

# Michigan Law Review

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Volume 102 | Issue 6

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2004

## The Ethnic Question in Law and Development

Lan Cao

*William and Mary Law School*

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### Recommended Citation

Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044 (2004).

Available at: <https://repository.law.umich.edu/mlr/vol102/iss6/6>

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# THE ETHNIC QUESTION IN LAW AND DEVELOPMENT

Lan Cao\*

WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY. By Amy Chua. New York: Doubleday. 2003. Pp. ix, 340. \$26.

*World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, by Professor Amy Chua,<sup>1</sup> is an analytically complex narrative of contemporary ethnic violence in the current era of globalization. Although such violence has historical roots, according to Chua it has also been fueled by free-market forces and democratization. The book is a forceful and provocative indictment of the current U.S. policy of promoting and exporting markets and democracy to developing and formerly communist, market-transitional countries.

In her book, Professor Chua applies her thesis — that ethnicity, global capitalism, and democracy are a volatile mix — to countries such as Rwanda and Sierra Leone, Indonesia and Malaysia, Russia and Zimbabwe, Venezuela and the former Yugoslavia. As different as those countries are, they share a defining characteristic: the presence of what she calls “market dominant minorities” among the majority population — that is, minorities, such as the ethnic Chinese in Southeast Asia, Indians and Lebanese in Africa, Jews in post-Soviet Russia, the ethnic Kikuyu in Kenya, whose spectacular wealth and “control” of the economy arouse deep resentment in the impoverished majority. This majority views itself as the “true,” “indigenous” native whose mission is to retaliate against the economically dominant ethnic

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\* Professor of Law, William and Mary Law School. — Ed. I thank Professors Donald Horowitz, Alan Meese, William Van Alstyne, and Spencer Weber Waller for reading drafts of this Review, and for providing critical comments. Professor Meese was particularly generous with his time and was always willing to discuss the complex intricacies of antitrust law with an antitrust novice such as myself. Thanks also to Professor Horowitz for sharing his thoughts about ethnicity and ethnic conflicts with me. His nuanced and perceptive treatment of this subject is an inspiration.

I presented earlier drafts of this Review at Brooklyn Law School and William and Mary Law School, and thank participants for their suggestions. Thanks also to Meghan Hallock, Bradley Henderson, Mugdha Kelka, Ryan Pedraza, and Jeff Reale for their research assistance. This project received generous financial support from Dean Taylor Reveley at William and Mary Law School.

1. Professor of Law, Yale Law School.

“outsider” and return the country to its “rightful” owners. This ill-will is deep and historically rooted but for the most part controlled by autocratic regimes.

Two phenomena, market liberalization and democracy, have exacerbated and inflamed the situation. The introduction of laissez-faire capitalism into such environments has benefited those already economically dominant; that is, the already-hated market-dominant ethnic minority. Simultaneously, the spread of democracy, in the form of universal suffrage and electoral politics, has allowed ethno-nationalist demagogues to catapult themselves into office by exploiting majority rage against market-dominant minorities (p. 6). In other words, markets allow an already-rich ethnic minority to get even richer, and democracy allows the already-impooverished ethnic majority to get even.

For Chua, the United States should therefore rethink its reflexive exhortations, through the World Bank and the IMF, of markets and democracy as panaceas for the developing world. As currently promoted, “the global spread of markets and democracy is a principal, aggravating *cause* of group hatred and ethnic violence throughout the non-Western world” (p. 9; emphasis added). Free markets plus democracy in the presence of a market-dominant minority result in backlash: backlash against markets because they represent the market-dominant minority’s wealth; or backlash against democracy, by forces with a vested interest in counteracting the country’s democratic impulses against markets; or violence directed against the market-dominant minority (p. 10).

The main solution for gross inter-ethnic inequality that Professor Chua proposes is ethnically conscious capitalism designed to favor the majority and restrain the ethnic minority. Because this ethnically biased market intervention is perhaps the most controversial and provocative point made in the book, I focus my Review on markets, market-dominant minorities, and Chua’s proposal to “directly address the pressing, potentially explosive problems of ethnic resentment” (p. 266) by pursuing ethnically conscious market interventions.<sup>2</sup>

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2. Although our approaches differ, both Chua and I assume ethnic conflicts exist because of the market dominance of ethnic minorities. Neither Chua nor I focus on ways to forestall the existence of ethnic conflicts through institutional designs that facilitate conflict management and “intercommunal accommodation.” Katharine Belmont et al., *Institutional Design, Conflict Management, and Democracy*, in *THE ARCHITECTURE OF DEMOCRACY 2* (Andrew Reynolds ed., 2002). For example, scholars have proposed arrangements such as executive power-sharing, group autonomy, federalism and decentralization, and other forms of electoral systems for ethnically divided societies as ways to enhance ethnic integration, accommodation, or both. See *id.*; see also Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 *YALE J. INT’L L.* 51 (2003) (exploring forms of ethnic accommodation in Africa). The other component of Chun’s thesis — that democracy breeds ethnic conflicts under specified conditions — has been critiqued elsewhere. See, e.g., Tom Ginsburg, *Democracy, Markets and Doomsaying: Is Ethnic Conflict Inevitable?*, 22 *BERKELEY J. INT’L L.* 310, 326-34 (2004).

Part I discusses Chua's thesis. Part II looks at how markets may be effectively introduced into such ethnically volatile environments. It critiques Chua's proposal favoring massive "affirmative action" for the ethnic majority and explores other mechanisms, for example, culture change, to address group attributes that may retard economic development and antitrust laws to address, in an ethnically neutral manner, external, structural problems such as monopolies, predation, and vertical restraints. Part II also examines why market-dominant minorities exist. Certainly, in cases such as South Africa and Zimbabwe, their existence is due to brutal colonial exploitation. But in other cases, market-dominant minorities are classic "middleman minorities" whose prosperity is attributable to business networks and informal but efficient capital markets based on common ethnic ties and the group's reserve of social capital. Although Chua is less interested in why certain groups are market dominant than in the consequences resulting from their domination, understanding the reasons behind that economic success is important in crafting an appropriate solution. Part III concludes the Review and reiterates the main argument against government-mandated, ethnically targeted market interventions.

#### I. MARKETS, DEMOCRACY, AND ETHNICITY: PROFESSOR CHUA'S THESIS

Since the demise of communism, the West has viewed markets and democracy as the antidote to poverty and authoritarianism throughout the world. Professor Chua's sobering message, by contrast, is that in many parts of the developing world, global markets and democracy — two of America's most cherished values — breed not free trade and a cosmopolitan citizenry but instead ethnic hatred and conflict. This is a novel and bold challenge to the field of law and development. The dominant school in law and development views development as a modernization process consisting of relatively apolitical and historically identifiable sequences, ultimately culminating in varying forms of western, market-oriented, liberal democracies.<sup>3</sup> Ideally, development should occur in "a space beyond culture,"<sup>4</sup> to shield

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3. W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* 4-16 (3d ed. 1990). Rostow identified five sequences associated with modernization: (1) the traditional society organized around agrarian subsistence; (2) pre-conditions for takeoff; (3) the takeoff, characterized by increased economic growth and industrialization; (4) economic maturity, characterized by increased global integration; and (5) high mass consumption, with consumption replacing subsistence. *Id.* at 12.

4. David Kennedy, *The Disciplines of International Law and Policy*, 12 *LEIDEN J. INT'L L.* 9, 82 (1999).

markets from culture<sup>5</sup> as well as politics.<sup>6</sup> As one scholar has aptly observed about the prevailing tendency to depoliticize development, “EU policy managers treat the transitional economies of Central and Eastern Europe less as a set of political exclusions and choices than as the technical management of different natural stages of development.”<sup>7</sup>

Chua’s book rightly rejects this apolitical view of development. The book presents development as not merely a project of technical or economic management involving the relatively straightforward application of international trade rules or economic axioms but as a political process embedded within a country’s cultural, historical, and political framework. Markets must be introduced with the understanding that they are operating in a politicized environment, especially for many developing countries where great disparities in wealth exist and coincide with ethnic stratification. Chua insists that although markets may indeed facilitate economic growth for the developing country as a whole,<sup>8</sup> distributional choices should be at the forefront of the development debate.<sup>9</sup> The book thus renounces the

5. Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 80 (2000). Paul writes:

The whole legal structure of the free trade norm rests on a rational economic model. . . . Cultural claims threaten that rationality argument. Cultural claims derive from sentiment, nostalgia, insecurity; they are rooted in non-rationality. To protect the rationality of the market from the non-rationality of nationalism and culture, the international community rejects cultural exceptions.

*Id.*

6. David Kennedy has criticized this view. See David Kennedy, *Background Noise? The Underlying Politics of Global Governance*, HARV. INT’L REV., Summer 1999, at 52 (“Common but mistaken ideas — like the idea that international governance is separate from both the global market and from local culture, or is more a matter of public than private law — sharply narrow the sense among foreign-policy professionals of what is possible and appropriate for foreign policy.”).

7. *Id.* at 53.

8. Chua acknowledges that “[t]he extraordinary market-generated economic growth of the 1980s and 1990s almost certainly left Indonesia’s roughly 200-million-strong indigenous (or *primubi*, ‘of the soil’) majority better off, at least in terms of average income.” P. 43; see also p. 56 (“Globalization has even produced some benefits for the indigenous majority.”); p. 187 (“In absolute terms the majority may actually be marginally better off as a result of markets . . .”); p. 234 (“Global markets may well hold the key to long-term greater prosperity for the poor and not-so-poor countries of the world.”). Chua also writes:

As proponents of free markets correctly point out, global capitalism has, in certain important respects, done wonders for the world, including many developing countries. Global per capita income has tripled in the last thirty-five years. Technology has transformed even small villages. Life expectancy and adult literacy rates have, on the whole, increased significantly in the developing world. Global infant mortality rates are lower than ever.

Pp. 244-45.

9. Hirschman, too, emphasized the need to be wary of distributional conflicts, see Albert O. Hirschman & Michael Rothschild, *The Changing Tolerance for Income Inequality in the*

prevailing understanding in the field, as epitomized by the “Washington Consensus.”<sup>10</sup> There is no attempt in this book to reduce development to an exercise of technical judgments and expertise. This, in itself, is a valuable contribution to the field of law and development.

### A. *Market-Dominant Minorities Around the World*

Chua identifies country after country where an ethnic minority is economically dominant over the impoverished ethnic majority and analyzes how this crucial factor has a critical impact on the development process. In Southeast Asia, for example, long before but especially during the European colonial era, the ethnic Chinese prevailed economically in Burma, the Philippines, Thailand, Malaysia, Vietnam, and Indonesia (pp. 23-48). In Latin America, a white elite exists in countries such as Bolivia, Mexico, Brazil, Argentina, Ecuador, and Peru. This elite is either Spanish-blooded “latifundistas” whose wealth is derived from brutal colonial policies and plantation farming or recent Christian Lebanese and Jewish immigrants who have become the region’s leading entrepreneurs (pp. 55-67).

In post-Soviet Russia, by exploiting the country’s pro-market reforms, specifically its mass privatization plans and “loans-for-shares” deals, a group of industrialists and bankers succeeded in plundering Russia and turning themselves into “billionaire-owners of Russia’s crown jewels while the country spiraled into chaos and lawlessness” (p. 77). Six of the seven wealthiest oligarchs in Russia are Jewish, while Jews make up less than one percent of the Russian population (pp. 78-79).

In Africa, market-dominant minorities are indigenous Africans as well as Indians, Lebanese, or former European colonizers. Angola,

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*Course of Economic Development*, 87 Q.J. ECON. 544 (1973), but Chua has moved the discussion by highlighting the fact that such conflicts run along ethnic lines.

10. Economist John Williamson, who coined the term, had argued in 1990 for a set of policy reforms, particularly for Latin American countries, that could be set forth in ten propositions: fiscal discipline; redirecting public expenditure priorities toward sectors with high economic returns and improved income distribution, such as primary health care, primary education, and infrastructure; tax reform to broaden the tax base; interest rate liberalization; a competitive exchange rate; trade liberalization; liberalization to attract foreign direct investment; privatization; deregulation to abolish barriers to entry and exit; secure property rights. John Williamson, *What Should the Bank Think About the Washington Consensus* (July 1999), at <http://www.iie.com/publications/papers/williamson0799.htm>; see also JOHN WILLIAMSON, *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* (1990).

Another term for “Washington Consensus” has been coined by the economist Jagdish Bhagwati: the “Wall Street-Treasury Complex.” See Jagdish Bhagwati, *The Capital Myth: The Difference Between Trade in Widgets and Dollars*, FOREIGN AFF., May-June 1998, at 7, 10-12 (describing “a definite network of like-minded luminaries among the powerful institutions — Wall Street, the Treasury Department, the State Department, the IMF, and the World Bank . . . which may aptly, if loosely, be called the Wall Street-Treasury Complex”).

Zimbabwe, Namibia, and South Africa all have a market-dominant, colonial-in-origin white minority. Kenya has the economically successful Kikuyu who emerged from British rule “as a disproportionately urban, ‘capitalist’ elite among Kenya’s indigenous tribes” (p. 105). The Ibo, known as the “Jews of Nigeria,” are economically dominant in Nigeria and around the world, where they are deemed to be an unusually enterprising trader minority.<sup>11</sup>

The market dominance in Africa of non-indigenous ethnic minorities is even more stark. In Kenya, despite the market dominance of the Kikuyu, the country’s largest corporations, banks, and hotels are owned by roughly 70,000 Indians who constitute less than two percent of the population.<sup>12</sup> In West Africa, the Lebanese are the economically preeminent minority (p. 119). By the early 1990s, the Lebanese, with less than one percent of the population, dominated all of the most productive economic sectors, from diamonds and gold, to finance and retail, to construction and real estate.<sup>13</sup>

## B. *Global Markets and Backlashes*

### 1. *Backlash Against Markets*

By Chua’s own acknowledgment, globalization has produced benefits and opportunities, not just for the market-dominant minority but also for the “indigenous” majority (pp. 30, 56). But globalization has also increased economic disparities among ethnic groups as well as the visibility of such disparities, resulting in intensified ethnic resentment, increased ethnic consciousness, and populist uprisings. Globalization, in other words, may facilitate a country’s economic development overall but, in countries with market-dominant minorities, it may also aggravate ethnic concentrations of wealth, stoking ethnic anger and resentment.

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11. P. 108. There are other examples of African market-dominant minorities: the Eritreans in Ethiopia, p. 111, the Ewe in Togo, p. 111, the Susu in Guinea, p. 111, the Baganda in Uganda, p. 112, and the Chagga in Tanzania, p. 112. All of these groups have been subjected to widespread resentment.

12. P. 113. Although there are examples of predatory practices by some of the Indians in Kenya, they do not explain Indian economic dominance. Most of the Kenyan Indians descend from coolie laborers brought by the British in the late 1800s to build the Uganda-Kenya railway. These Indians rose from poverty despite facing both discrimination from colonial whites and animosity from native Africans. P. 114.

13. Pp. 116-17. The Lebanese arrived in Sierra Leone in the late 1800s, quickly became skillful traders, buying produce from African farmers, waiting until prices rose, and then selling them to European firms. P. 115. The Lebanese are known to work from dawn to dusk and operate their businesses on very little overhead. Based on their reputation for “industriousness and commercial acumen,” p. 116, European firms readily granted them long-term credit, which allowed them to consolidate their economic dominance.

Under those conditions, Chua states there will predictably be backlashes against markets — ethnically targeted nationalizations and confiscations driven by ethnocentric nationalism. Examples include present-day Zimbabwe (p. 129), post-Sukarno Indonesia (pp. 132, 138), Sri Lanka (pp. 132-33), post-independence Burma (p. 133), Bhutto's Pakistan (p. 133), Bolivia, Mexico, Peru (p. 134), and post-Soviet Russia (p. 139). Other possible backlashes include (1) a return to authoritarianism in order to suppress ethnic hatred; and (2) expulsions and genocide of the market-dominant minorities. Given the alternatives, Chua concludes that among the range of available remedies, ethnically conscious "affirmative action" for the ethnic majorities is preferable. Chua advocates the institution of policies that constrain the market activities of the market-dominant ethnic minority to "alter the composition of the entrepreneurial class."<sup>14</sup>

Chua's recommendation is based on two premises: first, a link between violence against an ethnic minority and its market dominance, and second, a link between non-violence and the degree to which the state has blunted the minority's market dominance. A number of scholars have questioned this link,<sup>15</sup> but this Review's critique of her recommendation assumes the establishment of the first linkage. Even assuming such a link, however, corrective remedies, if necessary, should not proceed along ethnically charged lines.

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14. Kevin Davis et al., *Ethnically Homogeneous Commercial Elites in Developing Countries*, 32 LAW & POL'Y INT'L BUS. 331, 335 (2001). For a critical review of the transformation of the term "affirmative action" from its original use — resolute ("affirmative") action to banish the scourge of racial discrimination in our public institutions and private enterprises — into a shifted, dubious usage condoning and encouraging racial discrimination in both, see William W. Van Alstyne, *Affirmative Actions*, 46 WAYNE L. REV. 1517 (2000).

15. See, e.g., Davis et al., *supra* note 14, at 355-56. The authors point out that:

[T]here are examples of economically dominant minorities, such as the Lebanese in the Caribbean, which have not been the targets of significant levels of violence. Second, in some of the cases where dominant entrepreneurial minorities have been the targets of violence, the minority's economic status appears to have been of secondary importance.

*Id.* at 355-56 (footnote omitted). For a discussion of scholars who believe that economic disparities, particularly disparities in entrepreneurship, have a limited effect on ethnic conflicts, see *id.* at 356-58. These scholars claim that ethnic conflicts are founded on "primordial affiliations" and "ancient hatreds." *Id.* at 357. Perhaps most significantly, the preeminent ethnic scholar, Donald Horowitz, believes that "while there is some evidence that business rivals tend to be hostile toward elite minority groups, there is little evidence that hostility on the part of either customers or workers has played a significant role in ethnic conflict involving entrepreneurial minorities." *Id.* at 357 (citing DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 113-31 (1985)). Such conflicts, according to Horowitz, are a manifestation of various group efforts to achieve status and legitimacy, and the implication may be that groups that do not achieve status through economic dominance or entrepreneurship would not necessarily turn to violence if there were viable outlets for status achievement, for example, through politics and public administration. As some have already noted, Chua herself has disclaimed that economic determinism is causally related to ethnic conflicts, which makes one wonder why Chua favors the implementation of ethnically conscious market interventions. Davis et al., *supra* note 14, at 355 n. 92.



## 2. *Evaluation of Ethnically Conscious Market Interventions*

Chua puts forth a number of proposals to correct ethnic wealth imbalances. Although many are in fact quite reasonable, sound, and pragmatic, Chua dismisses them as unrealistic (p. 265). She admits that “[e]ducational reform and equalization of opportunities for . . . poor indigenous-blooded majorities” (p. 264) are necessary for market benefits to reach those not already economically dominant. Where political cronyism is a factor in the market dominance of certain ethnic minorities, Chua states that eliminating such cronyism is necessary. It is insufficient, however, because “such favoritism tends to be more the consequence than the cause of market dominance” (p. 265), and most market-dominant minorities are economically dominant at every level of society, including those sectors where political connections play little to no role in success. After considering redistributive measures such as tax-and-transfer programs and social safety nets, Chua settles on adopting aggressive affirmative-action programs to benefit disadvantaged majorities (p. 269). This last measure would mean “government interventions into the market, consciously designed to ‘correct’ ethnic wealth imbalances” (p. 269).

Take Malaysia. There, affirmative-action interventions include the adoption of “sweeping ethnic quotas on corporate equity ownership, university admissions, government licensing, and commercial employment” (p. 270). The Malay Constitution allows government control of university admission to benefit Malays,<sup>16</sup> resulting in a “brain drain” of Chinese students who enroll in universities abroad.<sup>17</sup> Employment preferences, once confined to the public sector, have been extended to the private sector as the government has established quotas for Malay employment in commercial and industrial firms,<sup>18</sup> including foreign firms whose investment in Malaysia is conditioned on maintaining quotas for Malays.<sup>19</sup>

To increase Malay equity ownership, Chinese-owned Malaysian companies must set aside 30% of their equity for Malays, “on financial terms very generous to the new shareholders” and often with no choice about the identity of the Malay set-aside recipients.<sup>20</sup> Similarly,

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16. DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 660 (2d ed. 2000).

