from a powerful seller.

¹²⁷ ICN Task Force for Abuse of Superior Bargaining Position, *Report on Abuse of Superior Bargaining Position*, April 14-16, 2008, www.internationalcompetitionnetwork.org.

¹²⁸ The ICN Task Force's questionnaire requested respondents to provide their own definition of ASBP, but offered the following guidance in Appendix E of the Report:

major trading partners-- Germany, Japan and Korea--employed such provisions as part of their competition law while four others employed ASBP in other contexts such as protecting local suppliers in rural areas, tort liability under a commercial code, a private civil remedy statute, and as an administrative regulation of retail chains. The Report simply conveys the survey results without taking a position and although there was discussion of the Report at the conference, no action was taken. Of particular interest here was the conflict between Japanese and U.S. representatives that was revealed.

The eminent Japanese antitrust professor, Mitsuo Matsushita, after comparing the Japanese and U.S. views that were advocated at the ICN, explained the divergence in the context of differing philosophies of the purposes of antitrust law.¹²⁹ He summarized the Japanese view in this way:

Abuse of superior bargaining position infringes the foundation of the free competition where the parties to transactions determine transaction terms or conditions based on their free and independent business judgment. In cases where a party in a superior bargaining position over the other party, by using that position, restrains the independent business activities of the other party and forces the other party to accept disadvantages that it would not accept if the competition worked properly, its conduct prevents the other party from competing freely and independently. The other party on which the disadvantages are imposed

This questionnaire seeks information on the analysis and treatment of “abuse of superior bargaining position” in business to business relations in ICN member jurisdictions. In jurisdictions that regulate “abuse of superior bargaining position,” the concept typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits. (For example, acts such as request for provision of supplier’s labor without compensation and coercive collection of contributions, exercising buying power, are considered abusive in Japan.) A party in the superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power.

¹²⁹ Matsushita, *supra* note 126.

would be in the disadvantageous position in terms of condition of competition with its competitors. On the other hand, the party imposing disadvantages on the other party would be in the advantageous position in terms of condition of competition through the different means from price and quality.

And he summarized the U.S. view:

The concept of an abuse of superior bargaining position is very vague, and ... any regulation of such abuse is likely to introduce a great deal of uncertainty into the market regarding how best and most efficiently to negotiate contracts with smaller counterparts. Substantial uncertainty is inherent both in determining when a party is in a superior bargaining position particularly where there is no market power requirement, and in assessing when particular contract terms would be deemed to be abuse. These uncertainties are likely to raise the costs of contracting, to the detriment of parties and ultimately consumers.

There are a number of reasons why ASBP does not fit into the prevailing Chicago School heritage in the U.S. For starters, ASBP is not about monopoly. Rather, it is about relative positions of power within a vertical channel. If “competition” is viewed narrowly, ASBP therefore does not reduce competition. Indeed, the Chicago School tends to view vertical relationships as essentially “cooperative”, since they are taken as based in voluntarily arrived at contracts and do not reduce output.¹³⁰ Most importantly, ASBP does not fit into the Chicago condition that competition policy should have a single-minded objective of promoting efficiency.¹³¹

¹³⁰ According to Judge Frank Easterbrook: “The goal of antitrust... is preventing the allocative loss that comes about when firms raise price over long run marginal cost, and thus deprive consumers of goods for which they are willing to pay more than the cost of production. This implies a program for antitrust: look for situations in which firms can increase their long run profits by reducing output. Cartels are one and mergers ending in substantial market shares are another. Vertical restrictions do not fit this category.” Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?* 2003 COLUM. BUS. L. REV. 345,46 (2003).

¹³¹ *But see* Albert A. Foer, *On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust*, 60 ANTITRUST BULL. 103 (2015).

