

THE FIGHT FOR “FAIRNESS”:
Cracking Down on Anti-competitive Practices in Contemporary
China and Post-Civil War America

by

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This thesis argues that China currently falls within what economic historian W.W. Rostow called the “drive to maturity” stage of economic development, and that America underwent its own drive to maturity in the decades following the end of the Civil War. It goes on to demonstrate that the anti-competitive practices used by firms in post-Civil War America are similar to those being used in contemporary China and, congruently, that policies recently enacted in China in order to curtail those practices are comparable to a number of policies that have been implemented in the United States. Finally, this thesis contends that any evaluation of Western-style anti-unfair competition policies in China today must take the peculiarities of its own economic history into consideration in order to yield an accurate analysis.

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Introduction

“Fairness” has long been one of the goals for which American politicians and social reformers have strived. This may be due, in part, to the versatility and the applicability of the concept itself. The Oxford English Dictionary defines fairness as “impartiality, equitableness, justness” and “fair dealing.”¹ Indeed, the United States’ history is rife with struggles by different groups to obtain that equity and justice—from social movements like Anti-Slavery and Suffrage to Civil Rights and Gay Rights. In the wake of fluctuating, shifting, and transforming social movements like those just named, however, fairness in its economic sense—specifically as it pertains to *competition*—has remained a relatively constant focus of rhetoric and policy in the United States.

This has been particularly true since the last half of the Nineteenth Century. Since the Civil War, America’s economy has seen the advent of industrialization and the spread of technology, the integration and growth of businesses, and the Age of the Robber Barons—occurrences which I will more fully explain in later sections of this text. As a reaction to this period, President Theodore Roosevelt took steps to combat what he and many others saw to be growing economic *unfairness*. This included, among other things, the elimination of economic competition at the hands of firms. In his notorious New Nationalism Speech, given in Osawatomie, Kansas in 1910, President Roosevelt made his prioritization of economic competition and this notion of fairness abundantly clear, stating:

¹ *Oxford English Dictionary Online*, n. “fairness,” accessed April 29, 2015, <http://www.oed.com/view/Entry/67729?redirectedFrom=fairness>.

I stand for the square deal. But when I say that I am for the square deal, I mean not merely that I stand for fair play under the present rules of the game, but that I stand for having those rules changed so as to work for a more substantial equality of opportunity and of reward for equally good service.²

Echoes of President Roosevelt’s language of “fair play,” “rules,” and “equality” can be heard in American politics today. As recently as 2011, in fact, President Barack Obama visited the same city in Kansas to deliver similar remarks. In that speech, President Obama stated that the United States “succeeds when everyone gets a fair shot, when everyone does their fair share, and when everyone plays by the same rules...They’re American values.”³ He then went on to claim that the free market “only works when there are rules of the road to ensure that competition is fair, open, and honest.”⁴ More than one hundred years after President Roosevelt made the economic “square deal” the focal point of his legacy, policymakers in America still tout economic competition as unique to their country’s history and crucial to its continued success.

Indeed, while Americans still commemorate President Roosevelt’s crusade for economic competition at home, they have also expressed a desire to expand this fight to include competition in an international context. Only months after his speech in Osawatomie, in the 2012 State of the Union Address, President Obama asserted that he would not “stand by when [America’s] competitors don’t play by the rules,” specifically citing increases in the number of trade-related lawsuits brought against China and the creation of a Trade Enforcement Unit tasked with “investigating unfair trading

² “New Nationalism Speech,” TeachingAmericanHistory.org, accessed April 29, 2015, <http://teachingamericanhistory.org/library/document/new-nationalism-speech/>.

³ “Full text of President Obama’s economic speech in Osawatomie, Kans.,” *Washington Post*, December 6, 2011, accessed April 29, 2015, http://www.washingtonpost.com/politics/president-obamas-economic-speech-in-osawatomie-kans/2011/12/06/gIQAVhe6ZO_story.html.