17. *Id.* at 661; THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* 50 (1990).

18. Sumit Ganguly, *Ethnic Policies and Political Quiescence in Malaysia and Singapore*, in *GOVERNMENT POLICIES AND ETHNIC RELATIONS IN ASIA AND THE PACIFIC* 233, 260 (Michael E. Brown & Sumit Ganguly eds., 1997).

19. *Id.*

20. HOROWITZ, *supra* note 16, at 667, *discussed in* pp. 270-71; JAMES V. JESUDASON, *ETHNICITY AND THE ECONOMY: THE STATE, CHINESE BUSINESS, AND MULTATIONALS IN MALAYSIA* 137, 141 (1989).

any company seeking permission to expand or applying for import or export licenses must sell 30% of its existing shares to native Malay or Bumiputra-controlled entities or, alternatively, issue new shares to ensure a 30% Bumiputra equity ownership.<sup>21</sup> This 30% requirement also applies to companies seeking a listing on the local stock exchange.<sup>22</sup>

These measures are both invidious and superficial. They are invidious as they are state-mandated discriminatory measures directed against a politically vulnerable ethnic minority, resulting in government exacerbation of ethnic division and consciousness. They are superficial because they do not address one of the primary underlying causes of Chinese market dominance — the ability of the Chinese (and other middleman minorities) to create social capital compared to the ethnic majority's. The majority's "low endowments of social capital continue to limit that group's rate of entrepreneurship,"<sup>23</sup> as in the case of the Malays. Purely redistributive measures in favor of an ethnic group (such as nationalization or reserving a portion of shares in a company for Malays) do not necessarily "have any impact upon its level of direct investment in business enterprises. These policies may turn them into investors but not entrepreneurs."<sup>24</sup>

Additionally, the Chinese in Malaysia have found ways to adjust to such ethnically targeted corporate restructuring. First, to bypass government-mandated Malay preferences, "Ali Baba" schemes involving Malay front men are used in license applications, land conveyances, share issuances, and contract bids; the front man's role is limited to collecting a fee for the use of his name.<sup>25</sup> Second, where shares are transferred to Malays, the new shareholders tend to be politically influential, allowing the firms to benefit from their political connections. Participating in joint ventures with the Urban Development Authority (created to grant Malays a share in development in cities) or with Pernas (the National Corporation created to buy assets to be held in trust to distribute to Malays) has

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21. Donald L. Horowitz, *Causes and Consequences in Public Policy Theory: Ethnic Policy and System Transformation in Malaysia*, 22 POL'Y SCI. 249, 266-68 (1989). Bumiputra refers to "native" or "indigenous" Malays and is sometimes used to highlight the claim that Malaysians of Indian or Chinese descent are foreign.

22. CHRISTOPHER ADAM ET AL., ADJUSTING PRIVATIZATION: CASE STUDIES FROM DEVELOPING COUNTRIES 228 (1992); Steve Glain, *Malaysian's Grand Social Experiment May Be Next Casualty of Asian Crisis*, WALL ST. J., Apr. 23, 1998, at A15.

23. Davis et al., *supra* note 14, at 353.

24. *Id.* at 353 n.89.

25. HOROWITZ, *supra* note 16, at 666; THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 52 (1994) [hereinafter SOWELL, RACE AND CULTURE].

helped Chinese firms obtain project approvals they would have had difficulty receiving otherwise.<sup>26</sup>

Although Chua acknowledges that her proposal is among the “more controversial strateg[ies] for addressing the problem of market-dominant minorities” (p. 269), she makes no attempt to identify the causes underlying a minority group’s market dominance. Indeed, she disclaims any such effort, stating that “[e]xplaining the market dominance of various ethnic groups is not the focus of this book” (p. 42). This reluctance may be due to her apparently conflicted sense about the extent to which corrupt alliances are a major factor in the economic dominance of market-dominant minorities. Certainly the book is replete with examples of corrupt alliances between market-dominant minorities and ruling elites.<sup>27</sup> But it is unclear whether she attributes minority wealth and dominance to corrupt alliances and cronyism<sup>28</sup> or to something else — entrepreneurialism, ingenuity, or access to capital, for example.<sup>29</sup> The distinction is important as the case against wealth corruptly amassed is normatively strong and remedies to rectify such corruption are relatively uncontroversial.<sup>30</sup> By contrast, the case against wealth derived from superiority in skill, hard work, and entrepreneurialism is more complicated and remedies to reduce

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26. HOROWITZ, *supra* note 16, at 667-68; K.S. Jomo, *A Specific Idiom of Chinese Capitalism in Southeast Asia*, in *ESSENTIAL OUTSIDERS* 250 (Daniel Chirot & Anthony Reid eds., 1997).

27. *See, e.g.*, pp. 28, 30 (discussing the wealth of the Sino-Burmese and the handsome payoffs made to Burma’s ruling political elite); pp. 43-44, 151-52 (discussing Chinese alliances with the Suharto regime in Indonesia); pp. 153-57 (discussing Chinese alliances with the Marcos regime in the Philippines); pp. 148-51 (discussing Lebanese alliances with the government officials of Sierra Leone); pp. 113-15, 157-58 (discussing Asian Indians’ alliances with the Moi regime in Kenya).

28. In fact, in several instances, she notes that cronyism is not the primary factor for certain ethnic-minority dominance. *See* p. 113 (“[T]he suggestion that political cronyism is the sole or even principal explanation of Indian economic dominance in Kenya overstates the case.”). She later writes:

Likewise, while political favoritism is a frequent, exacerbating problem in societies with a market-dominant minority, such favoritism tends to be more the consequence than the cause of market dominance. Most market-dominant minorities, whether the Bamiléké in Cameroon or Indians in Fiji, are disproportionately economically successful at every level of society, including small traders, retailers, and shopkeepers with no political connections whatsoever.

P. 265.

29. In her description of the European elites in Bolivia, Chua noted that most were descendants of “enterprising waves of immigrants” from Europe. P. 55. For a list of African market-dominant minorities, see *supra* note 11.

30. Corrupt practices such as bribery should be dealt with through the institution of the equivalent of the Foreign Corrupt Practices Act of 1977 (“FCPA”), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.). For literature outlining the damage done by corruption, see, for example, M. Shahid Alam, *Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment*, 48 *AM. J. ECON. & SOC.* 441, 448-52 (1989), and Andrei Schleifer & Robert W. Vishny, *Corruption*, 108 *Q.J. ECON.* 599, 611-15 (1993).

minority wealth in this case are more difficult to justify. In Part II below, I examine why certain groups tend to be market dominant despite external hostility and put forth two ethnically neutral proposals, one directed inwardly toward group culture change and the other directed outwardly toward the eradication of anticompetitive market concentrations.

## II. ADDRESSING MARKETS AND MARKET-DOMINANT MINORITIES IN ETHNICALLY NEUTRAL WAYS

Although Chua gives multiple accounts of ethnic-minority market dominance, she does not address *how* certain minority ethnic groups manage to achieve economic dominance. Chua makes generalized references to cronyism and corruption without necessarily attributing them as the cause — or even a cause — of minority economic success.<sup>31</sup> But there are also references to hard work, social cohesion, and “entrepreneurial energies” (p. 35) of the minorities such as the Chinese. Indeed, while political favoritism and cronyism are a problem, “such favoritism tends to be more the consequence than the cause of market dominance” (p. 265). In those cases, the economic dominance of the minority, particularly a middleman minority, is the result of the group’s levels of entrepreneurship.<sup>32</sup> Affirmative action for certain ethnic groups designated as deserving of preferences by the government is particularly problematic in such a situation, where the ethnic minority succeeds despite hostility only to be subject to additional government-sanctioned discrimination in the name of affirmative action.

Take, as an example, Chua’s discussion of ethnic Chinese dominance in Burma. Globalization in Burma has disproportionately benefited the Burmese Chinese. Yet it is unclear from her discussion whether Chinese dominance is due to Chinese wrongdoing or to Chinese economic competitiveness and superior networks. Chua noted that large infrastructure projects are in the hands of the Chinese (pp. 25-26), but acknowledged these contracts were won “[a]gainst international competition.”<sup>33</sup> And when the Burmese government privatized the gem industry, “private mining concessions . . . sold on

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31. Members of a minority ethnic group could by skill and hard work become wealthy and then, to cope with majority resentment and hatred, turn to corrupt alliances with government officials for political cover.

32. Davis et al., *supra* note 14, at 335.

33. Pp. 25-26 (quoting *Myanmar and China: But Will the Flag Follow Trade?*, *ECONOMIST*, Oct. 8, 1994, at 35).

the basis of competitive bidding” resulted in most of the concessionaires going to Sino-Burmese businessmen.<sup>34</sup>

One example Chua discussed in detail is itself telling for the contradictions inherent in her treatment of Chinese market dominance. She examined the bean-curd industry in Java and the chicken-feed industry in Bangkok. The first, founded by a local Javanese woman in 1920, remains essentially unchanged after more than eighty years and has floundered due to globalization and market competition. The second, founded by two Chinese brothers who left China “virtually penniless” (p. 40), settled in Thailand, and for years lived “on next to nothing” (p. 40), is now a \$9 billion global conglomerate. Chua pointed out that what distinguishes the Javanese tofu business from the Chinese-Thai chicken-feed business is “breathtaking dynamism” combined with Chinese “frugality, hard work, willingness to delay gratification, and intense desire to accumulate wealth almost as an end in itself” (p. 42). Yet her solution would punish the Chinese for their hard work and dynamism by institutionalizing constraints to impede their progress. It is all the more problematic given the fact that it is directed against politically vulnerable minorities who have succeeded economically despite external hostility. Additionally, it would harm the country economically by depriving it of the full benefit of a group’s entrepreneurial spirit and capital.

Section II.A briefly explores the market dominance of certain ethnic groups, focusing on the various mechanisms such groups use to achieve economic success and argues that the market dominance of certain ethnic groups can be ascribed to the groups’ social-capital reserves. In such cases, remedies should not be punitively aimed at destroying the group’s social-capital base. Indeed, for groups such as the prototypical middleman minorities and others who become market dominant despite external discrimination, corrective remedies to blunt their economic achievement, by means of state-mandated discrimination against them, in the name of affirmative action for the majority are neither wise nor just. Rather than muffle a group’s competitive skills and its hard-to-acquire social-capital network, one could instead examine whether certain social-capital attributes associated with economic development could be similarly instilled in the majority. This would involve a controversial strategy of causing a group to turn inward and engage in culture change. Section II.B

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34. P. 28. Chua also noted that Burma’s gem industry is dominated by Burmese Chinese at every level, from high-powered financiers to concession operators to jewelry shop owners, and that Burmese government officials “are also handsomely paid off at every level.” P. 28. Again, it is unclear whether the Chinese achieved economic dominance only because of corrupt payments to officials or whether corrupt payments to officials are simply expected as a part of doing business in Burma.

employs a more outward strategy, relying on the principles of competition law to address the ethnic minority's dominance in certain economic sectors.

### A. *Social Capital and Culture*<sup>35</sup>

#### 1. *Homogeneous Groups, Ethnic Economies, and the Ethnic Boundary*

There are many factors that underlie an ethnic minority's market dominance. Some are descendants of colonizers, for example, Europeans in South Africa. Some are classic middleman minorities who were commercially astute and economically dominant even before the colonial age.<sup>36</sup> Others are immigrants who began from the humblest ladder rung and have managed to achieve economic dominance in their adopted country. The Indians, brought to Fiji and East Africa as coolies or indentured servants, are examples of the last scenario.<sup>37</sup>

Chua suggests, without stating it directly, that cultural factors may explain the economic success of certain market-dominant minorities — certainly those in the second and third categories mentioned above. In comparing the Burmans with the Chinese, Chua expressed that “[h]uman capital levels among indigenous Burmans are . . . abysmal” (p. 29). There might be “cultural obstacles,” such as “a native prejudice against ‘greedy’ profit-seeking [which] make it extremely

35. The term “culture” is used in many different ways. Culture originally referred to the cultivation of crops or animals. RAYMOND WILLIAMS, *KEYWORDS* 77 (1976). Cultural anthropologists have long recognized the inherent difficulty of defining “culture.” There are more than one hundred definitions of culture, ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT* 56 (1999), for example, “the total way of life of a people”; “the social legacy the individual acquires from his group”; “a storehouse of pooled learning”; “a set of standardized orientations to recurrent problems”; “a mechanism for the normative regulation of behavior.” CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 4-5 (1973) (quoting CLYDE KLUCKHOHN, *MIRROR FOR MAN* (1965)) (quotation marks omitted); *see also id.* at 89 (defining culture as a “historically transmitted pattern of meanings embodied in symbols”). Geertz, it has been said, subscribes to a “thick description” of culture, using it “to refer to the entire way of life of a society: its values, practices, symbols, institutions, and human relationships.” Samuel P. Huntington, *Cultures Count, Foreword to CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS*, at xiii, xv (Lawrence E. Harrison & Samuel P. Huntington eds., 2000) [hereinafter *CULTURE MATTERS*]. By contrast, a “thin description” of culture would encompass only “subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society.” *Id.*

German philosophers in the eighteenth century used the term “Kultur” to describe the process of inculcating into or civilizing individuals; the term subsequently became synonymous with the term “civilization.” KUPER, *supra*, note 35 at 30-32.

36. *See, e.g.*, CLIFFORD GEERTZ, *PEDDLERS AND PRINCES: SOCIAL CHANGE AND ECONOMIC MODERNIZATION IN TWO INDONESIAN TOWNS* 25-26 (1963).

37. THOMAS SOWELL, *MIGRATIONS AND CULTURE: A WORLD VIEW* 310, 314 (1996) [hereinafter *SOWELL, MIGRATIONS AND CULTURE*].

difficult for Burmans to compete in a market economy” (p. 29). Some have observed that certain ethnic groups do not favor engaging in commercial activities, preferring instead employment in the public sector<sup>38</sup> or living a subsistence as opposed to an acquisitive or competitive lifestyle.<sup>39</sup> Others have noted the low level of social-capital reserves among certain groups such as the Malays and hence the inability of group members to engage in intra-cooperative economic activities.<sup>40</sup> Cultural attributes may also explain why “many market-dominant minorities have been successful notwithstanding long histories of official discrimination against them. This is certainly true of the Chinese in Southeast Asia, Lebanese in West Africa, and Jews almost everywhere” (p. 265).

Sociologists and even some legal scholars have long noted the existence of market-dominant minorities and explored the reasons behind their economic success. Such groups have invariably formed their own ethnic economies<sup>41</sup> — economies owned by ethnic members and predominantly hiring other coethnics — or as W.E.B. Du Bois called it, the “group economy: ‘a cooperative arrangement of industries and services within the Negro group such that the group tends to be a closed economic circle largely independent of the surrounding white world.’”<sup>42</sup> Often, ethnic economies start out serving the ethnic market and later break out to serve non-ethnic clientele.<sup>43</sup>

In addition, various groups “have become prominent or predominant in particular occupations in countries all over the planet,”<sup>44</sup> creating economic niches — the clustering of ethnic entrepreneurs in the same occupations and industries.<sup>45</sup> In the United States, Indians and Pakistanis own a large proportion of the budget motels and gas stations in New York City.<sup>46</sup> Koreans own green

38. Davis et al., *supra* note 14, at 340 (noting that even Malay-Muslim businessmen in Malaysia regard public-sector employment as more prestigious than engaging in commerce).

39. *Id.* at 340 (discussing native Fijians).

40. *Id.* at 348.

41. IVAN LIGHT & STEVEN J. GOLD, *ETHNIC ECONOMIES* 4 (2000).

42. Roger Waldinger & Howard Aldrich, *Trends in Ethnic Business in the United States, in ETHNIC ENTREPRENEURS: IMMIGRANT BUSINESS IN INDUSTRIAL SOCIETIES* 49, 59 (Roger Waldinger et al. eds., 1990) (emphasis omitted) (quoting W.E.B. DU BOIS, *ECONOMIC COOPERATION AMONG NEGRO AMERICANS* 179 (1907)); *see also* W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 43 (Bedford Books 1997) (1903).

43. Roger Waldinger et al., *Opportunities, Group Characteristics, and Strategies, in ETHNIC ENTREPRENEURS, supra* note 42, at 13, 23-24; Waldinger & Aldrich, *supra* note 42, at 57.

44. SOWELL, *RACE AND CULTURE, supra* note 25, at 2.

45. LIGHT & GOLD, *supra* note 41, at 20.

46. Jonathan Foreman, *Bombay on the Hudson, MANHATTAN INST. CITY J.*, Summer 1997, at 14, *available at* LEXIS, News Library, Cityjr File; Edwin McDowell, *Hospitality Is*

groceries in New York City and wig stores nationwide.<sup>47</sup> Arabs and Lebanese Muslims own grocery stores in Chicago and Detroit, respectively.<sup>48</sup> Soviet Jews operate at least fifty-percent of taxis in Los Angeles.<sup>49</sup> Ethnic Chinese in Malaysia, Thailand, the Philippines, and other Southeast Asian countries dominate commerce and are known as middleman minorities, due to their “go-between” positions between producer and consumer, owner and renter, elite and masses, employer and employee.<sup>50</sup> Thus, “[c]apital and labor are often organized along ethnic lines. Fukienese entrepreneurs in Hong Kong, Malayalee clerks in Bombay, and Ibo plantation laborers in Equatorial Guinea were all mobilized into their economic activity on the basis of ethnic affinity.”<sup>51</sup>

The dominance of certain ethnic groups in certain economic sectors might be due to factors found in the host country (which might explain why a group is more successful outside its home country than within) or it might “reflect[] their traditional positions in the occupational hierarchies of their homeland prior to migration,” which may shed light on why “[m]igrants from ‘commercial cultures’ like the Parsis, the Banyas, the money lending Bhatias, the Memons, the Bohras, the Khojas — all Gujarati groups — long dominated trade and commerce in West India and later in East Africa as well.”<sup>52</sup> Similar observations have been made about Chinese retailers, India’s Gujarati merchants, German farmers, Jewish middlemen, and Lebanese traders in many countries.<sup>53</sup>

*Their Business*, N.Y. TIMES, Mar. 21, 1996, at D1; Robert Reinhold, *Flow of 3d World Immigrants Alters Weave of U.S. Society*, N.Y. TIMES, June 30, 1986, at A1.

47. IVAN LIGHT & EDNA BONACICH, IMMIGRANT ENTREPRENEURS: KOREANS IN LOS ANGELES, 1965-1982, at 37, 151 (1988); Richard Levine, *Young Immigrant Wave Lifts New York Economy*, N.Y. TIMES, July 30, 1990, at A1; Reinhold, *supra* note 46.

48. LIGHT & BONACICH, *supra* note 47, at 439 n.4.

49. *Id.*

50. HOWARD PAUL BECKER, MAN IN RECIPROCITY 225-37 (1956).

51. HOROWITZ, *supra* note 16, at 8. An example is the dominance of Jews in New York’s garment industry. One might explain such dominance by noting the influx of Jewish immigrants into the city, but an international perspective reveals that:

Jews have been prominent, if not predominant, in the apparel industry over a period longer than the entire history of the United States, and in countries ranging from medieval Spain to modern Australia, from the Ottoman Empire to the Russian Empire, as well as in Argentina, Brazil, Germany, and Chile.

SOWELL, RACE AND CULTURE, *supra* note 25, at 2.

52. Ivan Light et al., *Migration Networks and Immigrant Entrepreneurship*, in IMMIGRATION AND ENTREPRENEURSHIP 25, 40 (Ivan Light & Parminder Bhachu eds., 1993) (citation omitted) (quoting Jagdish S. Gundara, *British Extraterritorial Jurisdiction, Imperial Enterprise and Indians in Nineteenth Century Zanzibar* (1990) (paper presented at the *Indian Diaspora Conference* at the University of Toronto)).