Many countries, including Japan, and many advocates of antitrust do not share the full cup of U.S. devotion to efficiency. Professor Matsushita points out that in Japan the economic structure has long been characterized by the dominance of large businesses over small businesses within severe dependency structures, all of which requires oversight. In Germany, the post-war Ordo-Liberal philosophy heavily influenced emergence of a social market economy, very different from the Nazi period where individuals' freedom was suppressed. Ordo-Liberals favor unconcentrated markets because they are conducive to freedom and democracy, arguing for private economic powers to be controlled by law while, in other economic areas, the direct state intervention should be kept at a minimum.¹³² Recognizing freedom to compete as a starting point for competition, they tend to be more suspicious of potentially exclusionary vertical restraints than the U.S.

Thus the controversy over ASBP significantly reflects cultural, political, and historical differences among nations. Professor Matsushita observes:

ASBP is one of the most interesting areas in antitrust law to see how much harmonization and convergence should be pursued among nations and how much indigenous features should be retained. In other words, how much diversity should be kept in diversity when legislators of antitrust laws in the world seek for "unity in diversity".¹³³

To what extent may we say these differences between the U.S. and Japan on ASBP can be attributed to a differing trust factor? The U.S. position seems to rest on a trust in the market system to provide efficient outcomes that outweigh injury or injustice that may occur outside of the most direct competitive relationship, *i.e.*

¹³² GERBER, *supra* note 108 at 167-75 ("The core idea was that the law should prevent deviations from what the ordoliberalists called 'complete competition,' i.e. competition in which no firm has sufficient power to manipulate prices or other conditions of competition."). Professor Behrens notes that the Nazis even forced whole industries to cartelize on a sectorwide scale. These "imposed cartels" were broken up by the post-war anti-cartel legislation enacted by the American occupation forces. E-mail dated May 18, 2017, on file with author.

¹³³ E-mail from Professor Matsushita, on file with the author.

outside of horizontal competition.¹³⁴ By categorizing the buyer/supplier relationship as essentially cooperative rather than both cooperative and competitive, it avoids having to deal with abuses not caused by monopoly or monopsony, effectually holding that nothing but very substantial market power -- power over an entire market's pricing structure-- can cause remediable harm. While this reflects an American trust in the ability of businesses to protect themselves through voluntarily entered contracts, it ignores the fact that some firms are, to paraphrase Orwell, much more equal than others. I suspect, however, that the underlying rationale is really one of distrust in the ability of government to make better decisions than businesses.¹³⁵

Appropriately, the U.S. does not want a type of ASBP law that would launch into litigation an avalanche of private contract disputes. If antitrust enforcers were seriously to consider adopting a form of ASBP, lines would have to be drawn to clarify when a contract could be challenged and when not. This is a regulatory task for which the U.S. can likely learn much from foreign experiences, although it seems

¹³⁴ Here, again, there are complexities. Thomas Cheng points out that in Japan supplier relationships are often deeper and more integrated than in the U.S., with such relationships often lasting for decades. He speculates that it is because there is such a high degree of trust that the trust is abused by the more powerful party. E-mail from Professor Cheng dated May 16, 2017, on file with author.

¹³⁵ *E.g.*, Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?* 2003 COLUM. BUS. L. REV. 345,350 (2003). ("Just as we all insist today on proof that a given practice is bad for consumers,' so we must insist on proof that a given legal regimen implied by an economic model does better than the unregulated market. To point to a competitive failure is not to show that regulation is better. That is the Nirvana Fallacy. Government has its own costs and errors, which may be worse (and harder to correct) than the problems of markets. Do not invoke a theory of market failure unless you also have a theory of regulatory failure- and a way to show that the costs of the former exceed the costs of the latter.") I comment, in keeping with my theme that cultural values are relevant to antitrust, that the concept of market failure should not be tied only to inefficiency; it should also be considered a market failure when a market fails to satisfy our strong sense of fairness and justice for market participants.