⁴ Ibid.

practices” in the People’s Republic.⁵ Even President Obama’s Republican opponent in the 2012 Presidential Election, former Governor of Massachusetts, Mitt Romney, expressed similar—if more harshly worded—concerns over China’s trading practices and monetary policy.⁶ Pollsters on both sides of the political aisle in the United States maintain that these concerns are not only bipartisan, but that they transcend socioeconomic lines as well, demonstrating not only that America’s fight for competition has come to encompass foreign as well as domestic matters, but that China has become a figurative “public enemy number one” in that campaign.⁷ Anti-competitive practices in China, however, are not exclusive to its dealings with America. Just as domestic competition began to dwindle in the United States during the years leading up to President Roosevelt’s administration, so too has China’s domestic economy been plagued by firms’ attempts to evade competition through a variety of illegal practices, which I will more fully explore in later sections of this text.

By considering economic historian W.W. Rostow’s theoretical framework for economic development, in conjunction with historical recounts of America’s own economic growth, I will attempt to gauge the economic development of contemporary China and to identify the equivalent period in American history. Specifically, I will argue that China currently falls within what W.W. Rostow called the “drive to maturity” stage of economic development, and that America underwent this same phase in decades following the end of the Civil War. Given the resemblances between each

⁵ “President Obama’s State of the Union Address,” *New York Times*, January 25, 2012, accessed April 29, 2015, http://www.nytimes.com/interactive/2012/01/24/us/politics/state-of-the-union-2012-video-transcript.html?_r=0#.

⁶ John Harwood, “The Electoral Math of Romney’s Stance on Trade With China,” *New York Times*, March 22, 2015, accessed April 29, 2015, <http://www.nytimes.com/2012/03/23/us/politics/mitt-romneys-stance-on-china-trade.html>.

⁷ *Ibid.*

country's drive to maturity, I will then examine the various ways in which firms attempted to evade economic competition during the relevant period in the United States, and compare those methods to what has recently occurred in the People's Republic. This analysis will reveal that many of the anti-competitive practices that were widely used in post-Civil War America are similar to those being used in contemporary China. Because of these similarities, it may be natural for scholars to assume that Chinese lawmakers should refer to American history, specifically the policies that the United States has enacted in order to restrict these practices, in addressing its own struggles. Indeed, this thesis will show that, in the past decade, China has done exactly that. I will finally argue, however, that any analysis of these policies, on behalf of Chinese leadership, must consider each country's particular economic history in order to be valid.

Rostow's Stages of Development

To ensure that an evaluation of contemporary China in the context of a separate period in American history is valid, it is important that the two periods in question are themselves comparable. It is not hard to imagine, for example, that a comparison regarding anti-competitive practices between contemporary China and something as developmentally dissimilar as colonial America might yield little in the way of information that could be useful to Chinese politicians today. One gauge by which this comparability can be ascertained, then, is economic development. To that end, this thesis will identify several qualities that the Chinese economy exhibits today. It will then attempt to isolate a particular historical period in which the United States' economy exhibited the same or similar qualities. In order to obtain an understanding of the particular characteristics that serve as sufficient measures of an economy's development, I will use the linear-stages-of-growth model in economic theory—referring specifically to the seminal piece on stages-of-growth analysis, W.W. Rostow's *The Stages of Economic Growth: A Non-Communist Manifesto*. In *The Stages*, Rostow argues that, in order for countries to develop economically, they must pass through five general phases of growth—each separated by and consisting of specific economic milestones. By observing which of these benchmarks contemporary China has achieved, it will be possible to identify the stage through which it is currently passing.