53. ROBIN COHEN, GLOBAL DIASPORAS: AN INTRODUCTION 170 (1997) [hereinafter COHEN, GLOBAL DIASPORAS]; SOWELL, RACE AND CULTURE, *supra* note 25, at 2, 11, 12, 47.



In numerous and diverse countries, these minorities establish an ethnic economy by relying on group cohesiveness and homogeneous networks to benefit group members. Where certain ethnic economies are formed by recent immigrants, there may also be benefits derived from the diaspora's linkages to its homeland institutions.<sup>54</sup> In the United States, for example, Korean-owned firms tend to engage in a form of vertical intra-group preferences: Korean importers rely on Korean suppliers from Korea and distribute those Korean-made products to coethnic wholesalers who in turn distribute them to coethnic retailers for sale.<sup>55</sup> In the retail wig business, ninety-five percent of those surveyed stated they depended on Korean suppliers for wigs made in South Korea.<sup>56</sup> At the same time, Korean newcomers who start business dealing with Korean-imported products "have easy access to information and can very often purchase merchandise on a credit basis. In operating such businesses, they receive preferential treatments from Korean wholesalers in item selections, prices, speed of delivery and credits."<sup>57</sup>

Sociologists have observed the tendency to identify members of one's ethnic group as "near or distant kinsmen whom one knows as intimates and whom therefore one can trust. One intuitively expects fellow ethnics to behave at least somewhat benevolently toward one because of kin selection, reinforced by reciprocity. . . . Fellow ethnics are, in the deepest sense, 'our people.'"<sup>58</sup> In the establishment of ethnic economies, the ethnic group generally exhibits certain recurring characteristics, such as "clannishness,"<sup>59</sup> adhering to group norms and maintaining the ethnic boundary delineating insiders from outsiders. This insular proclivity abounds among different ethnic groups in different countries all over the world: the Hasidic Jews in New York City's diamond industry, Lebanese traders in Sierra Leone, the Chinese in Southeast Asia, the Indians in Uganda, the Koreans and

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54. Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1012-14 (2001).

55. LIGHT & GOLD, *supra* note 41, at 121; Pyong Gap Min, *Korean Immigrants in Los Angeles, in IMMIGRATION AND ENTREPRENEURSHIP, supra* note 52, at 185, 196; Waldinger & Aldrich, *supra* note 42, at 71; Linda J. Wong, *The Role of Immigrant Entrepreneurs in Urban Economic Development*, 7 STAN. L. & POL'Y REV. 75, 79 (1996) (describing how "immigrant consumers and entrepreneurs maintain cultural, social, and economic ties with their homelands that dramatically increase export opportunities"). According to Korean owners in Los Angeles, between sixty-six and one hundred percent of their suppliers were Koreans and that many of them were part of "a vertical distribution network that might originate in South Korea." LIGHT & BONACICH, *supra* note 47, at 151.

56. LIGHT & BONACICH, *supra* note 47, at 151.

57. Waldinger & Aldrich, *supra* note 42, at 71 (quoting Pyong Gap Min, *A Structural Analysis of Korean Business in the United States*, 6 ETHNIC GROUPS 1 (1984)).

58. PIERRE L. VAN DEN BERGHE, *THE ETHNIC PHENOMENON* 25 (1981).

59. SOWELL, *RACE AND CULTURE, supra* note 25, at 49.

Indians in the United States,<sup>60</sup> the Turks in the garment industry in Paris and Berlin,<sup>61</sup> the Algerians, Moroccans, and Tunisians in the retail trade in France,<sup>62</sup> and so forth.

Ethnic economies, in other words, like traditional capitalism, are based on personal relationships and ethnic ties. According to Max Weber, outcast groups such as the Jews are ethnically insular and segregated from the mainstream by their observance of “taboos . . . [and] hereditary religious obligations in the conduct of life.”<sup>63</sup> Their pariah status instilled in Jews a “dual ethic,” with one set of ethics for dealing with Jews and another set for dealing with non-Jews.<sup>64</sup>

Other scholars have expanded on Weber’s theory with research on middleman minorities and trade diasporas. The term “middleman minority” originally referred to ethnic minorities who were market traders in precapitalist societies. Middleman minorities are marginal people who specialize in trading and are part of global diasporas, such as the overseas Chinese, Jews, and Lebanese.<sup>65</sup> As pariah minorities themselves, these middlemen exhibit “caste-like attributes”<sup>66</sup> and shared loyalties.<sup>67</sup> Their outsider status means diasporic traders often

60. *Id.* at 50-52, 54-59.

61. Mirjana Morokvasic, *Immigrants in Garment Production in Paris and in Berlin*, in IMMIGRATION AND ENTREPRENEURSHIP, *supra* note 52, at 75, 76-82.

62. Gildas Simon, *Immigrant Entrepreneurs in France*, in IMMIGRATION AND ENTREPRENEURSHIP, *supra* note 52, at 125, 132-34.

63. MAX WEBER, THE SOCIOLOGY OF RELIGION 109 (Ephraim Fischhoff trans., Beacon Press 1963) (1922). Weber also believed that Jews were not sufficiently free of communal loyalties to engage in rational, bourgeois capitalism. For Weber, “Jewish capitalism was speculative pariah-capitalism, while the Puritan was bourgeois organization of labour.” MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 271 n.58 (Talcott Parsons trans., Charles Scribner’s Sons 1930) (1920) [hereinafter, WEBER, THE PROTESTANT ETHIC]. Karl Marx similarly explained that Jews were disliked because they were not Christians and because their tendency toward “huckstering” gave them an economic advantage which made them even more despised. Karl Marx, *On the Jewish Question* (1843), in THE MARX-ENGELS READER 26, 48 (Robert C. Tucker ed., 2d ed. 1978) (1843).

64. MAX WEBER, 2 ECONOMY AND SOCIETY 614 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (1914). Jews are associated with the primitive, ethnic capitalism practiced by pariah minorities. The same charges have been directed at the Chinese. Allen J. Chun, *Pariah Capitalism and the Overseas Chinese of Southeast Asia: Problems in the Definition of the Problem*, 12 ETHNIC & RACIAL STUD. 233, 233-56 (1989); Gary Hamilton, *Pariah Capitalism: A Paradox of Power and Dependence*, 2 ETHNIC GROUPS 1, 1-15 (1978).

65. COHEN, GLOBAL DIASPORAS, *supra* note 53, at 101-04. Early works study the role middleman minorities play in the economic structure of host countries and its impact on ethnic relations. *See, e.g.*, HUBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY-GROUP RELATIONS (1967); ABNER COHEN, CUSTOMS AND POLITICS IN URBAN AFRICA 14-25 (1969) [hereinafter COHEN, CUSTOMS AND POLITICS]; R.A. SCHERMERHORN, COMPARATIVE AND ETHNIC RELATIONS: A FRAMEWORK FOR THEORY AND RESEARCH (1970).

66. COHEN, GLOBAL DIASPORAS, *supra* note 53, at 101.

67. For members of diasporas, “[t]he powerful pull of loyalty exerted by the imagined nation demonstrates that, even in the age of science, a loyalty system based on romantic myths of shared history and kinship has a capacity to endure that may be the envy of a state

develop an “aptitude for economic specialization” because their “psychological self-isolation would prove impossible if those who practised it did not, at the same time, develop on the economic plane a special efficiency in the exploitation of such economic opportunities as had been left open to them.”<sup>68</sup> Middleman minorities may be market dominant yet politically vulnerable, uncomfortably “lodged between . . . two ethnic groups that stand in a classlike relation of superordination and subordination. The dominant elite of the dominant group uses the middleman minority to foster economic development, but turns it into a scapegoat when things go wrong.”<sup>69</sup>

Many factors shed light on the widespread existence of ethnic economies, but external factors — outsider status, vulnerability, and disadvantage — are crucially relevant. In other words, the boundaries established by the ethnic group, or imposed upon it by a hostile society, engender cooperation and solidarity among members within the group. Max Weber acknowledged that Catholic discrimination against Protestants, including the exclusion of Protestants from the civil service and the armed forces — not just the Protestant ethic — contributed significantly to the high incidence of Protestant entrepreneurship.<sup>70</sup> Werner Sombart attributed Jewish dominance in commerce to exclusion of Jews from medieval trade guilds.<sup>71</sup> Scholars have subsequently advanced disadvantage as a major reason for the high rates of entrepreneurship<sup>72</sup> among ethnic minorities denied

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with the most liberal civil society and patriotic citizenry.” Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT’L L. 359, 374 (1996).

68. COHEN, GLOBAL DIASPORAS, *supra* note 53, at 103.

69. *Id.*

70. WEBER, THE PROTESTANT ETHIC, *supra* note 63, at 5-7.

71. WERNER SOMBART, THE JEWS AND MODERN CAPITALISM 300-01 (1913).

72. See, e.g., IVAN LIGHT & CAROLYN ROSENSTEIN, RACE, ETHNICITY, AND ENTREPRENEURSHIP IN URBAN AMERICA 161 (1995) (discussing how labor market impediments caused middleman minorities to turn to “defensive self-employment”); Howard Aldrich et al., *From Periphery to Peripheral: The South Asian Petit Bourgeoisie in England*, in 2 RESEARCH IN THE SOCIOLOGY OF WORK: PERIPHERAL WORKERS 1, 8 (Ida Harper Simpson & Richard L. Simpson eds., 1983) (stating that “because of natives whites’ prejudice and hostility,” Asians in England must “seek employment below their skill level or else create their own employment opportunity by forming a small business”); Annie Phizacklea, *Entrepreneurship, Ethnicity, and Gender*, in ENTERPRISING WOMEN: ETHNICITY, ECONOMY, AND GENDER RELATIONS 20, 21 (Sallie Westwood & Parminder Bhachu eds., 1988) (describing entrepreneurship as an escape route for minority men stuck in dead-end jobs because of racism); Chua Lee Hoong, *The Business of Race in the Race for Business*, STRAITS TIMES (Sing.), June 29, 1996, at 34, available at 1996 WL 14659458 (describing how Chinese ethnic networks were a reaction against discrimination when banks refused to lend to “Chinamen”); cf. Davis et al., *supra* note 14, at 344 (describing how Indians were brought to Fiji and East Africa as indentured laborers and faced invidious hostility).

“access to majority-controlled paths of economic advancement.”<sup>73</sup> “[C]ompensatory entrepreneurship” is thus a response to hostility.<sup>74</sup>

Scholars have also attributed the minority creation of ethnic economies to internal factors, for example, group characteristics consisting of ethnic resources and ethnic social capital. External hostility, especially toward groups deemed “unassimilable,” creates solidarity within the group and contributes to the group’s reliance on ethnic resources to create social capital.<sup>75</sup> Groups with a social-capital base of “networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit”<sup>76</sup> are particularly poised to produce economic capital. Absent trust, “elaborate and expensive bonding and insurance devices would be necessary — or else the transactions could not take place.”<sup>77</sup> This particular form of trust — founded on common external and internal factors, such as societal hostility and shared cultural values — is “not easily duplicated in any artificial community, and indeed, [is] rarely found in communities united by geographic proximity or other demographic characteristics.”<sup>78</sup> Groups with a thick social-capital base “convert social characteristics of their group into economic resources, thus creating employment and income independent of class resources.”<sup>79</sup> Interconnectedness allows the group to use its social capital to improve its economic capital<sup>80</sup> in three crucial areas: obligations and expectations, access to information, and norms enforced by effective sanctions.<sup>81</sup> Unlike human capital, which consists of knowledge and skills acquired through individual education and training, social capital grows out of group relations, consists of group-based factors that encourage cooperation among group members, and is transmitted

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73. Patricia G. Greene, *A Resource-Based Approach to Ethnic Business Sponsorship: A Consideration of Ismaili-Pakistani Immigrants*, 35 J. SMALL BUS. MGMT. 58, 59 (1997).

74. LIGHT & ROSENSTEIN, *supra* note 72, at 160.

75. Lan Cao, *The Diaspora of Ethnic Economics: Beyond the Pale?*, 44 WM. & MARY L. REV. 1521, 1594-95 (2003) [hereinafter Cao, *The Diaspora*].

76. Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65, 67 (1995). For a discussion of the various uses of the term “social capital” in scholarship, see Francis Fukuyama, *Social Capital*, in CULTURE MATTERS, *supra* note 35, at 98, 100.

77. James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S99 (Supp. 1988).

78. Greene, *supra* note 73, at 67.

79. LIGHT & ROSENSTEIN, *supra* note 72, at 24.

80. SOWELL, RACE AND CULTURE, *supra* note 25, at 49-55.

81. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990); Coleman, *supra* note 77, at S97-S101.

through cultural mechanisms such as religion, tradition, and historical habits.<sup>82</sup>

This explains the prevalence and strength of ethnically homogeneous middleman trading groups, for example, the East Indians in East Africa, the Jews in Europe, and the pockets of ethnic economies in the United States and other countries.<sup>83</sup> One characteristic of such groups is “the idea that a trader will discriminate among potential partners in order to economize on the cost of enforcing contracts.”<sup>84</sup> Members of groups that share easily observable traits, such as language, race, or ethnicity, rely on such common characteristics as cost-effective proxies for inferring other potentially relevant information, thereby allowing the group to lower transaction costs and solve market imperfections.<sup>85</sup> These transactions are embedded in ethnic relationships and involve, by implication, certain preferences for members of the same ethnic group and exclusion of non-members.<sup>86</sup>

A word of caution is appropriate. At some point, kinship ties could dampen individual incentives to accumulate wealth<sup>87</sup> and facilitate

82. FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 26-27 (1995).

83. Robert Cooter & Janet T. Landa, *Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 INT’L REV. L & ECON. 15, 15 (1984); Davis et al., *supra* note 14, at 344-45.

84. Cooter & Landa, *supra* note 83, at 15.

85. See Richard H. McAdams, *Cooperation and Conflict: The Economies of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1021 (1995); see also Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 853 (1999) [hereinafter Cao, *Looking at Communities and Markets*] (discussing how communal cohesiveness allows a homogenous ethnic group to bypass barriers in the mainstream market and lower transaction costs through intra-group exchanges).

86. Cao, *The Diaspora*, *supra* note 75, at 1598-99; Davis et al., *supra* note 14, at 347.

87. Max Weber, of course, argued that the spread of Calvinism, which emphasized “individualistic motives of rational legal acquisition by virtue of one’s own ability and initiative,” WEBER, *THE PROTESTANT ETHIC*, *supra* note 63, at 179, quoted in ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY AND SOCIAL TRANSITION* 47 (1978), “had the psychological effect of freeing the acquisition of goods from the inhibitions of traditionalistic ethics.” *Id.* at 47. By elevating rational thought over superstition and magic and the pursuit of individual over communal interests, Protestantism helped to “shatter the fetters of the kinship group.” *Id.* at 50, quoted in MACFARLANE, *supra*. Subsequent scholars have echoed Weber’s warnings of the fetters of kinship. See, e.g., PETER T. BAUER & BASIL S. YAMEY, *THE ECONOMICS OF UNDER-DEVELOPED COUNTRIES* 64 (1957) (“[T]he extended family... is an example of an institution which has many advantages in one stage of economic achievement, but which may later become a drag on economic development.”); W. ARTHUR LEWIS, *THE THEORY OF ECONOMIC GROWTH* 114 (1955) (“The extended family system has tremendous advantages in societies living at a subsistence level, but it seems not to be appropriate to societies where economic growth is occurring. In such societies it is almost certainly a drag on effort.”).

corruption,<sup>88</sup> so that a collectivist norm that once facilitated economic development could end up impeding it.<sup>89</sup> Intra-group trust and reciprocity could remain frozen and inward-directed, so that the once-beneficial norm of collectivism could cause stagnation because no collective action is possible outside the group.<sup>90</sup> Group preferences for group members may prevail even after the group has become dominant, leading to excessive clannishness and systematic exclusion of other ethnic groups.<sup>91</sup> In this latter case, the state may apply its antidiscrimination laws, striking down commercial arrangements where one person was favored over another because of ethnicity.<sup>92</sup> It could also, as I examine in Section II.B, respond with antitrust law to

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88. LEWIS, *supra* note 87, at 114 (noting that strong group ties may facilitate bureaucratic corruption and nepotism because bureaucrats may be bound first by obligations to traditional networks rather than to outsiders with superior credentials).

89. The same observation might be made about certain cultural attributes, for example, Japanese frugality, which may be developmentally helpful at one stage (post-World War II) but not another (the current prolonged recession), Fukuyama, *supra* note 76, at 100, or the East Asian tendency to rely on personal ties in economic transactions, which “served economic development well for nearly half a century . . . [but] are not likely to serve the region as well in the future,” Dwight H. Perkins, *Law, Family Ties, and the East Asian Way of Business*, in CULTURE MATTERS, *supra* note 35, at 232, 243.

90. *See, e.g.*, EDWARD C. BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY 85 (1958) (stating that the norms of amoral familism (essentially loyalty only to family) impeded the development of norms that would further non-familial, collective cooperation; in this sense, amoral familism might be viewed as a limited collectivism among immediate family members, but with respect to those outside the family sphere, amoral familism is an intensely individualistic norm); FUKUYAMA, *supra* note 82, at 57 (stating that although trust and small-group cohesiveness are crucial to the creation of prosperity, the ability of “business organizations to move beyond the family rather rapidly and to create a variety of new, voluntary social groups that were not based on kinship” is also necessary for the development of “large, modern, rationally organized, professionally managed corporations” such as those of Japan and Germany); Partha Dasgupta, *Economic Progress and the Idea of Social Capital*, in SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 325, 388-90 (Partha Dasgupta & Ismail Serageldin eds., 2000) (arguing that “past accumulation of certain kinds of social capital can act as a drag on economic development, by preventing more efficient institutions from spreading”); Rachel E. Kranton, *Reciprocal Exchange: A Self-Sustaining System*, 86 AM. ECON. REV. 830 (1996) (arguing that trade sustained by personal relationships of trust and reciprocity can impede the development of a functioning market economy because if most people engage only in reciprocal exchanges, the number of potential partners will be limited and the search costs to find a partner will be high; dense personal networks could impede the development of impersonal markets).

91. *Cf.* Davis et al., *supra* note 14, at 348 (finding that despite the fact that ethnic networks do discriminate against outsiders in certain decisions, such as credit extension or business transfers or the choice of partners in joint ventures, there is no discrimination in typical retail transactions, which supports the hypothesis that these networks exist primarily to “help their members minimize the risk of opportunistic behaviour”).

92. *See generally* Cao, *The Diaspora*, *supra* note 75, at 1600-07. This may be especially needed in hiring decisions to ensure that members of other ethnic groups have access to employment within an ethnic economy, especially if that ethnic economy is dominant. This would accord with the recommendation by some scholars that rather than focus on programs to “redistribute entrepreneurial opportunities,” Davis et al., *supra* note 14, at 354, “developing states should focus on opportunities to engage in fulfilling employment,” *id.* at 355.

eliminate anticompetitive practices that perpetuate group preferences and dominance.

In addition to outward-directed measures that aim to change commercial practices, inward-directed measures may also be useful. To the extent that certain cultural attributes advance or impede economic development, one must inquire further whether culture change is possible or desirable.

## 2. *Culture Developmentalism and Culture Change*

It is an overstatement to assert that culture provides the sole or perhaps even primary explanation for an ethnic group's market dominance. But even eschewing monocausal explanations to take into account "intervening variables and . . . situational context,"<sup>93</sup> one could assert that culture plays some role or even, as some have put it, "culture makes almost all the difference. Witness the enterprise of expatriate minorities — the Chinese in East and Southeast Asia, Indians in East Africa, Lebanese in West Africa, Jews and Calvinists throughout much of Europe, and on and on."<sup>94</sup> A recent study tested the culture/economics linkage using cross-country data, focusing on a country's social capital and its relationship to growth (in per capita income), and found a correlation between the level of trust and economic growth.<sup>95</sup> Scholars have long identified certain traits that

93. Lucian W. Pye, "Asian Values": *From Dynamos to Dominoes?*, in *CULTURE MATTERS*, *supra* note 35, at 244, 254. At the level of intuition alone, one would not claim that culture explains everything. "Economists are not alone in asking why some people — the Chinese, say — have long been so unproductive at home yet so enterprising away. If culture matters, why didn't it change China?" David Landes, *Culture Makes Almost All the Difference*, in *CULTURE MATTERS*, *supra* note 35, at 2, 2. Similarly, as others have observed, "the same values, operating . . . in quite different circumstances, can and usually will produce different effects." Pye, *supra*, at 245. This may explain why Asian values, touted as crucial to the Asian economic "miracle," became a negative factor in the late 1990s:

The combination of a drive for greater market share above all else, a fixation on only the long run, and the notion that it is heroic to suffer the pains of delayed gratification — all essential Asian values — inspired economically useful behavior during the initial stages of economic development, but the combination led in time to serious problems of overcapacity and numerous bubble economies.