that the prevailing U.S. culture prefers to shun regulation whenever possible. The periodically high level of trust for business executives in the U.S. compared to low trust for government likely tilts the balance against adopting ASBP in the near term. One may ask, however, whether what I have referred to as “the prevailing U.S. culture” is culturally thick or thin.¹³⁶ Is this more a matter of politics or of culture? Or are the two, politics and culture, deeply intertwined? If primarily cultural in the thick sense, what prevails today is likely to prevail tomorrow; if primarily political, relative levels of trust could change as soon as the next major political or business scandal or display of intolerable incompetence,

On the other side of the coin, a country that adopts ASBP may reflect greater cultural trust in government; it may esteem hierarchy in the form of civil servants, including judges, more than Americans do and have greater confidence in their ability to draw lines, make predictions, and execute with competence; it may tend to distrust private businesses that have leverage over other less powerful entities.

Ultimately, and not ignoring that cultural and other factors can shift with time and political dynamics, different countries are likely to disagree not only whether ASBP is needed and politically feasible; even if they do adopt it in principle,

¹³⁶ See Andrew I. Gavil, *Competition and Cooperation on Sherman Island: An Antitrust Ethnography*, 44 DEPAUL L. REV. 1225, 1226-27 (1995) (“More than just an economic policy reflected in the antitrust laws, competition is a pervasive component of the fabric of American life that emerges in discussions of all aspects of political, social and economic institutions. As a category of human relations, however, competition exists only in relation to other norms. ‘Cooperation’ and ‘individualism’ are as much a part of the American culture as is ‘competition,’ and at the source of each are ‘relationships’ - social, economic, and political. We define ourselves, our families, our governments, even our civilizations in terms of these relationships; be they ‘competitive,’ ‘cooperative’ or ‘individualistic.’ Each of these concepts, however, masks a complex of assumptions about human behavior and character, the role of government and the character of business. Those assumptions are deeply rooted in the American historical experience, indeed in the broader history of the development of western civilizations, and are in a continuing state of evolution.” [footnotes omitted]).

they may disagree on where to draw the lines for enforcement, *e.g.*, should ASBP be handled within the competition law framework or through other means such as contract or tort law; should there be detailed codified rules that attempt to define how virtually every conceivable situation should be resolved; how should sufficient dependency be defined, to bring the concept of superior bargaining position into play; what levels of coercion must be demonstrated; what safe harbors might be designated to reduce the frequency of challenges; should there be private rights of action or only cases brought by the government?

None of this is to claim that trust is the only factor that will be considered when a government allocates behaviors along the competition or cooperation scale. Far from it: decision-makers will likely also weigh political pressures, the competence of particular governmental institutions, estimates of the seriousness of the problem, predicted consequences of various remedies, and other factors.¹³⁷

X. CULTURE AND COMPETITION: A BASKET OF COMPLEXITIES

Today there are approximately 130 jurisdictions in the world that have market-oriented economies, some form of antitrust laws, and whose government competition authorities are members of the International Competition Network (“ICN”). The ICN is committed to reaching out to its member states to help them develop “competition culture”. As our discussion has demonstrated, the prospect for converging toward a universal agreement on the rules for competition and cooperation requires some complex balancing. The following are some of the principal issues that emerge from the foregoing discussion.

¹³⁷ Indeed, as Professor Behrens has pointed out to me, one could make an argument in favor of ASBP that is not based on a cultural sense of fairness but by building on the absence of workable competition that would be present when a party is so dependent, due to absence of a realistic alternative, that the element of choice, so essential to a competitive system, is missing. *Supra* note 132.

A. The Malleability of Culture

We know that cultures generally change slowly, but we also know that various aspects of culture can be relatively “thick” or “thin” with thinner aspects being susceptible to faster change.¹³⁸ How malleable are cultural traits relating to competition and cooperation? Does it matter whether we are talking about mergers, collusions, or monopolization? How quickly can the relevant cultural heritage be changed as, *e.g.*, major political or economic breaks with the past occur?