Before proceeding, though, I would like to acknowledge the limitations of this methodology. First, it should be noted that, by choosing to compare the economy of China with that of the United States, I am asserting neither that the American experience is the normative model, nor that it can be successfully applied to the

circumstances of every other nation. Instead, I have chosen the United States as the subject of my comparison with China because of the considerably large extent to which scholars have documented and discussed its economic history. I would also like to acknowledge the limited nature of the stages-of-growth model. Indeed, even Rostow himself has joined his critics in discussing the arbitrary nature of his work. Noting that the stages he lays out “are, in no absolute sense, a correct way,” Rostow explains that they are designed “to dramatize not merely the uniformities in the sequence of modernization but also—and equally—the uniqueness of each nation’s experience.”⁸ This research will therefore employ Rostow’s framework to a deservingly limited and skeptical degree. It will serve as a theoretical “jumping-off point,” from which historical and factual analysis will quickly take over and drive the latter portions of this text. For now, however, I will begin to examine the foundation of this model with a brief discussion of each of Rostow’s stages of economic development, beginning with the first phase, the traditional society.

Traditional Society

The traditional society is one in which its inhabitants have a limited knowledge of their ability to manipulate the world around them in order to yield more productivity—a concept that Rostow associates with the pre-Newtonian world.⁹ Because of these limitations on productivity, traditional societies often have to focus a great deal of their resources on agriculture. Although the productivity of countries in this stage can vary depending on the amount of fertile land available to them and the

⁸ W. W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto*, 3rd ed. (Cambridge: Cambridge University Press, 1990), 1.

⁹ *Ibid.*, 4.

development of certain limited-use technologies, such as improved irrigation practices, the primary characteristic of the traditional society is that production is bound by the amount of output that individuals are able to produce for themselves. In addition, political power in traditional societies is often focused in the hands of regional landowners—further underscoring traditional societies’ economic dependence on agriculture.¹⁰

Preconditions for Take-off

The second stage of economic development sets up the preconditions for take-off. That is to say, because the transition from pre-Newtonian beliefs to modern science, including the introduction of concepts such as increasing returns to scale and compound interest, is so lengthy, it warrants its own analysis. During this period, new technologies and techniques make greater production in agriculture and industry possible. The earliest example of these preconditions, of course, is Western Europe during the late seventeenth and early eighteenth centuries—what many historians refer to as the Industrial Revolution. Britain, relatively ideal in terms of its geography, natural resources, and accessibility for trade, was able to advance in this respect much faster than its neighbors were. Indeed, most countries did not develop these preconditions on their own at all, instead inheriting them through the invasion, “literal or figurative,” of more developed nations.¹¹ The growth of the banking and investment industries is also representative of the preconditions for take-off phase. As output increases and markets widen, these activities mobilize capital in order to meet the

¹⁰ Rostow, *Stages of Economic Growth*, 5.

¹¹ *Ibid.*, 6.

developing economy's increasing needs for transportation, communications, and raw materials. The most prominent characteristic of this phase, however, is the transition of political power, from the landed, regional, and in many cases colonial interests of the traditional society, to the independent nation-state.¹²

Take-off

After the preconditions for take-off have been met, the next phase in the stages-of-development model is the take-off itself, which Rostow calls “the great watershed in the life of modern societies.”¹³ In this phase, the society has overcome all remnants of the traditional phase, economic and political, that might upset the steady rate of its economic growth. Farmers are willing to accept the commercialization of their industry as well as the changes in agricultural techniques that accompany it. Those concepts which were novel in the preconditions phase, such as compound interest and returns to scale, become habitual and, eventually, institutionalized. During the society's take-off, the percentage of savings and investments increase significantly. Even renowned economist W. Arthur Lewis, who is credited with inventing the dual sectors model of economic development, differing from Rostow's approach in several key respects, felt investment was so crucial that, “We cannot explain any ‘industrial’ revolution...until we can explain why saving increased relatively to national income.”¹⁴ Also according to both Rostow and Lewis, “As the capitalist sector expands, profits grow relatively,

¹² Rostow, *Stages of Economic Growth*, 7.