*Id.* at 253.

Hence a word of caution is needed in any attempt to explore the relationship between culture and economic development. "We need to be somewhat humble in ascribing precise weights to cultural variables. We know that they are important, but exactly how important at any particular time is hard to judge. We are dealing with clouds, not clocks, with general approximations, not precise cause-and-effect relationships." *Id.* at 255.

94. Landes, *supra* note 93, at 2. See generally DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* (1998).

95. Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q.J. ECON. 1251 (1997). The authors used data gathered from thousands of interviews in industrialized and developing countries, in which the respondents were asked their attitudes about family life, work, religion, and other values. In measuring a country's social capital, the authors asked, "Generally speaking, would you say

appear to correlate with positive economic performance.<sup>96</sup> To whatever degree, culture (and the bundle of norms and behaviors that flow from it, such as group cooperation and social capital) does matter. As Federal Reserve Board chairman Alan Greenspan discovered and conceded in pondering the post-Soviet experience of Russia, economic transformation did not “automatically establish a free-market entrepreneurial system”<sup>97</sup> merely because capitalism was “human nature.”<sup>98</sup> Instead, Greenspan acknowledged that it was “not nature at all, but culture.”<sup>99</sup>

Senator Daniel Patrick Moynihan aptly observed: “The central conservative truth is that it is culture, not politics, that determines the success of a society. The central liberal truth is that politics can change a culture and save it from itself.”<sup>100</sup> If cultural factors are relevant and culture does in fact shape economic development, can culture be changed (through politics and other avenues) and cultural obstacles removed?<sup>101</sup>

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that most people can be trusted, or that you can't be too careful in dealing with people?” *Id.* at 1256. For the twenty-nine market economies included in the study, they found that, controlling for income, education, and private investment, trust is positively correlated with growth in per capita income. Indeed:

[A] ten-percentage point rise in [trust] is associated with an increase in growth of four-fifths of a percentage point. A one-standard-deviation change in trust (fourteen percentage points) is associated with a change in growth of more than one-half (.56) of a standard deviation, nearly as large as the standardized coefficient for primary education (.64).

*Id.* at 1260.

96. Max Weber identified certain attributes associated with the “Protestant ethic:” individualism, a desire to compete, overcome nature, and achieve chosen goals. WEBER, *THE PROTESTANT ETHIC*, *supra* note 63. Others have focused on group cooperation and trust, FUKUYAMA, *supra* note 82, and preference for investment in education and work over consumption and leisure. LAWRENCE E. HARRISON, *WHO PROSPERS?: HOW CULTURAL VALUES SHAPE ECONOMIC AND POLITICAL SUCCESS* 16-23 (1992); SOWELL, *MIGRATIONS AND CULTURE*, *supra* note 37, at 17; Edna Bonacich, *A Theory of Middlemen Minorities*, 38 *AM. SOC. REV.* 583, 585 (1973).

97. William Pfaff, *Western Economic Theories Have Left Soviet Bloc Economies in Shambles*, *CHI. TRIB.*, Aug. 31, 1999, at 15.

98. *Id.*

99. *Id.*

100. Huntington, *supra* note 35, at xiv.

101. Chua is uncomfortable with this inquiry and with the very notion of culture change — first, whether it is possible and second, whether it is normatively desirable. On the first question, “[a]ttempts to inculcate a ‘work ethic’ . . . have not proved . . . effective. Indigenous elites in developing countries have frequently encouraged their fellow citizens to emulate market-dominant minorities and to become more ‘diligent’ and ‘motivated.’ ” P. 266. She notes that exhortations by Malaysia’s prime minister for the ethnic Malays to model themselves after the Chinese have not been successful. “Not surprisingly, such governmental ‘cultural revolutions’ — attempting to change culture from the top down — have been notoriously unsuccessful.” P. 266. On the second question, she observes: “Apart from the issue of feasibility, there is also a moral question. ‘Culture’ cannot simply be treated as an inconvenient impediment to free markets.” P. 266.



There are, however, scholars from certain disciplines, such as economics and anthropology, who shy away from even exploring or asserting a linkage between culture and economic development. Economists generally view the adoption of the right economic policy as producing the desired economic result without regard to culture. Culture, for economists, is an uncomfortable realm, perhaps because "it presents definitional problems, is difficult to quantify, and operates in a highly complex context with psychological, institutional, political, geographic, and other factors."<sup>102</sup> Anthropologists, influenced by the tradition of cultural relativism, may be reluctant to evaluate the cultural norms and practices of another society.<sup>103</sup> As a noted sociologist observed,

In the humanities and liberal circles generally, a rigid orthodoxy now prevails that can be summarized as follows: Culture is a symbolic system to be interpreted, understood, discussed, delineated, respected, and celebrated as the distinctive product of a particular group of people, of equal worth with all other such products. But it should never be used to explain anything about the people who produced it.<sup>104</sup>

Other reasons why cultural explanations may be disfavored in intellectual circles include concerns over the concept of culture as "over-determining,"<sup>105</sup> the possible use of culture "by reactionary analysts and public figures" as a way to "blam[e] the victim"<sup>106</sup> or

102. Lawrence E. Harrison, *Why Culture Matters, Introduction to CULTURE MATTERS*, *supra* note 35, at xvii, xxv [hereinafter Harrison, *Why Culture Matters*].

103. For example, Richard Shweder writes:

[T]he assertion that "culture matters" is a way of saying that some cultures are impoverished or backward, whereas others are enriched or advanced. It means there are good things in life (e.g., health, domestic tranquility, justice, material prosperity, hedonic self-stimulation, and small families) that all human beings ought to want and have but that their culture keeps them from wanting and/or having.

Richard A. Shweder, *Moral Maps, "First World" Conceits, and the New Evangelists*, in *CULTURE MATTERS*, *supra* note 35, at 158, 160; *see also id.* at 161 ("I have never put much stock in the view that holds that a good reason for becoming interested in other cultures is that they are impediments to the realization of some imagined universal aspiration of all people to be more like northern Europeans.").

In a similar vein, in 1947, the Executive Board of the American Anthropological Association declined to endorse the United Nations Universal Declaration of Human Rights because it viewed the Declaration as ethnocentric. Harrison, *Why Culture Matters*, *supra* note 102, at xxvi.

104. Orlando Patterson, *Taking Culture Seriously: A Framework and an Afro-American Illustration*, in *CULTURE MATTERS*, *supra* note 35, at 202, 202. This position is a reversal of the position that prevailed earlier, "when the Parsonian theory of values as ends and normative regulators of action was predominant." *Id.* at 203.

105. *Id.* at 203. This means relying on a "simplistic or untenable conception of culture" and using it "in a crudely deterministic way" to explain certain group's problems, so that culture is viewed as "a fixed, explanatory black box invoked to explain anything and everything about the group." *Id.*

106. *Id.* at 204. Professor Patterson rejects the argument that cultural explanations amount to blaming the victim. If a person who has low self-esteem and behaves in self-

avoid questions about the impact laws and policies may have on poverty,<sup>107</sup> and the desire to celebrate cultural diversity and ethnic pride.<sup>108</sup> Additionally, evaluating culture makes many well-meaning people uncomfortable because “criticisms of culture cut close to the ego and injure identity and self-esteem. Coming from outsiders, such animadversions . . . stink of condescension.”<sup>109</sup> Thus the following statement is an accurate description of the ambiguous role ascribed to culture: “We all realize that before we resort to culture today to explain the differences in economic progress or political attitudes among nations and ethnic groups, we prefer to find other explanations.”<sup>110</sup> Assuming that most people in most countries desire economic development, and assuming that culture is one crucial factor in achieving that objective, the question of culture change becomes an important one. Is it possible and is it desirable?

Culture is not confined to and bounded by national demarcations, as it is continuously influenced by subnational and transnational elements.<sup>111</sup> Thus, culture is not static, and what might be presented as an inextricable part of a national culture might in fact be a recent development prompted by economic circumstances. The Japanese, for example, insist that eating whale meat has cultural significance and therefore are unwilling to be bound by the international ban on whaling, despite considerable international pressure.<sup>112</sup> Yet, until World War II, whale meat was not an important food source in Japan. It was only during the postwar period, when non-whale protein sources were scarce, that the Japanese relied on whale meat for school lunches.<sup>113</sup> Similarly, Japan’s lifetime employment system and its high savings rate, generally deemed to be an essential component of the

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defeating ways as a result of having been abused is told by someone to go to a psychologist to seek therapy, “[i]t would be absurd to accuse that person of blaming the victim. Yet this is exactly what happens when a sympathetic analyst is condemned for even hinting that some Afro-American problems may be the tragic consequences of their cultural adaptation to an abusive past.” *Id.*

107. *Id.*

108. *Id.*

109. Landes, *supra* note 93, at 2.

110. Nathan Glazer, *Disaggregating Culture*, in CULTURE MATTERS, *supra* note 35, at 219, 220.

111. See, e.g., Mario Vargas Llosa, *The Culture of Liberty*, FOREIGN POL’Y, Jan./Feb. 2001, at 66, 68 (denouncing the “static conception of culture that has no historical basis”); *id.* at 70 (“Cultures must live freely, constantly jousting with different cultures. This renovates and renews them, allowing them to evolve and adapt to the continuous flow of life.”).

112. In 1982, the International Whaling Commission adopted a moratorium on whaling. Japan was one of the few countries that opposed the ban. See *Chairman’s Report of the Thirty-Fifth Annual Meeting*, 34 REP. INT’L WHALING COMMISSION 13 (1984).

113. Suvendrini Kakuchi, *Tokyo Persists with Bid to Lift Whaling Ban*, INTER PRESS SERVICE, Nov. 13, 1997, at <http://members.aol.com/cmwwrc/marmamnews/97111301.html>.

country's cultural characteristics, came out of the post-World War II experience; lifetime employment was instituted to control labor strife and high savings was adopted by those with direct wartime experience of deprivation and shortages.<sup>114</sup> "Thus it is difficult to disentangle culturally derived behaviors from behaviors that have been enhanced or encouraged by the economic system."<sup>115</sup> According to the noted Jamaican-born sociologist, Professor Orlando Patterson, Afro-American cultural models of "compensatory sexuality" and "unsecured paternity"<sup>116</sup> celebrating early marriage and high fertility have roots in the economic institutions of slavery and sharecropping. This cultural model, however, is not static because "although cultural continuities certainly exist, people are not slaves to them. They use them and they can change them if they really want to."<sup>117</sup> Culture is pliable and changing rather than static or deterministic. "Biology helps explain human behavior but does not determine it. Similarly, culture helps explain behavior but does not determine it, either."<sup>118</sup> Hence, while culture is not an irrelevant factor, according to Professor Patterson, it is not the sole factor. It is not true, as he puts it, that "nothing can be done about culture. This misunderstanding springs from the view of culture as something immutable."<sup>119</sup>

As scholars have observed, "culture is not an independent variable. It is influenced by numerous other factors, for example, geography and climate, politics, the vagaries of history."<sup>120</sup> The relationship between culture and other factors might be a two-way one.<sup>121</sup> Culture influences institutions — "culture is the mother and . . . institutions are the children"<sup>122</sup> — and vice versa. Douglass

114. Michael E. Porter, *Attitudes, Values, Beliefs, and the Microeconomics of Prosperity*, in *CULTURE MATTERS*, *supra* note 35, at 14, 24.

115. *Id.*

116. Patterson, *supra* note 104, at 212.

117. *Id.* at 218.

118. *Id.* at 208 (quoting Ward Goodenough, *Culture: Concept and Phenomenon*, in *THE RELEVANCE OF CULTURE* 93, 97 (Morris Freilich ed. 1989)).

119. *Id.* at 204.

120. Harrison, *Why Culture Matters*, *supra* note 102, at xxviii; *see also* JARED DIAMOND, *GUNS, GERMS, AND STEEL* 417-19 (1997) ("[C]ultural factors and influences . . . loom large. . . . Some of that cultural variation is no doubt a product of environmental variation . . . . A minor cultural factor may arise for trivial, temporary local reasons, become fixed, and then predispose a society toward more important cultural choices . . . .").

121. Patterson, *supra* note 104, at 208 ("[A] cultural explanation does not preclude social causes. Often what's most interesting and useful in any analysis is to identify and disentangle the complex explanatory interplay between cultural and non-cultural factors, an interplay in which both sets of factors can be both independent and dependent in one's causal model.").

122. Daniel Etounga-Manguelle, *Does Africa Need a Cultural Adjustment Program?* in *CULTURE MATTERS*, *supra* note 35, at 65, 75; *see also* DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 117 (1990). In explaining the

North's work on institutions suggests that informal constraints that "come from socially transmitted information [that is] a part of the heritage we call culture" exist and affect institutional development.<sup>123</sup> In this respect, "[c]ultural norms and beliefs can be seen as the deepest level of institution, and thus the same framework can illuminate the role of cultural differences in economic performance."<sup>124</sup> Although some scholars have found cultural differences between the Italian North and South to be at the root of poverty and social pathology in the South,<sup>125</sup> they have also attributed Italy's decision to decentralize

different developments that have taken root in the former colonies of Britain and Spain in the Americas, North noted that "[i]n the former, an institutional framework has evolved that permits the complex impersonal exchange necessary to political stability and to capture the potential economic gains of modern technology. In the latter, personalistic relationships are still key to much of the political and economic exchange." *Id.* Similarly,

[a]lthough formal rules may change overnight as the result of political or judicial decisions, informal constraints embodied in customs, traditions, and codes of conduct are much more impervious to deliberate policies. These cultural constraints not only connect the past with the present and future, but provide us with a key to explaining the path of historical change.

*Id.* at 6.

123. NORTH, *supra* note 122, at 37. For a discussion of New Institutional Economics and how different institutional arrangements or governance structures play a part in determining the cost and benefit associated with the transaction, see Cao, *Looking at Communities and Markets*, *supra* note 85, at 865 n.86. New Institutional Economics is closely associated with Ronald Coase's transaction cost economics. It recognizes that economic actors incur extensive transaction costs, including screening, monitoring, enforcement, and opportunity costs. Given these costs, the type of institutional arrangement adopted by the parties will have an effect on whether these costs will be high or low. See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 15-42 (1985).

124. Christopher Clague & Shoshana Grossbard-Shechtman, *Preface to ANNALS*, Jan. 2001, at 8, 10.

125. See, e.g., ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) [hereinafter PUTNAM, *MAKING DEMOCRACY WORK*]. Putnam found that civic culture made all the difference in northern Italy, where networks of associations and the norms of trust they produce helped overcome collective action problems and made individuals and groups more productive. *Id.* at 181-82. Putnam concluded that:

Success in overcoming dilemmas of collective action and the self-defeating opportunism that they spawn depends on the broader social context within which any particular game is played. Voluntary cooperation is easier in a community that has inherited a substantial stock of social capital, in the form of norms of reciprocity and networks of civic engagement.

*Id.* at 167. Similarly,

[w]here people know one another, interact with one another each week at choir practice or sports matches, and trust one another to behave honorably, they have a model and a moral foundation upon which to base further cooperative enterprises. Light-touch government works more efficiently in the presence of social capital.

ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 345-46 (2000). Social capital refers to "features of social organization, such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions." *Id.* at 167; see also BANFIELD, *supra* note 90, at 85 (describing the people of the Montegrano district in southern Italy as subscribing to a norm of "amoral familis[m]" whereby one should "[m]aximize the material, short-run advantage of the nuclear family; assume that all others will do likewise").

public policy and administration and promote civil society in the 1970s as crucial in the promotion of trust in the South.<sup>126</sup>

Given the relationship between culture and institutions, one might ask whether changing culture may change both institutions and the course of institutional development. Some societies have embarked on culture change. Although Confucian countries, with their emphasis on familial relations and loyalties, tend to be fairly corrupt, political leadership under Lee Kwan Yew has made Singapore one of the least corrupt countries in the world, ranking it in the same league as Denmark, Finland, Sweden, and New Zealand.<sup>127</sup> Germany and Japan, following World War II, went from two of the most militaristic countries in the world to two of the most pacifist.<sup>128</sup>

Japan, in fact, has undergone several periods of self-imposed cultural transformations. When faced with Western military might in the late 1800s, the country embarked on an intensive period of systematic culture change.<sup>129</sup> Known as the Meiji Restoration, the Japanese, realizing they did not compare favorably “with the more progressive powers of the world,”<sup>130</sup> decided to modernize by bringing foreign experts to Japan and sending Japanese agents abroad. This restoration was conducted as a “revolution from above” aimed at modernizing to defend the country from Western threat.<sup>131</sup> The Meiji Restoration has been described as a movement to “learn[ ] the ways of the West in order to reform virtually every aspect of national life.”<sup>132</sup> Japan modeled its military and legal codes and bureaucracy after Germany’s. It undertook systematically to perform the basic functions of government, such as establishing a national postal service, public education for boys and girls, and universal military service. These

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126. PUTNAM, MAKING DEMOCRACY WORK, *supra* note 125, at 181-85.

127. Huntington, *supra* note 35, at xv-xvi.

128. During World War II, Japan, for example, was a country that sent its men on suicide missions with the imperial rescript, “Duty is heavier than a mountain, while death is lighter than a feather.” Norimitsu Onishi, *Japan Heads to Iraq, Haunted by Taboo Bred in Another War*, N.Y. TIMES, Nov. 19, 2003, at A1. By contrast, postwar Japan’s official attitude toward death was markedly different. As the government capitulated to demands of hijackers of a Japan Airlines plane in 1977, the then prime minister explained, “Human life is weightier than the earth.” *Id.* After World War II, Japan’s U.S.-imposed constitution, which prohibits the use of force for the resolution of disputes, has been fervently embraced by the Japanese.

129. Unless otherwise stated, the discussion of Japan’s Meiji Restoration is drawn from Landes, *supra* note 93, at 7-10.

130. Sidney Devere Brown, *Okubo Toshimichi: His Political and Economic Policies in Early Meiji Japan*, 21 J. ASIAN STUD. 183-197 (1962) (quoting Okubo Toshimichi).

131. Tom Ginsburg, *Dismantling the “Developmental State”?: Administrative Procedure Reform in Japan and Korea*, 59 AM. J. COMP. L. 585, 588 (2001).

132. Bill Ong Hing, *Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering*, 8 UCLA ASIAN PAC. AM. L.J. 246, 248 n.16 (2002).

measures, the latter two in particular, were designed to create a new imperial state, to inculcate a sense of nationhood nonexistent during the quarter millennium of Tokugawa rule, and, in the process, “to imbue its subjects with a sense of higher duty to the emperor and country and to link this patriotism to work.”<sup>133</sup> These measures were not solely designed to transform political or economic institutions but rather included a significant cultural component. Japanese schools devoted substantial time to the study of ethics and taught students not just various subjects but also discipline, order, and responsibility. Every school had a picture of the emperor in an effort to achieve national unity and transcend parochial loyalties that characterized the period prior to the Meiji Restoration; on national holidays, throughout the country and at the same time, the same ritual was performed in front of the emperor’s picture.<sup>134</sup>

In other periods throughout its history, Japan has undertaken extraordinary efforts to involve its people in various national cultural projects.<sup>135</sup> The process has been termed “social management” to distinguish it from Western theories of social control and from the Japanese emperor model, emphasizing instead the interactive nature in which Japanese private groups cooperated with a strong, interventionist state to formulate and implement programs to manage society.<sup>136</sup> During the Tokugawa or early modern era, from the 1600s to the mid-1800s, authorities of the shogunate, through “kyoka,” or “moral suasion,” exhorted peasants to “work hard, pay their taxes, and avoid luxury.”<sup>137</sup> This system was passed down to the leaders of the modern Japanese state to embark on “an ongoing, managerial process of persuading or teaching the masses to internalize appropriate values.”<sup>138</sup> Bureaucracies were established to run moral suasion campaigns. Among the more notable include the Imperial Rescript on Education of 1890, designed to catch up with the West by fostering a sense of nation in the masses, calling upon subjects to be loyal to parents and to the emperor, obey the laws, and offer themselves to the state,<sup>139</sup> and the Local Improvement Campaign of 1906 to 1918 to persuade villages and small towns not just to pay taxes

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133. Landes, *supra* note 93, at 10.