B. Multicultural Nations

Most states contain more than one culture.¹³⁹ Within the nation state may be regional, ethnic, religious, professional and generational differences, for example, and each of these subcultures may be similar with regard to some cultural values, such as punctuality or power distance, but may differ on attitudes toward competition and cooperation. The so-called north/south divide, sometimes seen within a single country like Italy or Brazil, often creates varied lifestyles that may accommodate different attitudes toward competition. Multiple cultures within a single state may require compromises on the extent to which particular values will be reflected in laws and their enforcement, or may be the basis for substantial shifts in policy as majority coalitions or ruling parties change.

¹³⁸ CHANG, *supra* note 52 at 196, argues that culture changes with economic development, pointing to examples (stereotypes such as “lazy Japanese” and “thieving Germans”) of “apparently unchangeable ‘habit of national heritage’ ...transformed quite quickly by changes in economic conditions.”

¹³⁹ See ERNEST GELLNER, *NATIONS AND NATIONALISM*, 53, 64-71 (1983).

C. Culture and Institutions

Ultimately, a cultural attitude toward competition/cooperation expresses itself through institutional modalities such as the passage of legislation and the manner in which the legislation is implemented. In the U.S., the antitrust and many of the related sectoral regulation laws originally reflected a popular, democratic rebellion against a variety of large-scale changes such as the development of the powerful national corporation, brought on by the industrial revolution and disadvantaging diverse interest groups. In most other countries the establishment of competition policy has been initiated more from the top of government, perhaps propelled by certain private elites such as academic economists as in Chile, or as the result of pressures to join the E.U. or obtain assistance from the World Bank or I.M.F., subject to a condition of commitment to effectuating an antitrust regime.¹⁴⁰ From the top it typically moved downward, rather than bubbling up from popular demand.

Different polities have different transmission belts for the translation of cultural attitudes into policy and enforcement. Indigenous cultural and political subdivisions are likely to create different mixes of legislation marking off lines between competition and cooperation—even if the legislative frameworks of different nations are generally similar. And we cannot ignore that institutions also can change cultural values.¹⁴¹

¹⁴⁰ See Julian Pena, *The Limits of Competition Law in Latin America*, 236 *et seq.*, in Ioannis Lianos & D. Daniel Sokol (eds), *THE GLOBAL LIMITS OF COMPETITION LAW* (2012).

¹⁴¹ LAWRENCE ROSEN, *LAW AS CULTURE*, xii (1941) (“[Law is] constituted by culture, and culture (in no small way) by law.”).

D. Generations

The pace of cultural change may be a function of generational change. We hear, for example, about generations such as the so-called boomer generation of the post-World War II era, having their distinctive cultures. And we generally understand that older people, who have imbibed their national culture for a much longer period, are likely to be more embedded in an older set of values than the younger generations. This suggests that efforts to stereotype nations as having a particular culture must take into account the prospect of generational changes outdating generalizations. For example, the Japanese government's treatment of cartels and other aspects of antitrust changed dramatically from the economic miracle years to the present.

E. Economics, Education, and Recreation

An educator, Alfie Kohn, wrote a controversial book in 1986 that argued against what he described as the American obsession with competition, finding in America an extreme position among nations in economics, education, and recreation.¹⁴² An open question is whether these three, and other possible realms of activity, are necessarily related in terms of their treatment of competition and cooperation. Within a given modern culture, the mix of competition and cooperation is likely to vary in each of the realms identified by Kohn; culture definitely influences legal and other institutions, but these institutions also influence culture. The institutions of education and recreation are very different from economic

¹⁴² ALFIE KOHN, *NO CONTEST, THE CASE AGAINST COMPETITION, WHY WE LOSE IN OUR RACE TO WIN* (revised ed., 1992). (“Different cultures depend on competition to different degrees in structuring their economic system or schooling or recreation. At one end of the spectrum are societies that function without any competition at all. At the other end is the United States.” *Id.* at.1-2.) “I have become convinced that competition is an inherently undesirable arrangement.” *Id.* at 9.

institutions and their customs, culture, and politics can be assumed to evolve, at least to a large extent, separately.