134. LANDES, *supra* note 94, at 376.

135. SHELDON GARON, *MOLDING JAPANESE MINDS* 6 (1997).

136. *Id.*

137. *Id.* at 7.

138. *Id.*

139. *Id.* at 8. To foster a sense of nationhood and identification with the central state, the Home Ministry replaced the hamlets’ Shinto shrines with one state-supported shrine per village. *Id.* at 9.

but also to practice frugality and avoid indulgence.<sup>140</sup> In the early 1920s, the Ministry of Education began the first of a successive series of “daily life improvement campaigns” to introduce methods of “scientific budgeting, better nutrition and hygiene, and avoiding wasteful spending on festivals, alcohol, and tobacco.”<sup>141</sup> The Home Ministry, whose officials considered themselves “shepherds of the people”<sup>142</sup> ran welfare programs by coordinating private relief efforts while trying to reform the norms and habits of the poor by cultivating the spirit of “‘self-management’ . . . a commitment to diligence, thrift, and other good habits so that individuals and families would avoid relying on public assistance.”<sup>143</sup> These various campaigns were run by either the Home Ministry or the Ministry of Education,<sup>144</sup> which received reports from district chiefs containing detailed village-by-village information on time devoted to funerals and weddings, and in the latter case, the numbers of attendees, the type of ceremony, and the food served.<sup>145</sup>

These campaigns launched thousands of hortatory lectures by officials and community leaders of women and youth groups, religious organizations, and other civic associations. Methods used to supplement moral suasion included motion pictures, handbills distributed to households, and posters on public buildings exhorting saving and frugality. In addition to welfare and thrift programs, the moral suasion campaigns also took on three other programmatic areas — religion, prostitution, and women’s integration into civic life.<sup>146</sup> These efforts were cooperative endeavors between the state and outside groups to push the state toward “middle-class commitments to the modernization of popular beliefs, daily habits, and gender

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140. *Id.*

141. *Id.* at 11. The elimination of wasteful spending is generally viewed in development economics as an important step in capital formation and accumulation. In *Economic Development with Unlimited Supplies of Labour*, Arthur Lewis asked a question that remains central in the field today: how to induce capital formation and how to transform surplus capital into investment capital. See W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labour*, in PARADIGMS IN ECONOMIC DEVELOPMENT: CLASSIC PERSPECTIVES, CRITIQUES, AND REFLECTIONS 68, 75 (Rajani Kanth ed., 1994). To the extent that the Japanese state successfully convinced the people to not waste money on non-economically productive activities such as funerals, weddings and other feasts, this strategy fits squarely within the standard prescriptions for spurring economic growth. The tendency in traditional economies is to spend surplus capital on “tombs, country houses, temples,” *id.* at 73. The key is to “tempt capital into productive channels rather than into the building of monuments,” *id.*, or on funerals and weddings and other lavish ceremonies.

142. *Id.* at 16.

143. *Id.* at 7.

144. *Id.* at 15-16.

145. *Id.* at 12-13.

146. *Id.* at 15-16.

relations.”<sup>147</sup> Throughout the twentieth century, the Japanese middle class began to regard the state as a progressive force and through policy boards, community groups, and civic forums, embarked on various forms of norm or culture change — eliminating the “evil customs of the past,”<sup>148</sup> introducing “‘scientific’ methods of child rearing to rural and lower-class women,” joining with “Western-educated Protestant reformers . . . to teach the poor the virtues of hard work, savings, and self-help” — all with the aim “to improve the diet, hygiene, work habits, housing, consumption patterns, and ritual life of the Japanese people.”<sup>149</sup> To catch up with the West, the Japanese government

energetically disseminated an “emperor-system ideology” to the public, inculcating patriotism, loyalty to the emperor, and the virtues of diligence and thrift. The state did so by utilizing a highly centralized set of institutions: the national school system, the military, a network of State Shinto shrines, and numerous hierarchically organized associations<sup>150</sup>

while at the same time channeling the “Japanese people into active participants in the state’s various projects.”<sup>151</sup> Indeed, “[t]he cultural values underlying Japan’s successful strategy in catching up with the West were nurtured and manipulated by the elites in the interest of the developmental state.”<sup>152</sup>

In recent years, some nationals of Latin-American, African, and Asian countries have pushed for a “cultural reorientation”<sup>153</sup> of their own countries. There are suggestions from those from the economically developing regions<sup>154</sup> that certain values are “development-prone” and “development-resistant,”<sup>155</sup> and efforts are underway to

147. *Id.* at 19.

148. *Id.* at 20 (quoting the Meiji regime’s Charter Oath of 1868).

149. *Id.*

150. *Id.* at 5.

151. *Id.* at 6.

152. Charlotte G. O’Kelly, *ANNALS*, Sept. 1996, at 176, 177 (book review).

153. Etounga-Manguelle, *supra* note 122, at 66.

154. To the extent that evaluations of culture and the movement for culture change come from those “within” the culture, it may alleviate the concern that the push for culture change is an act of cultural imperialism:

One reason is that we are chary of intervening in a culture to change its characteristics, assuming we knew how. At a time when we think of all cultures as worthy of equal respect, what justification would we have to intervene — whether that intervention is public or private — and change a cultural feature that we think limits economic development?

Glazer, *supra* note 110, at 222.

155. Mariano Grondona, an Argentinean scholar, lists twenty cultural factors and evaluates each to determine whether it is favorable or resistant to economic development. Although neither the development-prone nor development-resistant typology, with the twenty enumerated values, exists in the real world, Professor Grondona states that the



identify systematically, in Latin America, values and attitudes that are an obstacle to economic progress and to evaluate how such attitudes are reflected in the ways six elite groups — the politicians, the military, businesspeople, clergy, intellectuals, and leftists — express themselves.<sup>156</sup> Although the culture issue has been explored in different periods of Latin-American history,<sup>157</sup> in recent years it has resurfaced with increased vehemence due to the collapse of “dependency theory.”<sup>158</sup> As the celebrated Peruvian writer Mario Vargas Llosa observed, reforms, economic or otherwise, in Latin America cannot be successful

unless they are preceded or accompanied by a reform of our customs and ideas, of the whole complex system of habits, knowledge, images and forms that we understand by “culture.” The culture within which we live and act today in Latin America is neither liberal nor is it altogether democratic. We have democratic governments, but our institutions, our reflexes and our mentality are very far from being democratic. They remain populist and oligarchic, or absolutist, collectivist or dogmatic, flawed by social and racial prejudices, immensely intolerant with respect to political adversaries, and devoted to the worst monopoly of all, that of the truth.<sup>159</sup>

This idea that “economic development is a cultural process”<sup>160</sup> has gained intellectual ground in Latin America in recent years. That is to say, “[t]he paradox of economic development is that economic values are not enough to ensure it. Economic development is too important to be entrusted solely to economic values. The values accepted or

categories are merely “ideal types, or mental constructs, that facilitate analysis because they offer two poles of reference that help us locate and evaluate a given society.” Mariano Grondona, *A Cultural Typology of Economic Development*, in *CULTURE MATTERS*, *supra* note 35, at 44, 53 (emphasis omitted).

156. Carlos Alberto Montaner, *Culture and the Behavior of Elites in Latin America*, in *CULTURE MATTERS*, *supra* note 35, at 56, 57-58.

157. For a discussion of the various efforts in Latin America toward effectuating changes in values and attitudes, see Lawrence E. Harrison, *Promoting Progressive Cultural Change*, in *CULTURE MATTERS*, *supra* note 35, at 296, 297-99 [hereinafter, Harrison, *Promoting Progressive Cultural Change*] (discussing works by eminent writers from Venezuela, Argentina, Chile, Nicaragua, Spain, Peru, among others, that question whether traditional Ibero-American values have a retarding effect on economic change in the region).

158. Dependency theory generally holds that, given the structural power system endemic to the international economic framework, developing countries are consigned to a perpetual position of dependency on the industrialized, economically advanced country. See Lan Cao, *Law and Economic Development: A New Beginning?* 32 *TEX. INT'L L.J.* 545, 551-54 (1997) (reviewing *LAW AND DEVELOPMENT* (Anthony Carty ed., 1992)).

159. Harrison, *Promoting Progressive Cultural Change*, *supra* note 157, at 297-98 (quoting Claudio Véliz, *THE NEW WORLD OF THE GOTHIC FOX: CULTURE AND ECONOMY IN ENGLISH AND SPANISH AMERICA* 190-91 (1994) (quoting Mario Vargas Llosa, *América Latina y la Opción Liberal*, in *EL DESAFÍO NEOLIBERAL: EL FIN DEL TERCERMUNDISMO EN AMÉRICA LATINA* (Barry Levine ed. 1992))).

160. Grondona, *supra* note 155, at 46.

neglected by a nation fall within the cultural field.”<sup>161</sup> Having the right set of cultural values will allow a nation to resist temptations that are appealing in the short term but are detrimental to long-term economic development.<sup>162</sup>

The process of culture change is not limited to Latin America. In a provocative article, a Cameroonian scholar questions the African mindset<sup>163</sup> that exalts the past rather than the future,<sup>164</sup> views authority and dominance as a status of birth rather than a position that could be acquired,<sup>165</sup> allows the community to subordinate the individual,<sup>166</sup> celebrates conviviality to an excess and rejects open conflict,<sup>167</sup> believes in sorcery and witch doctors, and “attributes very little importance . . . to the financial and economic aspects of life.”<sup>168</sup> Although African culture, according to him, is “one of the most — if not *the* most — humanistic cultures in existence,”<sup>169</sup> “peaceful cultural revolutions”<sup>170</sup> must be undertaken “to change Africa’s destiny.”<sup>171</sup> One route through which culture change can be accomplished is through the educational system, by “asserting the absolute preeminence of education, by suppressing the construction of religious structures and other palaces to the detriment of schools, and by modifying the content of the curricula, accenting not only science but

161. *Id.*

162. *Id.*

163. Despite the immense “diversity — the vast number of subcultures” in Africa, the author believes that it is possible to generalize about African culture because “there is a foundation of shared values, attitudes, and institutions that binds together the nations south of the Sahara, and in many respects those to the north as well.” Etounga-Manguelle, *supra* note 122, at 67.

164. This means an absence of “dynamic perception of the future.” *Id.* at 69.

165. This means that “[i]n Africa, you must be born dominant; otherwise, you have no right to power except by coup d’état.” *Id.* at 70.

166. One of the byproducts of this norm is that “[t]he concept of individual responsibility does not exist in our hyper-centralized traditional structures. In Cameroon, the word ‘responsible’ translates as ‘chief.’” *Id.* at 71. Another byproduct is that, without the notion of individual responsibility, “those that occupy an intermediate position in the hierarchy” are held in contempt, as it is understood that the one to solve a problem is only the minister himself. *Id.* at 71.

167. This means “[f]riendship comes before business” and differences, even legitimate ones, are suppressed in order to maintain social harmony. *Id.* at 72 “In some African societies, the avoidance of conflict means that justice cannot be rendered in the daytime.” *Id.*

168. *Id.* This means that “[o]ther than some social groups like the well-known Bamileke of Cameroon or the Kamba of Kenya, the African is a bad *H. economicus*.” *Id.*

169. *Id.* at 75. African humanistic values include “the solidarity beyond age classification and social status; social interaction; the love of neighbor, whatever the color of his skin; the defense of the environment, and so many others.” *Id.*

170. *Id.* at 76.

171. *Id.* at 75.

especially the necessary changes of the African society."<sup>172</sup> The African school could emphasize critical thinking, dissent, the importance of creating "businesspeople, and therefore job creators," and transforming the role of women.<sup>173</sup> To transform the economic culture, "[w]e must accept profit as the engine of development."<sup>174</sup>

Since the Asian currency crisis of 1997, there is a similar effort to change "the traditionally particularistic personal relationships that have dominated the East Asian economies."<sup>175</sup> For example, the tradition of taking a "long view" meant many East Asian businesses neglected to monitor the profitability of enterprises. "The supposed virtue of such long-term perspectives was reinforced by the cultural propensity to see great virtue in delayed gratification and the willingness to suffer in the short run in the expectation that in time there would be greater rewards for steadfastness."<sup>176</sup> Such values were useful at the initial stages of development but created problems at the later stages. Contrast this with the Western practice of quarterly profit-and-loss statements to provide managers and investors with information about whether capital is being allocated efficiently.

Such efforts to effectuate change resemble the Japanese efforts at social management and have centered on educational reform. For example, after determining that the primary difference between Japan and Peru was that Japanese children learned progressive values and Peruvian children did not, a Peruvian businessman established the Institute of Human Development in 1990 to promote the "Ten Commandments of Development: order, cleanliness, punctuality, responsibility, achievement, honesty, respect for the rights of others, respect for the law, work ethic, and frugality."<sup>177</sup> In the past decade, over two million Peruvian students have participated in Institute-sponsored courses. The Institute's works are being adopted outside of Peru as well, by Nicaragua's minister of education in his own educational reform projects and by Mexico's prestigious Monterrey Institute of Technology and Higher Studies.<sup>178</sup> Other civic organizations in several Latin-American countries focus on curricular changes in the public-education system to promote wholesale changes in certain cultural attributes.<sup>179</sup>

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172. *Id.* at 76.

173. *Id.*

174. *Id.* at 77.

175. Harrison, *Why Culture Matters*, *supra* note 102, at xxiii.

176. Pye, *supra* note 93, at 253.

177. Harrison, *Promoting Progressive Cultural Change*, *supra* note 157, at 303.

178. *Id.*

179. *Id.* at 304-05.

Lest one too blithely disparages efforts to institute change through the educational system, it is important to note that scholars have long studied how “education constructs culture.”<sup>180</sup> The works of Pierre Bourdieu demonstrate “the central role that schools have in both changing and in reproducing social and cultural [structures] . . . from one generation to the next.”<sup>181</sup> As Bourdieu explains: “[i]f it be accepted . . . that culture . . . is a common code enabling all those possessing that code to attach the same meaning to the same words, the same types of behavior and the same works,” then “it is clear that the school . . . is the fundamental factor in the cultural consensus in as far as it represents the sharing of a common sense which is the prerequisite for communications.”<sup>182</sup> Cultural traditions may also be constructed — a process Eric Hobsbawm describes as “invented tradition,” defined as “a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past.”<sup>183</sup> Again, education would play a vital role in the reshaping of such cultural traditions — whether to promote frugality, trust, delaying gratification, sacrificing for the national interest, the time value of money — by adopting “a process of formalization and ritualization”<sup>184</sup> and “organizing cultural productions,”<sup>185</sup> as undertaken by Japan during the Meiji Restoration.

Although the degree of the state’s involvement may vary, in terms of “official encouragement, outright subsidies, and governmental coordination,”<sup>186</sup> there is currently a concerted effort in some developing countries to engage in culture change. This process includes the construction of social capital through educational reform and various forms of civic participation which resemble the earlier

180. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 974 (1996).

181. *Id.* at 973 (alteration in original) (quoting Richard Harker, *Bourdieu — Education and Reproduction*, in AN INTRODUCTION TO THE WORK OF PIERRE BOURDIEU: THE PRACTICE OF THEORY 86 (Richard Harker et al. eds., 1990)).

182. *Id.* at 973-74 (second and third omissions in original) (quoting Pierre Bourdieu, *Systems of Education and Systems of Thought*, in READINGS IN THE THEORY OF EDUCATIONAL SYSTEMS 159, 161 (Earl Hopper ed., 1971)); see also *id.* at 975 (describing how education is a vehicle for government norm management). Lessig states that “[e]ducation thus proceeds (1) through a practice, (2) directed by an authority, (3) that coerces — without appearing to coerce.” *Id.*

183. *Id.* at 978 (quoting Eric Hobsbawm, *Introduction: Inventing Traditions*, in THE INVENTION OF TRADITION 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1983)).

184. *Id.* (quoting Hobsbawm, *supra* note 183, at 4).

185. *Id.* at 982 (quoting Mary Crain, *The Social Construction of National Identity in Highland Equador*, 63 ANTHROPOLOGY Q. 43, 56 (1990)).

186. GARON, *supra* note 135, at 235.

efforts of the Japanese. One could imagine other possibilities, even those that conjure the “image of a meaning manager, or meaning architect, who has identified a social meaning that is to be transformed, and must find the techniques to achieve this transformation.”<sup>187</sup> Post-Soviet Russia or Malaysia, for example, could change the meaning of what it is to be a Russian or a Malaysian through the technique of “tying,” as Lawrence Lessig puts it, by associating one act with “another social meaning that conforms to the meaning that the architect wishes the managed act to have.”<sup>188</sup> Through education and coordination with other civic organizations, these governments could promote an inclusive understanding of citizenship and tie the Chinese and Jews to the Malay and Russian identity respectively by emphasizing the long history of both ethnic groups in Russia and Malaysia and their contribution to the economy through the government’s wealth taxation for redistributive purposes.<sup>189</sup> If what it means to be a Malaysian or a Russian is socially constructed and if “[s]ocial meanings are collective goods, and collective action is needed (sometimes, at least) to change collective goods,”<sup>190</sup> public education may be necessary to alter such social meanings. The use of rituals may also help by promoting the desired form of tyings<sup>191</sup> because “rituals serve to coordinate individuals in support of a new meaning.”<sup>192</sup> Thus when the Japanese government wished to inculcate a sense of national identity, it resorted to various emperor-centric rituals and mandated that they be performed daily in school.<sup>193</sup> Similar political rituals have been used in the United States, as when West Virginia required children to stand and salute the flag in school.<sup>194</sup> Development could also be tied to certain attributes, for example, frugality or a future orientation, with all Malaysians exhorted to adopt and internalize such attributes because they are Malaysian attributes. The government would avoid tying such attributes to the Chinese and avoid telling the Malays to act “more Chinese,”<sup>195</sup> as it has done — such tying would merely identify these attributes as intrinsically Chinese and hence foreign.

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187. Lessig, *supra* note 180, at 1008.

188. *Id.* at 1009.

189. The Soviet Union itself embarked on a self-conscious campaign to discourage the use of motorcycle helmets — made in Western Europe — by tying such use to the stigma of imperialism. Cartoons vilifying helmet wearers appeared in newspapers, and soon Russians dared wear helmets only at night to avoid detection. *Id.* at 965.

190. *Id.* at 1022.

191. *Id.* at 1013-14.

192. *Id.* at 1016.

193. *See supra* text accompanying notes 134, 150.

194. Lessig, *supra* note 180, at 1014.

195. *See supra* note 101.

Tying as a technique to produce or alter social meanings may transfer positive as well as negative associations. Indeed, politicians in Malaysia and post-Soviet Russia have sought to vilify the Chinese and Jews respectively as outsiders whose wealth ought to be “returned” to the true indigenous nationals. In these demagogic campaigns, the government tied Chinese to *not* Malaysian, or Jews to *not* Russian. Government efforts to change social and cultural meanings may of course be viewed pejoratively as a troubling “industrial policy for norm generation” resulting in “boundless and oppressive state efforts to manipulate social norms.”<sup>196</sup> They might seem all the more “chilling”<sup>197</sup> when undertaken by liberal states that do not as a matter of course engage in propaganda or brainwashing. Yet, as some have noted, such efforts may be more commonly pursued by governments, including the United States, than one may initially realize.<sup>198</sup> The former Soviet Union is another example of “‘consciously shaped and directed’ cultures”<sup>199</sup> whereby “rituals served as an ‘instrument of cultural management enabling political elites . . . to gain acceptance for a general system of norms . . . congruent with their interpretation of Marxism-Lenism.’”<sup>200</sup> In a manner reminiscent of the works performed by Japan’s Home Ministry during the Meiji Restoration, the Soviets, too, established “[r]itual specialists . . . ‘local organizers and administrators of the Party, the Komsomol, the trade unions and the local soviet’”<sup>201</sup> to engage in social and cultural reconstruction, often through “an extensive ‘advertising’ campaign.”<sup>202</sup> “Governments

196. Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2057, 2060 (1996).

197. Lessig, *supra* note 180, at 1008, 1016.

198. Even in the United States, for example, despite proclamations that the government does not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *id.* at 945 (quoting *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327-28 (1985) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))), the U.S. government, as well as governments elsewhere, regularly:

[A]ct to construct the social structures, or social norms, or . . . the social meanings that surround us. For these social meanings are what is orthodox. They constitute what is authority for a particular society, or particular culture. To the extent that they are built, or remade, or managed by government, then to that extent government is ‘prescribing’ the orthodox.

*Id.* at 947 (emphasis omitted). One example of government transformation of norms for progressive purposes is the Civil Rights Act, which altered the cultural landscape by providing a cultural and legal safe harbor for businesses that served black customers; by making discrimination illegal, the law allowed a business who served blacks to be viewed as doing so in order to obey the law, not necessarily to favor blacks. *Id.* at 966.

199. *Id.* at 983 (quoting CHRISTEL LANE, *THE RITES OF RULERS: RITUAL IN INDUSTRIAL SOCIETY — THE SOVIET CASE I* (1981)).

200. *Id.* (omissions in original) (quoting LANE, *supra* note 199, at 25).

201. *Id.* at 984 (quoting LANE, *supra* note 199, at 26).

202. *Id.* at 985 (quoting LANE, *supra* note 199, at 50).

trade on standing social meanings to advance state ends,<sup>203</sup> which have ranged, in the United States, from promoting “family values” to exclude homosexuals from social integration to, in the former Yugoslavia, constructing race and ethnic identities to build up nationalism.<sup>204</sup> And depending on the state’s efforts to produce and reshape social and cultural norms, this effort may raise the specter of “thought control,”<sup>205</sup> especially if the government allows few other channels for competing value systems, or if the government backs up its agenda with coercive forms of state action, as in North Korea or Cultural Revolution China.

Given the primacy of culture change in this Section, it is important to clarify what it is I am *not* arguing. I am clearly not claiming “that cultural managers could construct any culture they wish or that ‘given the right social context, *any* social activity can be turned into a ritual at the whim of ritual specialists.’ ”<sup>206</sup> “Rituals, and the reality they construct, depend on the values of the parties to that ritual.”<sup>207</sup> I am also not arguing that “backward” cultures are the universal cause of economic underdevelopment. But I am suggesting some relationship between culture and economic productivity — the degree to which a relationship exists will depend the particularities of history, economics, and politics. Acknowledging such a link, however, does not mean that culture is used to “deflect[] attention from other factors which might provide an equally compelling explanation of underdevelopment.”<sup>208</sup> The World Trade Organization and other institutions of the international economic system may in fact be structurally problematic, as evidenced by the exclusion from WTO rules, until recently, of textiles and agriculture, two areas where developing countries have a comparative advantage. Exploring the relationship between culture and economics should in no way detract from efforts to expose the structural biases against poor countries or promote a “colonialist ideology that views the North as rightly and naturally dominant over the South”<sup>209</sup> or the South as an “Orientalized Other” to the North. The point is not that some cultures are intrinsically better than others; it is rather simply that certain attitudes,

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203. *Id.* at 957.

204. *Id.*

205. *Id.* at 945 (quoting *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328 (1985)).

206. *Id.* at 986 (citation omitted) (quoting LANE, *supra* note 199, at 14).

207. *Id.*

208. Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 8 (1999). I thank Professor Thomas for sharing her thoughts on culture and economic development with me.

209. *Id.* at 6.

inclinations, norms, and behaviors impede or promote economic growth and if a group or nation so chooses, it could take steps toward promoting culture change.

If, however, a country or ethnic group is unwilling, for whatever reason, to engage in culture change, there are other options for addressing extreme imbalances in ethnic wealth concentration besides affirmative action in favor of ethnic majorities and discrimination against ethnic minorities. Aside from the normative question of whether it is just to discriminate against ethnic minorities because they are “too” rich or “too” economically powerful, government actions that single out an ethnic minority and perpetuate the perception that this minority is an outsider whose advancement needs to be restrained simply are not in the country’s long-term interest — if for no other reason than the strategic reason that the ethnic minority is the group with the much-needed economic as well as social capital.<sup>210</sup> Ethnically biased corrective remedies are likely to highlight ethnic differences, with the government actively dividing the country, at the very least psychologically, into ethnic insiders and ethnic outsiders, making ethnic consciousness a perpetual source of division in the national psyche.<sup>211</sup>

### B. *Market Concentrations and Ethnic Stratification*

Despite the prevailing view in the New Institutional Economics literature<sup>212</sup> that market-dominant ethnic minorities are merely a symptom of institutional underdevelopment that would disappear once institutional reforms are undertaken to reduce reliance on personalized exchanges,<sup>213</sup> there is strong, credible evidence the phenomenon would persist. Several factors are important in the analysis of why market-dominant minorities will continue to exist under free-market conditions. First, as already discussed, certain ethnic groups are advantaged by their access to social-capital networks that cushion such groups from external discrimination; state discrimination may prompt a group to turn to entrepreneurship in their own ethnic economies, causing an increase in the group’s social-capital endowment and making its members compete more fiercely

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210. When Malaysia was hit by an economic crisis in 1998, Malaysian anti-Chinese policies had to be modified and the government had “to sacrifice programs and policies once considered unassailable.” Joseph Kahn, *Ethnic Chinese in Malaysia Can Buy Big Equity Stakes*, N.Y. TIMES, Feb. 25, 1998, at D4.

211. Van Alstyne, *supra* note 14, app. & epilogue at 1556-64.

212. For a general overview of New Institutional Economics, see Cao, *Looking at Communities and Markets*, *supra* note 85, at 865-74.

213. Davis et al., *supra* note 14, at 334-35.



and efficiently.<sup>214</sup> Second, certain ethnic groups may continue to benefit because of discrimination in their favor,<sup>215</sup> as may be the case involving whites in South Africa, without triggering the mechanisms for market correction,<sup>216</sup> especially if there are barriers to entry and little competition,<sup>217</sup> as may be the case for many developing-country markets. And third, persistent ethnic disparities may be “locked in” as a result of monopoly power or anticompetitive conditions. This Section focuses on the third explanation.

A substantial body of scholarship argues that first producers who enjoy increasing returns gain a certain self-reinforcing and almost insurmountable advantage over other producers.<sup>218</sup> Markets with positive feedback loops allow those with an initial advantage to feed that advantage back onto itself through circular market mechanisms and market networks,<sup>219</sup> which “create increasing returns because of the potential for connecting to other users through a common standard.”<sup>220</sup> Initial advantages may result in path dependence and the establishment of a prevailing standard, and as supporting institutions are designed around the network standard, it becomes entrenched.<sup>221</sup>

214. *Id.* at 345, 353.

215. *Id.* at 340-45 (discussing the conditions under which “discrimination may increase the relative income of an ethnic group that is a numerical minority”); *id.* at 342.

216. Gary Becker argued that the market will drive out discriminating practices and institutions because indulgence in a “taste” for discrimination is costly for the discriminator. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 43-45 (2d. ed. 1971). To explain why this might not occur, scholars have pointed to market irregularities to explain the intransigence of racial disparities. See, e.g., John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2596 (1994) (discussing how transaction costs may interfere with market functions); McAdams, *supra* note 85, at 1046-48 (arguing that market forces are not strong enough to overcome group-based social norms aimed at furthering group status); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, in *FREE MARKETS AND SOCIAL JUSTICE* 151, 153-54, 157-58 (1997).

217. Davis et al., *supra* note 14, at 342.

218. *Id.* at 348-51.

219. An example is the computer-related market. The dominant operating system, currently Windows, attracts software authors to write Windows-compatible programs, attracting future users to choose Windows because it offers the largest array of available software, reinforcing Windows' lead, and the cycle continues. Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 732-33 (2000).

220. *Id.* at 733. The Windows network would consist of software writers, computer users, and computer manufacturers.

221. *Id.* at 733-34, 742-53. Douglass North describes how a network structure of institutions may be “locked in” by a set of rules that govern their interactions. Institutional change would be impeded and influenced by “(1) the lock-in that comes from the symbiotic relationship between institutions and the organizations that have evolved as a consequence of the incentive structure provided by those institutions and (2) the feedback process by which human beings perceive and react to changes in the opportunity set.” NORTH, *supra* note 122, at 7.

In the process, barriers to entry become high and initial advantages become durable.<sup>222</sup>

The market lock-in analogy has been used to explore how racism in the United States functions to foreclose competition and creates barriers to entry.<sup>223</sup> Scholars using antitrust and monopoly theory have also described racism as a form of racial cartel that engages in predatory behaviors for the benefit of members.<sup>224</sup> Like cartels that collude to bar the entry of new competitors, discriminatory groups developed norms to exclude nonwhites and punished defectors by ostracizing or boycotting them.<sup>225</sup> These theories were developed with the U.S. experience in mind, but may be general enough to apply to cases in developing countries. Ethnically based trading networks, initially formed to aid economically marginal minority groups, may have grown “impenetrable”<sup>226</sup> to outsiders, as the once-marginal group becomes market dominant and continues to prefer members in credit, hiring, and business-transfer decisions, including decisions to engage in ethnically based “vertical and horizontal integration”<sup>227</sup> that allow coethnic firms to “suck value out of each stage of a

222. See, e.g., Thomas A. Piraino, Jr., *An Antitrust Remedy for Monopoly Leveraging by Electronic Networks*, 93 NW. U. L. REV. 1, 3 (1998) (describing the durability of feedback-loop monopolies in certain economic sectors).

223. Roithmayr, *supra* note 219, at 734-35.

224. Robert Cooter writes:

Just as producers collude to fix prices and obtain monopoly profits, so social groups sometimes collude to obtain the advantages of monopoly control over markets. To enjoy the advantages of monopoly, a social group must reduce competition from others by excluding them from markets. In this way, the more powerful social group can shift the cost of segregation to its victims, and more costs besides, so that the victims of discrimination are worse off and the discriminators are better off.

Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 150 (1994) [hereinafter Cooter, *Market Affirmative Action*]; see also McAdams, *supra* note 85, at 1046-48 (discussing how coercive norms police and deter defectors from racial cartels not for economic but for social status).

225. Cooter, *Market Affirmative Action*, *supra* note 224, at 153-57.

226. Davis et al., *supra* note 14, at 348 (quoting MURRAY WEIDENBAUM & SAMUEL HUGHES, *THE BAMBOO NETWORK* 29 (1996)).

227. Cao, *The Diaspora*, *supra* note 75, at 1582. Light and Gold write:

*Horizontal integration* involves ethnic business owners cooperating to choose store location, avoid competitive pricing, pool information, and engage in collective buying. *Vertical integration* occurs when a whole package of business services — ranging from credit, wholesale goods, and maintenance to parking, transportation, real estate, manufacturing, and import-export concessions — are provided by coethnics.

LIGHT & GOLD, *supra* note 41, at 122. Note that sociologists such as Light and Gold use the terms “horizontal integration” and “vertical integration” to convey a different meaning than that understood in antitrust circles.

product's movement toward the market, losing little or no value to non-coethnic firms."<sup>228</sup>

Whether due to intra-ethnic preferences and networks, vertical and horizontal integration, or non-ethnic reasons, "[w]here productive activity is characterized by increasing returns to scale, the first producers to attain the level of output at which increasing returns begin will obtain a potentially insurmountable advantage over other producers."<sup>229</sup> If these first producers are concentrated along ethnic lines, the likely result is the perpetuation of the ethnic group's market dominance.<sup>230</sup>

Market conditions in developing countries may enhance the likelihood that productive activities will be characterized by increasing returns to scale.<sup>231</sup> Due to underdevelopment in social and infrastructural services, for example, private firms cannot rely on the state for electricity, telecommunications, or training but must instead purchase their own; because the costs are high, large firms will be advantaged because they can likely obtain these goods and services at a lower average cost.<sup>232</sup> Other reasons, such as a nontransparent bureaucracy, poor accounting standards, and weak formal mechanisms for information collection and contract enforcement, all tend to give advantages to large, established firms with more resources to establish and maintain the needed political contacts, obtain financing, or provide collateral.<sup>233</sup> Thus, "increasing returns to scale are prevalent in developing economies [and are] consistent with the well-known fact that large business groups dominate many developing economies."<sup>234</sup>

This tendency is likely to result in a "self-reinforcing phenomenon."<sup>235</sup> If an ethnic group takes an early lead in the production of certain goods and services, this initial advantage results in group capture of such production where "production in the society is characterized by increasing returns to scale."<sup>236</sup> Members of the less productive group may also be discriminated against regardless of their

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228. Cao, *The Diaspora*, *supra* note 75, at 1582 (quoting LIGHT & GOLD, *supra* note 41, at 12-13).

229. Davis et al., *supra* note 14, at 348; *see also* John W. Berresford, *Mergers in Mobile Telecommunications Services: A Primer on the Analysis of Their Competitive Effects*, 48 FED. COMM. L.J. 247, 295 n.180 (1996) (defining increasing returns to scale as "when the average cost of producing a product or service falls as the quantity of the product or service produced increases").

230. Davis et al., *supra* note 14, at 348.

231. *Id.*

232. *Id.* at 348-49.

233. *Id.* at 349.

234. *Id.*

235. *Id.* at 350.

236. *Id.*

actual productivity due to imperfect information,<sup>237</sup> discouraging them from investing in necessary skills if they believe such investment would be fruitless in the face of discrimination.<sup>238</sup>

Against such background conditions, certain standard remedies are available to address ethnic stratification, including investing in a transparent legal regime to lower the costs of screening, monitoring, and enforcing contracts to encourage established businesses to trade with members of the non-market-dominant ethnic group, or establishing credit bureaus to provide credit to the less economically productive group. In the following section, I explore how competition laws may break up market concentrations, enhance competition, and reduce barriers to entry in an ethnically neutral manner.

### 1. Antitrust

There are currently, at least in the United States, two competing views about the objectives and scope of antitrust policy. One view asserts that antitrust has traditionally reflected a distrust of concentrated economic power because market concentrations are equated with lessened competition, inter-firm collusion, higher prices, exploitation of consumers, political domination, and squeezing out of small businesses.<sup>239</sup> Scholars who espouse this view claim that this vision of antitrust has for years been reflected in Supreme Court decisions declaring that “Congress sought to prevent industrial concentration for social, political, and economic reasons.”<sup>240</sup> Antitrust was also concerned about preserving diversity and this concern was appropriately reflected in merger injunctions and laws against vertical

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237. *Id.*

238. *Id.* at 351.

239. Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981, 983 (1986) [hereinafter Fox, *Monopolization and Dominance*]; Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust — Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 942-43 (1987).

240. Fox & Sullivan, *supra* note 239, at 942-43 & n.38 (citing to *United States v. Von's Grocery Co.*, 384 U.S. 270, 277-78 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-63 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23, 328-34 (1962)). In the 1960s and 1970s, efforts to deconcentrate markets were not opposed, except when the target firms had expanded through natural, internal growth and not through abuse of monopoly or oligopoly power. Fox & Sullivan, *supra* note 239, at 943-44.

restraints.<sup>241</sup> These concerns reflect distrust of concentrated power, preference for diversity, and “opportunity for the unestablished.”<sup>242</sup>

The second view, referred to as the Chicago School of antitrust, rejects non-economic factors such as diversity or social welfare and focuses instead on consumer welfare and efficiency concerns.<sup>243</sup> Chicago School scholarship sets out to demonstrate that certain practices viewed with suspicion by many in the first camp, such as tying arrangements and vertical integration, have wealth and efficiency effects.<sup>244</sup> Overblown concerns about market dominance and monopolization have meant a failure to realize that many forms of joint ventures (other than naked-price and market-allocation agreements) may be beneficial.<sup>245</sup> For the most part, Chicago School scholars believe that markets are more vibrant and robust than generally thought and that they tend toward a competitive equilibrium for the most part without government intervention or judicial efforts, which are likely to be inept and counterproductive. This is because effective competition requires fewer competitors than generally believed and, even if competition is not presently sufficient, any attempts at monopoly profits,<sup>246</sup> output restrictions,<sup>247</sup> or predatory

241. Fox & Sullivan, *supra* note 239, at 944. For a hostile view toward vertical integration, see ARTHUR ROBERT BURNS, *THE DECLINE OF COMPETITION* 432 (1936) (claiming that “[v]ertical integration may diminish the responsiveness of the firm to changes in knowledge of methods of production”).

242. Fox & Sullivan, *supra* note 239, at 944. These scholars could find support for their position in the Supreme Court’s statement that the Sherman Act is the “Magna Carta of free enterprise.” *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

243. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 3-11, 81-89, 107-15 (1978). Bork argues in favor of efficiency and maximization of consumer welfare and states that consumer welfare should be the “exclusive” goal of antitrust. *Id.* at 61; see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 100-113 (2d ed. 2000) (arguing in favor of an efficiency-based antitrust law and against the inclusion of populist antitrust philosophy of the 1960s that protected inefficient businesses; economic efficiency is the paramount consideration); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 18-22 (1976); William H. Page, *Optimal Antitrust Penalties and Competitors’ Injury*, 88 MICH. L. REV. 2151, 2151-56 (1990).

244. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986) [hereinafter Easterbrook, *Workable Antitrust Policy*]; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-33 (1979). For example, Chicago scholarship denounced the leverage theory of tying, which condemned tying on the grounds that a firm with one monopoly in the tying product could leverage this monopoly to create a second monopoly in the tied product, allowing it to earn two monopoly profits instead of one. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 10.6a (2d ed. 1999).

245. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 373 (1966).

246. Monopolies are viewed “not as the existence of a single seller but as freedom from the threat of entry, typically as the result of a state-granted privilege.” William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 16 (1991) [hereinafter Page, *Ideological Conflict*].

pricing will be impeded by new entry, assuming the presence of an efficient capital market.<sup>248</sup> Cartels also will not be sustainable because of the inherent pressures on members to defect.<sup>249</sup> Contrary to populist concerns, the Chicago School believes that government interventions should be limited to practices such as naked price fixing or market division. More aggressive intervention, particularly intervention aimed at advancing non-economic values, bans practices that cannot harm consumers and therefore destroy socially beneficial cooperation.<sup>250</sup>

Which view is correct, either for the United States or for developing countries, is beyond the scope of this Review. Different countries may at different stages choose and emphasize different objectives deemed most suitable for them given their history, culture, and social or market conditions. More than ninety countries have competition laws either already in place or in draft.<sup>251</sup> There is no consensus in the world antitrust community as to what constitutes “good” versus “bad” antitrust law.<sup>252</sup> There is diversity in antitrust laws even among advanced, industrial economies, for example, between the European Union and the United States.<sup>253</sup> In many

247. The Chicago School is critically concerned with market power if it means power to reduce output artificially, that is, by raising price above cost by a significant amount for a significant period of time without losing customers. Consumer welfare is maximized when output decisions are subject to competitive pressures that push price down to marginal cost (including of course a reasonable return on capital investment). See, e.g., 2 AREEDA & HOVENKAMP, *supra* note 243, ¶ 501; POSNER, *supra* note 243, at 23.

248. HOVENKAMP, *supra* note 244, § 2.2b; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 2 (1984) [hereinafter Easterbrook, *The Limits of Antitrust*]; Easterbrook, *Workable Antitrust Policy*, *supra* note 244, at 1700-01.

249. Page, *Ideological Conflict*, *supra* note 246, at 16.

250. See Easterbrook, *The Limits of Antitrust*, *supra* note 248, at 4-9 (explaining how inhospitality toward unexplained practices deprives the economy of beneficial practices). Easterbrook writes:

When the collaborators possess no market power, either their cooperation is beneficial, in which event it will flourish, or it is not, in which event it will die as rivals take the sales.