Countries compete with each other in sports, economics, and war, but they also cooperate by providing fora (such as the Olympics and the United Nations), trading blocs, and rules (*e.g.*, of trading or of military conflict). Bringing the discussion back to antitrust, in some countries, as we've noted, it may be traditional for private businesses to coordinate their activities very closely, in what may be a cartel-like atmosphere or a vertical alliance, the better to compete in a global marketplace, with the result that the companies are cooperating in some important ways, but simultaneously competing. We need to hold open the possibility that cross-cultural surveys which do not focus specifically on economic issues may be misleading concerning competition policy.

F. The Competition/Cooperation Spectrum

I began writing this paper thinking that competition and cooperation are two poles on a spectrum and that the function of antitrust or competition policy is to authoritatively determine where various types of commercial activity are to be aligned on the spectrum. For example, the positive attitude of the U.S. toward cartels during the early New Deal, encouraging the cooperation of business, labor, and government to reach industry-by-industry anti-Depression agreements would have been placed toward the cooperative pole, but in recent years severe anti-cartel policies, including incarceration and treble damage class action remedies would be much nearer the competitive pole. Placement would reflect the prevailing culture, at least of decision makers, at these different periods. It is now time to ask, how helpful is this rather simplistic competition/cooperation spectrum?

The metaphor that competition and cooperation exist at opposite ends of a spectrum is of some, but limited, usefulness. In a book with the catchy title Co-

opetition, Yale professors Brandenburger and Nalebuff observe that business is both war and peace. “Business is cooperation,” they say, “when it comes to creating a pie and competition when it comes to dividing it up.”¹⁴³ “Co-opetition” is a cute word that lends linguistic emphasis to one way the two poles of the competition/cooperation scale may interact near the middle of the spectrum. But we should not carry the model of a two-dimensional cultural scale too far. It was, after all, not generated by cultural anthropologists for the purpose of guiding antitrust policies.

How far should we carry it? For some types of behavior, the competition/cooperation scale seems to offer a reasonably close fit for antitrust analysis and may help us make cross-cultural comparisons. For instance, in some countries, trade associations play a coordinating role among competing businesses, with competition law defining the legal relationship between competition and cooperation by holding that it may be legitimate for businesses to come together cooperatively to discuss technology, health and safety, or to share aggregated historic but non-current information about prices or output, or even to agree on an industry standard-- but they must not cooperate to the extent of discussing current or future prices or agreeing upon key terms of trade. The rules in each country for each type of trade association activity can presumably be displayed along the spectrum, facilitating a comparison of national policies.

In other areas of antitrust, it is less easy to apply the competition/cooperation scale. For instance, when a monopolist abuses its dominance, the extreme monopolist by U.S. definition is not competing-- because it is the only player in the relevant product market, and thus has no direct rivals against whom it can compete. During the structurally-oriented generations before the Chicago School revolution, placement on the scale would have been based on market share within a carefully defined geographic and product market, with the

¹⁴³ ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION 4 (1996). This is also the view of Steiner, text at note 86 *supra*.

highest market shares displayed at the cooperative end of the spectrum, to indicate relatively strong enforcement in the face of reduced competition. Today in practice, monopoly is defined more in terms of a firm's ability to ignore the competitive effects of a fringe of small rivals or to exclude rivals from the market. Thus the measure is now market power rather than market share. Market power can only be recognized by comparison to the power of others both in and outside of the relevant market, such as suppliers, customers, fringe rivals, and potential entrants. While there is some complexity in defining market power (just as there was in the key step of defining a relevant market in the structural analysis), it is at least possible to compare the relative degree of market power various nations require as their thresholds for enforcement concern. For instance, the U.S. is generally thought to require a more effects-based showing for a monopolization claim than the E.U. does for an abuse of dominance claim, and thus would be placed closer to the cooperative pole than the E.U., with respect to unilateral activity.¹⁴⁴