When the collaborators have no power, monopoly cannot be their objective, and we must consider the more likely possibility that the arrangements create efficiencies.

*Id.* at 21; see also *Rothery Storage & Van Co. v. Atlas Van Lines Co.*, 792 F.2d 210 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 191 (7th Cir. 1985) (“Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial.”); BORK, *supra* note 243, at 131 (explaining how anti-merger policy that banned mergers where the trend toward concentration was in its incipency would destroy wealth-creating transactions).

251. UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, MODEL LAW ON COMPETITION: UNCTAD SERIES ON ISSUES IN COMPETITION LAW & POLICY 9 box 1 TD/RBP/CONF.5/7 (2000).

252. Fox & Sullivan, *supra* note 239, at 956.

253. 2 JAMES R. ATWOOD, KINGMAN BREWSTER, & SPENCER WEBER WALLER’S ANTITRUST & AMERICAN BUSINESS ABROAD § 16 (Spencer Weber Waller ed., 3d ed. 1997); Fox, *Monopolization and Dominance*, *supra* note 239, at 983, 1017-18. Some have suggested that diversity among different antitrust regimes is desirable. John O. McGinnis,

developing countries, it is not uncommon to find “[g]overnment regulations that restrict entry, pricing, and trade [which] often curb new business development and distort the competitive process.”<sup>254</sup> Thus, in addition to any barrier to entry posed by the economic dominance of a market-dominant ethnic minority, there are also government-erected barriers to entry that, despite their persistence, may not be readily apparent.<sup>255</sup> Licenses, for example, could be granted on a non-competitive basis, to politically connected firms or preferred state-owned enterprises. Such competition-suppression measures would need to be eradicated either through anti-corruption laws, a policy of opening up the country to foreign direct investment, or antitrust enforcement. While free trade does produce pro-competitive effects,<sup>256</sup> it may be insufficient to deconcentrate certain economic sectors dominated by an ethnic group. Free trade may weaken barriers caused by government preferences for politically allied businesses and foreign investors may provide competition for the previously shielded government-linked or preferred businesses. Foreign investors may even provide tough competition for market-dominant minorities, thereby eroding their economic entrenchment. But foreign competition may instead join forces with market-dominant minorities through various cooperative arrangements, resulting in an expansion, not erosion, of the ethnic minority’s dominance.

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*The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549 (2003).

254. William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 71 CHI-KENT L. REV. 265, 282 (2001).

255. *Id.* at 283-84. The complex, nontransparent tax system, for example, confers too much discretion on tax officials, creates too many opportunities for corruption, and “deters new business entry and expansion by existing entrepreneurs.” *Id.* at 284. Similarly, underdeveloped capital markets make it difficult for businesses to raise capital and thus discourage new entry — perhaps except by market-dominant minorities with various ethnically based sources of community credit, such as rotating credit associations. See Cao, *Looking at Communities and Markets*, *supra* note 85. A heavily bureaucratic regime in many developing countries also acts as an entry deterrent, as shown in the works of Hernando de Soto. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (June Abbott trans., 1989); Davis, et al., *supra* note 14, at 352; Kovacic, *supra* note 254, at 283.

256. For the view that free trade is preferred to antitrust as a means of creating competition, see, for example, Robert D. Cooter, *Market Modernization of Law: Economic Development Through Decentralized Law*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW* 275, 306 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997) (“The pressure of international competition is more reliable and relentlessly procompetitive than the activities of antitrust officials. Developing nations can accomplish many goals of antitrust policy through free trade without the state creating an enforcement bureaucracy. . . . Free trade is, consequently, the best antitrust policy.”). A free-trade-liberalization alternative to antitrust enforcement would include the dismantling of tariff and nontariff barriers to facilitate imports of foreign goods. The presence of imports would discipline producers of domestic products. Kovacic, *supra* note 254, at 287.

Thus, despite highly convincing normative considerations against altering the ethnic composition of the entrepreneurial class,<sup>257</sup> assuming it is a priority for certain developing countries to reduce or eliminate ethnic disparities in entrepreneurship, the measures discussed above would need to be combined with antitrust law, as antitrust would be especially helpful in deconcentration efforts. If the objective is to promote entrepreneurship among the non-dominant ethnic groups, antitrust would be preferable to ethnically biased market interventions such as corporate set-asides and equity restrictions. Set-asides do not create entrepreneurs or help construct social capital for the recipient, and equity restrictions are easily bypassed by the use of front persons, as the Chinese regularly do in Malaysia.<sup>258</sup> Antitrust, on the other hand, could address the very issues that surround the existence of market-dominant ethnic minorities, but do so in an ethnically neutral way.

There are several avenues an antitrust agenda might pursue, and for the purpose of the Review, I will pick three areas — monopolization, predation, and vertical integration — to illustrate my point. To the extent that ethnic networks, such as ethnically based horizontal and vertical integration<sup>259</sup> are impenetrable and discriminate against outsiders, resulting in the perpetuation and consolidation of ethnic stratification, antitrust provides useful tools. Imagine scenario one, where a firm owned by a market-dominant ethnic minority has monopoly power<sup>260</sup> over some defined market. This is the classic Sherman Act section 2 case in U.S. law and what qualifies as improperly exercised actions would be up to the court or legislature of the country to decide.<sup>261</sup> A country could decide to adopt

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257. Davis et al., *supra* note 14, at 353-54 (discussing efficiency and social justice reasons for not altering the ethnic composition of ethnically homogeneous commercial elites).

258. See *supra* notes 25-26 and accompanying text. When the government in Indonesia gave select non-Chinese businesses the exclusive rights to import certain goods and access to capital on favorable terms, many subsequently sold them on the informal secondary market to “Indonesians of Chinese descent while pretending to retain control.” Ahmad D. Habir, *Conglomerates: All in the Family?*, in *INDONESIA BEYOND SUHARTO* 168, 173 (Donald K. Emmerson ed., 1999). Such businesses were then run by the ethnic Chinese who made periodic payments to the sellers for the political advantages of using indigenous-sounding names on company documents.

259. See *supra* notes 54-57, 226-228 and accompanying text.

260. Indicators might be profit levels in excess of those found generally in the economy; or the existence of a predominant share of the market. In the United States, when a firm’s market share is below 50%, courts are divided as to whether the plaintiff is foreclosed from proving monopolization. 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 807d (2d ed. 2002).

261. Issues for consideration would include whether the company’s dominance was the result of normal methods or natural growth or, alternatively, the result of “unfair practices,” predatory pricing, and other means to reduce competition (i.e., obtaining long covenants not to compete from former rivals, obtaining exclusive contracts whereby producers promise not to sell to rivals of the company, acquiring exclusive licenses for key patents).



a “no fault” approach to monopoly law, whereby mere possession of a monopoly would suffice for an antitrust violation, so that improper conduct is unnecessary.<sup>262</sup> Alternatively, it could decide that a company that had a monopoly “thrust upon it,” through “changes in taste or in cost [driving] out all but one purveyor,”<sup>263</sup> would not be deemed guilty of illegal monopolization. Similarly, it could exempt from antitrust prosecution monopoly power acquired through “superior skill, foresight and industry.”<sup>264</sup> The United States has chosen the third approach.<sup>265</sup>

A country set on correcting the market dominance of an ethnic minority might opt for a no-fault monopoly standard, which would cast the widest possible net for addressing the monopolization of certain markets by the market-dominant ethnic minority,<sup>266</sup> regardless

262. See John J. Flynn, *Statement to the Federal Trade Commission*, 48 ANTITRUST L.J. 845 (1979) (advocating “no conduct” approach to monopolization doctrine, whereby proof of monopoly would itself establish liability under section 2); Eleanor M. Fox, *Monopoly and Competition: Tilting the Law Towards a More Competitive Economy*, 37 WASH. & LEE L. REV. 49 (1980) (same). The Supreme Court has declined to apply such a no-fault approach to section 2 of the Sherman Act. See *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Am. Tobacco Co. v. United States*, 221 U.S. 106 (1911).

263. 3A AREEDA & HOVENKAMP, *supra* note 260, ¶ 611b (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429, 430 (2d Cir. 1945)).

264. *Id.* ¶ 637a (quoting *Aluminum Co.*, 148 F.2d at 430). See also *Grinnell Corp.*, 384 U.S. at 570-71 (finding that the offense of monopolization would not be found in monopoly derived from “growth or development as a consequence of a superior product, business acumen, or historical accident”).

265. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872 (2004).

266. Even though it is not entirely clear based on the language of the statute, one could conclude this is the approach chosen by Indonesia. Chapter IV of the Indonesian Competition Law prohibits controlling the production or marketing of goods or services “which may lead to monopolistic practices and or unfair business competition.” Prohibition Against Monopolistic Practices and Unfair Business Competition, No. 5, ch. 4, art. 17(1) (1999) (Indon.) [hereinafter *Indonesia Competition Law*] (emphasis added). This law was adopted on March 5, 1999, and became effective on March 5, 2000.

The possibility of monopolistic practices or unfair business competition might be inferred if there are no substitutes available for the goods or services concerned or if a firm or group of firms controls over fifty percent of a market segment of certain goods or services. *Id.* art. 17(2)(a)-(c). The law could be read to say that it prohibits business actors from monopolizing (controlling the production or marketing of goods or services) whether or not such action results in monopolistic practices. *But see Antimonopoly Law Must Target Cooperatives*, JAKARTA POST, Apr. 29, 1999 (stating that the proposed competition law — not yet effective as of the date of the paper’s publication — would not penalize a company if “the company’s market share was gained through efficient operations and the company does not use its dominant position to restrict new entrants to the market”). For an assessment of the Indonesian Competition Law, see Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 HARV. INT’L L.J. 579 (2000). According to Professor Fox,

the competition law of Indonesia is infused with principles of equality of opportunity, fairness, equal treatment, and a leveling of advantage. It could be interpreted as permitting massive break-ups of conglomerates; it may permit enjoining any act that hurts a competitor

of the reasons behind such dominance or even the harm that might flow therefrom. The emphasis would be on market structure and breaking up monopolies and oligopolies or high market concentrations, not on the anticompetitive conduct that might create or maintain such structures. In fact, this approach had been advocated at one point by the Neal Report in the United States in 1969 and if adopted would have required firms with more than fifteen percent of the market to reduce their market share within a year, presumably by raising prices and reducing output.<sup>267</sup> In developing countries, this no-fault standard could be adopted in tandem with the stated objective of dispersing power or maintaining small firms — even if doing so does not maximize innovative or allocative efficiency.<sup>268</sup> Whatever the decision, it should be articulated in terms of markets and economics, not ethnicity.<sup>269</sup>

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or other trader, even by competition itself. But this need not be the interpretation. The language of the Indonesian competition law is chameleon-like.

*Id.* at 592.

Interestingly and highly relevant to this Review, article 19 gives as examples of monopolistic practices or unfair competition refusing or impeding firms from engaging in the same business. The Elucidation further explains that this means that “[r]efusing or preventing other business agents may not be conducted in an improper manner or on non-economic ground, for example owing to differences in ethnicity, racial background, social status and so forth.” Prohibition of Monopolistic Practices and Unfair Business Competition supp. art. 19 [hereinafter Elucidation]. This could be read to prohibit various ethnically based preferences practiced by ethnic networks, as described in Part II.

267. Phil C. Neal et al., Report of the White House Task Force on Antitrust Policy, ANTITRUST L. & ECON. REV., Winter 1968-1969, at 11-12. Failure to do so would result in divestiture. A court could order a firm with a persistently high share of the market to “restrict output or advertising expenditures.” *Id.* cmt. at 72; see also CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICIES: AN ECONOMIC AND LEGAL ANALYSIS 111-13 (1959).

268. A country’s antitrust law could even find that a monopoly that expands continuously to meet the demand for its product is unlawfully monopolizing and not merely using superior skills. This view would be antithetical to that expressed in certain cases in the United States, whereby the Federal Trade Commission determined that such behavior should not be found to be in violation of section 2 because antitrust laws should not be used to “block hard, aggressive competition that is solidly based on efficiencies and growth opportunities, even if monopoly is a possible result.” *In re E.I. DuPont de Nemours & Co. (TiO<sub>2</sub>)*, 96 F.T.C. 653, 751 (1980).

269. South Africa’s post-apartheid competition law contains a comprehensive array of objectives beyond those that are efficiency based. The competition law is to take into account the need “to promote employment and advance the social and economic welfare of South Africans; [and] to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.” It does, however, also have an explicit ethnic focus — “to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.” Competition Act, No. 89, ch. 1, ¶ 2 (1989) (S. Afr.). This law was adopted on October 30, 1998, and became effective September 1, 1999. A Competition Tribunal may exempt for a specified term agreements otherwise prohibited by the Competition Law if such agreements contribute toward certain favored objectives, including the “promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.” *Id.* ch. 2, pt. C, ¶ 10. Under the Act, “historically disadvantaged” persons are defined as individuals “disadvantaged by

Remedies for monopolization may include divestiture: requiring the monopolist to sell off its assets to separate firms that will compete in the market, even if divestiture eliminates an efficient monopolist in favor of a less efficient set of competitors. Assuming, however, that the new firms with sufficient capital to purchase the monopolist's assets are also owned by members of the market-dominant ethnic minority, divestiture would not, by itself, result in ethnic deconcentration. It could, however, encourage or facilitate new entry by members of the economically disadvantaged group, because a market no longer dominated by a monopolist may be easier to penetrate than one that is. This is especially likely to occur if the government supplements deconcentration efforts with an overall policy aimed at helping smaller businesses compete. Indonesia's competition law, enacted in 1999 at the urging of the IMF, specifically states that one purpose of the law is "to ensure the certainty of equal business opportunities for large-, middle-, as well as small-scale business actors in Indonesia."<sup>270</sup> The competition law even contains a controversial exemption<sup>271</sup> for small businesses and cooperatives,<sup>272</sup> on the grounds that such an exemption was necessary because of an inhospitable business environment.<sup>273</sup> And since Suharto's overthrow, the Indonesian government has made small business promotion a priority of its economic development agenda.<sup>274</sup> There have also been

unfair discrimination on the basis of race" before the adoption of the 1993 Constitution of the Republic of South Africa. *Id.* ch. 1, ¶ 3, § 2.

South Africa is in a category by itself because the economic disparities originated from "blatant invidious discrimination on the part of authoritarian or post colonial rulers," Davis et al., *supra* note 14, at 354, and were legally sanctioned until very recently. This is not the case with the typical middleman minorities, such as the Chinese in Southeast Asia, Jews in Europe, or Indians in Fiji.

270. Indonesia Competition Law, *supra* note 266, ch. 2, art. 3(b).

271. *Antimonopoly Law Must Target Cooperatives*, *supra* note 266 (discussing that some Indonesian economists are against such an exemption because all business activities should be included on grounds of fairness and because excluding certain parties from the monopoly law could impede the creation of a competitive market).

272. Indonesia Competition Law, *supra* note 266, ch. 9, art. 50(h)-(i); Adam Lunn & Philippa Venning, *SE Asia's New Focus on Competition Law*, ASIA TODAY, Oct. 2002, LEXIS, Nexis Library, ALLNWS File.

273. *Antimonopoly Law Must Target Cooperatives*, *supra* note 266.

274. See, e.g., *Equity Rather than Ethnicity*, BUS. TIMES (SING.), Apr. 8, 1995, at 3, LEXIS, Nexis Library, MWP File (rejecting race-based economic policy and discussing measures such as a presidential decree to support small businesses in government procurement, the special extension of credit to small businesses, and the creation of "people's credit banks" to support new and medium-sized companies); *Indonesia: Key Policy Developments*, HILFE COUNTRY REP., QUEST ECON. DATABASE, March 21, 2002, at 6 (describing the establishment of the Indonesian Recovery Fund and its objective of promoting capital for small businesses); Tom McCawley, *A People's Economy*, ASIaweek, Dec. 18, 1998, at 62 (discussing measures to support small businesses, such as the granting of approximately \$2.67 billion to the Ministry for Cooperatives for relending to small businesses at a low interest rate of about sixteen percent), available at <http://www.asiaweek.com/asiaweek/98/1218/biz1.html>; Derwin Pereira, *I Want to Build a People's Economy*, THE

concerted efforts to promote small business without adopting ethnically biased policies.<sup>275</sup> Indeed, Indonesia has moved to embrace the ethnic Chinese as part of its heritage<sup>276</sup> and cease government promotion of ethnic differences, due perhaps to a desire to seek investments from mainland China.<sup>277</sup> In any event, Indonesia's Competition Law avoids any explicit mention of ethnicity, stating merely that "there shall be no concentration of economic power in particular business agents."<sup>278</sup>

Scenario two, predatory pricing, is linked to scenario one, monopolization, under U.S. antitrust law. Assume that an ethnically owned monopolist is an aggressive competitor. Because predatory conduct might resemble competitive conduct (for example, cutting prices or introducing new products in response to or in anticipation of competition), one key factor in a predation case is whether the defendant's behavior is aimed at the removal of competition and the recoupment of monopoly profits. A country dealing with predation has at least two choices: it could opt for narrow rules on the grounds

STRAITS TIMES (SING.), Dec. 24, 1998, at 22, LEXIS, Nexis Library, MWP File (describing efforts by the Cooperatives Minister under President B.J. Habibie to "build an economic democracy, a modern economy, where small businesses are the key element of the economic structure").

275. Editorial, *Own Up to Ethnic Problem*, JAKARTA POST, Oct. 28, 1997, at 4 (calling for a rejection of a proposal by a government official "to preserve the businesses of pribumi [indigenous, non-Chinese Indonesians] entrepreneurs by barring Chinese traders from entering these sectors"); Pereira, *supra* note 274 (stating the then Cooperatives Minister's belief that Indonesia should reject the Malaysian-style New Economic Policy of explicit preferences for the Malays and discrimination against the Chinese because "Indonesia rejects a system of politics and economics along ethnic lines"; the view during the Habibie presidency was that small businesses, including Chinese-owned small firms, would receive government aid); Keith B. Richburg, *Indonesia's "Most Dangerous Man,"* WASH. POST, Mar. 2, 1999, at A11 (discussing efforts by the then Cooperatives Minister to explain that support for small businesses would also benefit the ethnic Chinese because "[m]ost Chinese businesses are small").

276. Alan Sipress, *Ancient Dragons Rise in Indonesia*, WASH. POST, Feb. 2, 2003, at A18 (reporting that, after years of suppressing Chinese culture, the Indonesian government, under President Megawati Sukarnoputri, declared Chinese New Year to be a national holiday).

277. *Megawati Seeks Investments from China*, JAKARTA POST, Mar. 26, 2002.

278. Indonesia Competition Law, *supra* note 266, pmbl. § c. During discussions of various draft versions of the anti-monopoly legislation, there was a proposal that a phrase "especially for pribumi" [indigenous, non-Chinese Indonesians] be inserted. The motion for the insertion of such phrase was ultimately defeated. McCawley, *supra* note 274. *But see* Elucidation, *supra* note 266, ¶¶ 4-5. The following sentences might be interpreted as an oblique reference to the ethnic Chinese:

Businessmen close to the ruling elite have enjoyed excessive facilities, a situation leading to widening social gaps. . . .

[T]he above-mentioned situation and condition [has] demanded . . . that we observe and rearrange business activities in Indonesia . . . [in order to] avoid the concentration of economic power in certain individuals or groups . . . .

*Id.*

that predation is rare and rarely successful,<sup>279</sup> or for broader rules on the grounds that the mere threat of predation may allow a firm to garner monopoly profits. Of course, the choice between different predation regimes may also be a normative choice.

Under the first view, to carry out a predatory pricing scheme successfully, a firm would need a large market share, allowing the firm to lower its prices to drive out the competition.<sup>280</sup> A firm, even a dominant firm, would suffer significantly if it lowers prices to drive out rivals. The monopoly profits it hopes to gain once rivals are driven out would have to be high enough to make the initial losses worthwhile. Additionally, to sustain such monopoly prices, the firm would have to prevent the entry of new rivals. As a result, predation is rare.

Alternatively, a country might embrace a competing view that a firm may enjoy monopoly profits by driving out or intimidating rivals. The latter strategy of mere threat making is much less costly and is likely to be successful as “[c]ompetitors are reluctant to provoke the dominant firm that has shown its readiness to use strategic weapons. Would-be entrants hesitate to risk entry into markets of habitual predators.”<sup>281</sup>

If a country adopts an antitrust law that prohibits even no-fault monopolies — monopolies achieved without resort to illegal means — the logical conclusion would be that even pricing above cost could be deemed predatory<sup>282</sup> in attempted monopolization cases.<sup>283</sup> Outside the context of attempts to monopolize, whether predatory pricing exists or what constitutes it would not matter much because being a monopoly is already prohibited regardless of predation or other bad conduct.<sup>284</sup>

279. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (“[P]redatory pricing schemes are rarely tried, and even more rarely successful.”).

280. For support for this view, see 3 AREEDA & HOVENKAMP, *supra* note 260, ¶¶ 723-725; BORK, *supra* note 243, at 154.

281. Fox & Sullivan, *supra* note 239, app. at 979.

282. For example, this no-fault regime would consider the following pricing scheme to be predatory: the predator prices below rivals’ costs but above his or her own cost.

283. In the United States, section 2 of the Sherman Act condemns attempts to monopolize. Attempted monopolization could cover anticompetitive conduct by a single firm that does not have monopoly power. There must be a specific intent to monopolize, a dangerous probability that it would succeed, and the defendant’s conduct must be anticompetitive (for example, engaging in predatory pricing). See *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). In the United States, because the mere attainment of monopoly power is not illegal under section 2, the mere attempt to acquire such power would not be prohibited. Thus the defendant in the United States must also have engaged in misconduct that if successful would give it monopoly power.

But in a no-fault monopolization regime, misconduct would not be necessary. Even above-cost pricing would likely be considered predatory, casting a wide net to ensure that attempts to monopolize would not be successful.

284. On the other hand, if a country decides that a monopoly achieved by superior skill (no reliance on predatory pricing) would not be prohibited by antitrust, then it would likely favor a rule that permits a firm to price at or above its own average total costs. There are

To the extent that predatory behavior is a contributing factor in the market dominance of certain ethnic minorities, broad plaintiff-oriented rules concerning predation will allow for rivals to compete effectively against dominant firms. Again, there is no guarantee that the new rivals will come from the economically disadvantaged majority group precisely because these are ethnically neutral measures.

Scenario three involves the quite common practice, discussed in Sections II.A-B, of integration — horizontally and vertically — along ethnic lines. The antitrust laws of most countries prohibit horizontal agreements — agreements among rival firms — to fix prices,<sup>285</sup> divide markets,<sup>286</sup> or reduce output, so I will focus on vertical restraints. Vertical restraints are agreements between firms at different levels of the distribution chain, for example, agreements between a manufacturer and its wholesalers or retailers, to engage in exclusive dealings, tyings, or exclusive territorial agreements that allow the retailer to sell only to customers within a designated territory. Vertical restraints could also be arranged along ethnic lines, with a manufacturer entering into certain agreements with coethnic retailers.

A country might view vertical restraints as benefiting competition. But, within certain developing-country contexts,<sup>287</sup> one might disallow vertical restraints to open distribution channels for entrepreneurial access,<sup>288</sup> particularly to provide opportunities, though not guarantees, for retailers from the economically disadvantaged ethnic-majority group. If this were the primary concern, antitrust would similarly disallow other vertical restraints that might be more favorably treated under current U.S. law. Exclusive-dealing contracts that require a firm to buy all of its supplies from a particular source might be prohibited. For example, an exclusive-dealing vertical restraint might involve promises by a retailer that it will stock only one manufacturer's brand

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different rules for determining the existence of predatory pricing, based on the relationship between the defendant's price and its costs, such as variable costs and fixed costs. See generally 3 AREEDA & HOVENKAMP, *supra* note 260, ¶ 723d.

285. Thus, if a group of ethnic-Chinese companies agree to maintain uniform prices and to sell only to designated ethnic-Chinese wholesalers, this action would likely be prohibited by most antitrust laws.

286. Market division makes it possible for each conspiring firm to set or raise prices, or reduce output without fearing even the threat of competition from rivals.

287. In addition to the ethnic-based reason for disallowing certain vertical restraints, there might also be economic reasons. In an industry prone to collusion, which may be more likely in developing-country markets, vertical restraints used by manufacturers may facilitate a manufacturers' cartel. For a discussion of factors to watch out for in determining whether an industry is prone to collusion, see RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST* 335-40 (2d ed. 1981).

288. Older case law in the United States took this approach. See, e.g., *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-37 (1973).

— such as selling only a particular brand of soft drink — or it might involve a baker agreeing to buy all of its flour from a producer. Although exclusive-dealing contracts can maximize efficiency because having a guaranteed source of supply may induce retailers to invest in promotional activities and manufacturers to invest in training, such contracts may also foreclose access to retail markets and to sources of supply for rival manufacturers and rival retailers respectively. New firms, especially those owned by a member of the ethnic majority, may not be able to enter a particular market because exclusive-dealing agreements foreclosed a reliable supply of products. A strict anti-exclusive-dealing rule may be similar to one previously in effect in the United States, in which the Court found an antitrust violation whenever an exclusive dealing tied up a large amount of business and foreclosed a significant volume of commerce, regardless of the effect on competitive rivalry.<sup>289</sup>

The same reasoning may also lead a country to look unfavorably upon tying arrangements in which a seller conditions the purchase of one good or service on the buyer's purchase of another good or service. Whether such an arrangement is prohibited by current antitrust rules depends on many factors, as set forth in the following test. The plaintiff must show that (1) the tie affects more than a de minimis amount of interstate commerce; (2) the buyer was coerced into buying the tied product as a condition of buying the tying product; (3) the two products are separate; and (4) the defendant has economic power in the tying market.<sup>290</sup>

Early cases in the United States involved tying efforts by owners of a patented product seeking to tie a second article to the patented article. In several cases, the Court was concerned that tying enabled the defendant company to extend its monopoly power from the tying product to the tied product or to leverage its monopoly in one market for a monopoly in the other as well.<sup>291</sup> Even where there was no

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289. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314 (1949). This case was effectively overruled by *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328-29 (1961), which found exclusive dealings unlawful only if they significantly foreclose the opportunity for rivals to remain in or enter the market. The antitrust analysis could also focus on the cumulative effect of all exclusive-dealing contracts in the relevant market and not just on the particular contract at issue. In *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953), the Court barred the defendant from entering into contracts with 40% of the movie theaters in a certain geographical area in which the latter agreed not to show commercials from any other advertising agency. The Court did not focus only on the 40% of movie theaters that were bound by the agreement. Also relevant to the Court's decision was the fact that four firms with a combined market share of 75% all used exclusive-dealing contracts.

290. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 18 (1984).

291. The tying product is the product the buyer wishes to purchase. The product the purchaser is asked to buy in order to purchase the tying product is called the tied product. For example, in *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, *Dry Ice Corporation* made dry ice and specially lined cabinets for refrigerating foods chilled by dry ice. 283 U.S. 27, 32,

possibility of monopoly profits in the tied product, the Court nonetheless disallowed tying arrangements because it is “unreasonable, per se, to foreclose competitors from any substantial market. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious.”<sup>292</sup> Anticompetitive effects are presumed to exist if a certain dollar volume is foreclosed in the tied market as a result of the tie. This per se test was subsequently restated as requiring a showing that “a party has sufficient economic power . . . to appreciably restrain free competition in the market for the tied product” and that “a ‘not insubstantial’ amount of interstate commerce was and is affected” in the tied product.<sup>293</sup>

As far as the tying market is concerned, a successful tying challenge must establish that the defendant has economic power. Under earlier cases, the Court held that such power might be inferred whenever the defendant sells a uniquely desirable product. Uniqueness “confers economic power . . . when other competitors are in some way prevented from offering the distinctive product themselves.”<sup>294</sup> One case even found that “the requisite economic power is presumed when the tying product is patented or copyrighted.”<sup>295</sup> Later cases, however, have made it more difficult for the plaintiff to show economic power.<sup>296</sup>

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*supplemented on other grounds*, 283 U.S. 420 (1931). Dry Ice Corporation sold its cabinets and dry ice on the condition both would be used together. *Id.* at 30. When it discovered that Carbice sold its own dry ice knowing that it would be used with cabinets made by Dry Ice Corporation, Dry Ice sued. *Id.* The Court rejected the claim because it was concerned that “the owner of a patent for a product might conceivably monopolize the commerce in a large part of unpatented materials used in its manufacture.” *Id.* at 32; *see also* Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917). The *International Business Machines Corp. v. United States* Court held that the grant of a patent did not allow the patent holder to restrict the use of the machine to particular films owned by the patent holder. 298 U.S. 131 (1936). The Court enjoined IBM from leasing its machines on the condition that lessees buy their unpatented punch cards. *Id.* at 137. The Court noted that commerce in the punch-card market involved more than three million dollars annually. *Id.* at 136.

292. *Int’l Salt Co. v. United States*, 332 U.S. 392, 396 (1947) (citations omitted). Dollar volume of business in the tied product was about \$500,000 per year. *Id.* at 395.

293. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (quoting *Int’l Salt*, 332 U.S. at 392). There was also concern that consumer’s freedom of choice was being denied, whether or not the tied product was being offered at a competitive price. This case arose under section 1 of the Sherman Act.

294. *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 505 n.2 (1969).

295. *United States v. Loew’s, Inc.*, 371 U.S. 38, 46 (1962); *Siegel v. Chicken Delight*, 448 F.2d 43 (9th Cir. 1971); *see also* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 ILL. L. REV. 77, 128 n.268 (showing that courts once treated any departure from perfect competition as evidence of market power).

296. *See, e.g.*, *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977) (holding that the seller did not have economic power so long as competing sellers could replicate the



Although scholars have defended tying on a variety of efficiency grounds<sup>297</sup> and the Court has recognized that tie-ins may be a cost-effective way of bundling and selling a package of services,<sup>298</sup> the discussion above shows that the Court has also been concerned that tying arrangements hurt competition and increase entry barriers. Clearly, such concerns might be even more pronounced in developing countries with presumably less functioning markets that are distorted by cronyism, corruption, or political grants of special privileges and characterized by an absence of true competition. In such environments, courts and legislatures may adopt a strict per se rule to ensure that tie-ins do not facilitate exclusion of rivals by those with market power (to be defined to reflect national and local priorities, for example, regarding deconcentration), especially if there is concern about the overlap between market power and ethnicity.

So far I have been discussing inter-brand vertical restraints such as exclusive dealings and tie-ins. But countries that want to address the market dominance of ethnic minorities might also be concerned about intra-brand restraints because they could implicate social concerns that a developing country might choose to address. For instance, maximum resale price maintenance (“RPM”) imposed by a manufacturer on a dealer could have the effect of ruining less efficient dealers whose costs of doing business exceed the enforced price ceiling.<sup>299</sup> Maximum RPM, if allowed by antitrust, may have a disparate impact on the less efficient, less commercially astute non-market-dominant majority and thus a developing country concerned about their welfare would ban maximum RPM schemes.

Conversely, minimum RPM establishing a floor below which dealers are not allowed to price a manufacturer’s product could

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tying product and sell close substitutes); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 18 (1984) (holding that plaintiff must establish real economic power in the tying market to invoke the per se rule); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992) (en banc) (observing that trademarked product does not ipso facto confer market power); see also Alan J. Meese, *Tying Meets the New Institutional Economics*, 146 U. PA. L. REV. 1, 33-36 (1997) [hereinafter Meese, *Tying*].

297. For an insightful defense of tying on the grounds that tied sales expand output and result in a more efficient allocation of resources, see Meese, *Tying*, *supra* note 296, at 22-27.

298. See, e.g., *Jefferson Parish*, 466 U.S. at 12. The Court unanimously upheld a tying arrangement whereby a large hospital required patients undergoing operations to use the hospital’s anesthesiologists. Five members of the Court reiterated the applicability of the per se rule to tie-ins (four concurring Justices would have applied the rule of reason test) but concluded that because the hospital did not have sufficient market power, attracting only 30% of patients in the district, the per se rule would not be invoked. They also found that there were indeed two separate products but that the tie-in did not produce an adverse effect on competition — rival anesthesiologists could practice in other area hospitals.

299. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (declaring maximum RPM unlawful per se in part because such restrictions by the manufacturer could channel distributions through a small number of large dealers). This case has been overruled by *State Oil v. Khan*, 522 U.S. 3 (1997) (analyzing maximum RPM under the rule of reason).

actually protect inefficient dealers by preventing efficient dealers from undercutting them. A country concerned with the welfare of inefficient dealer may therefore wish to adopt a less hostile approach towards minimum RPM.<sup>300</sup>

The discussion above makes one primary point — that ethnically based economic concentrations and the underlying practices that further such market dominance (such as horizontal and vertical integration, networks, other intra-ethnic preferences such as exclusive dealings and tie-ins) may be addressed in economic terms through the establishment of antitrust laws. Antitrust cannot guarantee that certain ethnic groups will be economically successful as entrepreneurs because antitrust does not seek to alter market results. Nonetheless, breaking up monopolies and prohibiting certain practices that tend to result in the entrenchment of dominance should lower barriers to entry, and, combined with active state support for small- and medium-sized businesses, should help give new rivals (including those from the disadvantaged ethnic majority) a chance.

#### CONCLUSION

The revival of the field of law and development, and since the demise of the Soviet Union, the reliance on domestic and international markets for the attainment of economic development have led to an increased focus on the impact of markets on developing countries, especially because of the presence of market-dominant ethnic minorities in those countries. That market dominance correlates with ethnicity has made the issue particularly pressing, given the volatility of ethnicity and concerns about ethnic conflicts. As a result, a number of approaches to rectify the problem of ethnic-minority market dominance have been used and discussed. Malaysia adopts preferences favoring the majority ethnic Malay, resulting in ethnically based restraints against the ethnic Chinese in ways reminiscent of restraints used historically against Jews throughout Europe. Professor Chua's book supports Malaysia-type policies on grounds that such measures are normatively just and strategically necessary for stability. Others have argued instead that ethnic ownership and control of business should not trigger governmental remedies designed to reconfigure the ethnic composition of commercial elites,<sup>301</sup> favoring

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300. Minimum RPM was at one point viewed in the United States as a "fair trade" law to be allowed because prescribing minimum prices for the resale of trademarked goods would protect the smaller retailer from being put out of business by larger retail outlets, especially those selling as "loss leaders" to attract business. See 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 461 (Earl W. Kintner ed., 1978). But current U.S. law treats minimum RPM schemes as per se unlawful. *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

301. See generally Davis et al., *supra* note 14.

instead redistributive measures that work outside of and parallel to the market rather than intervene in market functions to curtail an ethnic group's market activities.<sup>302</sup>

In this Review, I have set forth two proposals. The first suggests that greater attention be given to exploring the possibility of culture change. This suggestion is based on a limited proposition — that if economic development is linked to culture and may be aided or impeded by culture, changing certain cultural practices and beliefs would facilitate economic development. It does not involve normative evaluations of any culture, nor does it attempt to assess the intrinsic worth of any culture beyond the relationship between culture and economics. Nor does it preclude examination of historical and structural impediments to development.

The second proposal looks to antitrust as a tool to rectify market dominance and concentrations of wealth in certain economic sectors. Insights from New Institutional Economics support my claim that in developing countries characterized by market imperfections, underdeveloped legal regimes, and external hostility, private, cooperative arrangements among members of the same ethnic group allow the group to bypass imperfect conditions in the mainstream market by using ethnic social capital to create economic capital. On the one hand, the establishment of ethnic economies is part of the group's efforts to address barriers in the open market. On the other hand, once the group succeeds and becomes a market-dominant force, continuing market imperfections and increasing returns to scale may result in the entrenchment of market dominance and the exclusion of others. In such cases, even if practices such as exclusive dealings and vertical restraints may have efficiency and consumer welfare justifications under market conditions such as those that exist in the United States, they may not under market conditions of many developing countries. These countries may promote competition and increase efficiency by using antitrust to prohibit such practices, facilitating entry by new competitors who may be members of the non-market-dominant group. In other cases, even if such practices *do* have efficiency and consumer-welfare benefits — imagine an efficient monopolist — developing countries may nonetheless decide to prohibit them because of overriding social and other non-economic concerns. In either event, state action would be articulated in non-ethnic terms.

There is admittedly the danger that antitrust would be used as a pretext to oppress ethnic minorities, with the state seeking to find “abusive” conduct by “dominant” firms that also “happen” to be

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302. *Id.* at 352, 358-59.

owned by minority firms.<sup>303</sup> And of course, even without malicious intent, to the extent that the market-dominant ethnic minority does in fact have market dominance, enforcement of antitrust will have a disparate impact on ethnic-minority firms.<sup>304</sup>

Yet, even if the state embarks on an antitrust solution not to enhance efficiency or consumer welfare, but rather to deal with ethnic market dominance, there is a difference between blatant state sponsorship of discrimination against ethnic minorities, proclaimed in ethnic terms, and an economically based policy to ensure the efficiency and competitiveness of markets through the adoption of a law that many countries in the world have already enacted. The first approach involves the state making note of, perpetuating, and entrenching ethnic differences and in the process, representing one ethnic group as outsiders and another as insiders. The second approach casts the issue as a market problem to be dealt with by economic, not ethnic, policies. All companies, regardless of the ethnicity of the owners, would be subject to the law, and to the extent that small-business promotion is also one of the state's objectives, all small businesses would be granted the same opportunity to compete for access to capital or credit.

Even if the result is the same — deconcentration of ethnic conglomerates — the difference in tone is important because, as some have cautioned, policymakers should be aware of the “full range of consequences of their decisions.”<sup>305</sup> When governments act and make distinctions based on ethnicity in ways that harm people solely because they are members of a certain ethnic group, particularly politically vulnerable minority ethnic groups,<sup>306</sup> such actions show deliberate intent to include some and exclude others and thus involve the government in the violation of “baseline norms of reciprocity” and

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303. Kovacic, *supra* note 254, at 288; *Equity Rather than Ethnicity*, *supra* note 274.

304. Michael Shari & Jonathan Moore, *The Plight of the Ethnic Chinese*, BUS. WEEK, Aug. 3, 1998, at 26 (describing how an antitrust law would result in the breakup of Chinese-owned conglomerates because the ethnic Chinese control forty-three of Indonesia's top fifty listed conglomerates).

305. Pildes, *supra* note 196, at 2058 (arguing in favor of government compensation to private individuals when government inflicts harm on them). Professor Pildes rejects the counterargument that private individuals should bear the loss themselves, as they do when the harm is due to an act of God. *Id.* at 2070.

306. The vulnerability of the Chinese in Indonesia, for example, has been widely noted. See, e.g. p. 45; Shari & Moore, *supra* note 304; Sipress, *supra* note 276, at A18. Sipress describes how the ethnic Chinese were barred from the senior ranks of government and their numbers limited at universities, causing many to turn to entrepreneurship. Discrimination continues as the ethnic Chinese are still described on their birth certificates as “foreign Orientals,” and must apply for a certificate stating that their parents were Indonesian citizens because such a certificate is required to obtain a passport, business license or university admission. *Id.*

fair dealing.<sup>307</sup> To inflict such “demoralization costs”<sup>308</sup> on an ethnic minority is wrong and unnecessary, particularly when there are other avenues available to accomplish more or less the same objective.

Essentially, then, the proposals set forth by Professor Chua in her book and those presented in this Review as alternatives represent competing views of ethnicity, markets, and legitimate state action. As the editor of the *Jakarta Post* puts it in cautioning against the adoption of ethnically biased governmental actions to address minority market dominance, “[a] law that favors one ethnic group or discriminates against certain ethnic groups will be the first step toward institutionalizing discrimination practices . . . . Such a law in Indonesia would only strengthen ethnic divisions and would take us further away from our goal of national integration.”<sup>309</sup>

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307. Pildes, *supra* note 196, at 2070.

308. *Id.* (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethnical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967)).

309. *Own Up to Ethnic Problem*, *supra* note 275.