But are we comfortable envisioning monopoly as an example of (or tending toward) cooperation?¹⁴⁵ Let me discuss this first in reference to private monopolies and then in reference to state monopolies. Even taking into account the *Copperweld* case in the U.S., which is interpreted to say that internal subdivisions of a firm cannot illegally collude with each other because they are part of the same economic entity,¹⁴⁶ both under U.S. and foreign law there can at least in theory be some firms

¹⁴⁴ Eleanor Fox, *Monopolization and abuse of dominance: Why Europe is Different*, 59 ANTITRUST BULL. 129, 130 (2014); EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 254 (2007) (“E.C. [European Commission] cases have allowed a dominant position to be proven with smaller market shares than those necessary to prove monopoly under U.S. law. On the other hand, U.S. law requires less than monopoly power to prove a claim of attempted monopolization, price discrimination, or a violation of the FTC Act. Thus the power necessary to show a dominant position under E.C. law may lie somewhere between these various shades of market power required by varying U.S. laws.”).

¹⁴⁵ See Easterbrook, *supra* note 39 and accompanying text.

¹⁴⁶ Note 99 *supra*.

that represent the purest degree of monopoly, that is, the complete absence of meaningful competition, whether of the external or internal variety. This would seem to place them at the extreme opposite of competition, and it is common parlance to say that cooperation is the opposite of competition. A better articulation may be to recognize that competition at its extreme is composed of highly fragmented units (*e.g.*, farm families and small farms), the main point being that these atomic units act independently and (at the extreme) engage in the minimum amount of cooperation with rival outsiders. This can be deemed individualism. The opposite of individualism in the parlance is collectivism. It is probably more comfortable to say that a monopoly represents a collectivization of all of the horizontal production within the defined market, rather than the perfection of cooperation.

This leads me to suggest a slight revision of the scale, so that we label *individualism/competition* at the fragmentary end and *collectivism/cooperation* at the unitary end. This better captures the range of categories of economic behaviors and governmental policy responses, and it importantly helps us to avoid having to defend saying that the state is the ultimate in cooperation, which may be true in some sense but sounds weird.

The ultimate in collectivism is the state. A state is able to hold a monopoly over tax collection, violence, or, for purposes of our discussion, areas of commerce, thereby fulfilling a polar role on the scale. One could array various national policies toward state monopoly at various points on the collectivism/cooperation end of the spectrum: *e.g.*, compare having doctrines of essential facilities; or network neutrality; or price regulation; or entry regulation; or state ownership of monopolistic commercial enterprises; or state political control over privately owned monopolies.

Similarly, the individualism/competition: collectivism/cooperation scale can be used to produce a cross-cultural array of national policies with respect to

mergers and joint ventures or other horizontal or vertical or conglomerate collaborations, according to their stringency or leniency, taking into account both state interventions and civil remedies. In short, I think it can be useful, but not without complications, to place variations of competition policies with respect to specific types of commercial action on an individualism/collectivism scale.

G. Striking a Balance Between Individualism/Competition and Collectivism/Cooperation

There are several benefits of using the individualism/competition/collectivism/cooperation scale as a way of visualizing competition policy. First, as in many social science methodologies, although there are unavoidable subjective elements to assigning a given category of economic behavior to its proper place on the scale, the assignment is based on empiricism rather than ideology. Second, it can be used to array comparative policies of various nations or cultural groups. And third, it can be used to trace changes in policy over time. Most important, it points to an essential function of competition policy, which is to strike the right balance for any particular nation at a particular time. In this it emphasizes that it is the state (actively or passively) that is the driver and not necessarily a particular economic theory. The state may and should take economic theory into account, but the decision whether or how to handle a category of behavior, whether to legislate, regulate, or passively accept customary practice is at base a political issue and as such can be expected to reflect cultural, historical, institutional, economic and political perceptions.¹⁴⁷

¹⁴⁷ Beinhocker's complexity economics recognizes the state's role in enabling societies to strike a balance between competition and cooperation: "[T]he antigovernment free marketers forget that economies don't exist in isolation. The economic evolutionary system is constructed out of a vast array of Social Technologies, many of which rely on government. Market-based evolution requires a careful balance between cooperation and competition, and governments play a

XI. Conclusion

The field of competition policy is at core about the authoritative allocation of economic activity into categories of cooperation or competition or, more likely, a mixture in varying proportions. The allocation is made on the basis of a variety of imprecise inputs—cultural, political, historic, economic, and institutional -- in addition to neoclassical economic theory, with the result that universal agreement among the market-oriented nations should not be anticipated.

Explicit and implicit evaluations of where trust is warranted and where distrust should be generated by government policies will play a role in the balancing that occurs within sovereign states. Trust is but one component of the cultural influences at play.

Trust participates in the development of economic institutions sufficiently to be embedded in an apt observation by a South American antitrust expert, Julian Pena, which can be extended well beyond any Latin American cultural grouping: “Competition laws in Latin America in theory look identical to those of developed countries but their enforcement differs substantially given different economic,

vital role in enabling their societies to strike this balance. Social Technologies such as contract law, consumer protection regulations, worker safety rules, and securities law all serve to engender cooperation and trust, while antitrust regulations serve to maintain healthy levels of competition.” BEINHOCKER, *supra* note 24 at 425. Beinhocker uses the term “complexity economics” as an umbrella term to describe a new paradigm for economics, incorporating work otherwise described as computational economics, agent-based modeling, social dynamics, evolutionary economics, behavioral game theory, the Santa Fe school, and interactions economics. He says this is still more of a research program than a single, synthesized theory. *Id.* at 96.

political, institutional, and cultural environments.”¹⁴⁸ Even where the words are the same, the music will likely be different.

One may predict that cultural impediments to universal agreement, similar to those described in relation to the example of Abuse of Superior Bargaining Position, will apply to treatment of what the U.S. calls “monopoly” and the E.U. calls “abuse of dominant position,” as well as to the standards and application of merger controls. With respect to cartels, there is today substantially more agreement (not necessarily irreversible, however) on the negative nature of cartels-- more than ever existed in the past. Nonetheless, even with cartel policies there are cultural differences keeping nations apart on questions of procedure,¹⁴⁹ remedy,¹⁵⁰ and penalty.¹⁵¹ Finally, within the realms of international trade and sectoral regulation, the differences between successive American administrations would appear to emphasize how both the political and cultural shifts that can occur within a single nation are capable of moving competition policies.¹⁵²

If the history of competition policy in the U.S. reflects continual readjustment of prevailing policies in view of our own dynamics of culture and politics, what can we say about international convergence? It is a stretch to believe that the world’s market-oriented nations will depend upon universalistic economic models of how markets ought to work. The quest for harmonization or convergence through non-

¹⁴⁸ Pena, *supra* note 140 at 237.

¹⁴⁹ *E.g.*, are there any forms of collusion that should be deemed *per se* illegal? Under what circumstances should the government be able to obtain documents or testimony from a company under investigation? What types of collusion should be exempt from the antitrust laws?

¹⁵⁰ *E.g.*, should a fine be based on injury or percentage of the defendants’ revenues? What civil remedies are available? Should there be civil class actions?

¹⁵¹ *E.g.*, should price fixing be a criminal offense?

¹⁵² *See, e.g.*, Woodard, *supra* note 79.

coercive persuasion is appropriate and desirable, but we should not anticipate that universal models will lead to full or even substantial agreement on the specific placement of various types of economic behavior on the scale of individualism/competition and collectivism/cooperation.