¹³ Ibid.

¹⁴ W. Arthur Lewis, “Economic Development with Unlimited Supplies of Labor,” in *Selected Economic Writings of W. Arthur Lewis*, ed. Mark Gersovitz (New York: New York University Press, 1983), 327.

and an increasing proportion of national income is re-invested.”¹⁵ In other words, these increased savings and investments help to fund an even greater expansion of industry, a portion of the profits from which are then reinvested, leading to even more growth.

Lewis goes on to associate this investment cycle with the process of rural-urban migration, stating:

In so far as [the capitalist surplus] is reinvested in creating new capital, the capitalist sector expands, taking more people into capitalist employment out of the subsistence sector. The surplus is then larger still, capital formation is still greater, and so the process continues...¹⁶

Out of all the traits that characterize the take-off phase, however, accelerated agricultural productivity is the most important, for only after the percentage of a society’s labor force that is required to feed its population decreases are other individuals able to engage in the industrial and financial sectors that ultimately yield sustainable economic growth.¹⁷

Drive to Maturity

Following the take-off phase is a generally longer, perhaps more volatile, period of economic growth, which Rostow calls the drive to maturity. In this stage, further improvements in both technology and technique expand from the smaller number of industries affected during the take-off to encompass every facet of the nation’s economy, made possible as more and more of the society’s income is invested and reinvested. The relative instability of growth during this period, when compared with what existed in the previous stage, is due to the fluid nature of the economy’s industrial

¹⁵ Lewis, “Economic Development,” 362.

¹⁶ Ibid., 323-4.

¹⁷ Rostow, *Stages of Economic Growth*, 8-9.

makeup. The extension of physical and human capital to new industries causes them to grow at increased speeds, while economies of scale cause the older industries' growth to level off. For example, by the end of the nineteenth century, the United States' economy had shifted its focus from coal, iron, and the railway industry to more technologically complex industries such as machine-tools, chemicals, and electrical equipment.¹⁸ As maturity is reached, and respective changes in import and export requirements take place, the society begins to situate itself within the context of the larger, international economy. This maturity is primarily characterized, however, by the society's ability to expand its economy beyond those industries that initially enabled its take-off. In theory, such a society is able to produce anything that it chooses—even if it is inefficient and costly to do so.¹⁹

Age of High Mass-consumption

The transition from maturity to the final stage in Rostow's model, the age of high mass-consumption, is indicated primarily by two major developments. The first of these is an increase in real income per head. As individuals' purchasing power increases, their consumption desires expand beyond food, clothing, and shelter to what might be called luxury goods, including automobiles and consumer durables. The second of these major changes is a marked increase in the proportion of the society's population that both reside in urban areas and that work in either an office or a skilled factory setting. There are other characteristics of high mass-consumption societies, however, that will prove more useful for the purposes of this research. For while

¹⁸ Rostow, *Stages of Economic Growth*, 9.

¹⁹ *Ibid.*, 9-10.

societies undergo changes in their standard of living, certain sociopolitical transitions occur simultaneously. Upon entering the age of high mass-consumption, societies begin to turn their focus away from the spread of technology and growth and towards social welfare. Indeed, the formation of a welfare state is one of the preeminent signs that a society is in a post-maturity stage, accompanied by a shift in the society's resources from manufacturing and industry to the service sector.²⁰ Although Rostow concludes *The Stages* by claiming that the United States has transcended the age of high mass-consumption, he does not name a successive phase, asserting that, "even in this adventure in generalization it is a shade too soon to create—on the basis of one case—a new stage-of-growth..."²¹

Contemporary China

Locating contemporary China within Rostow's model presents certain significant, albeit surmountable, challenges. As a part of the pre-Newtonian world, it is not difficult to classify dynastic China as a traditional society. Indeed, owning land was so closely associated with power during that period that constant battles to obtain and retain it meant that land was rarely in any one family's possession for an extended amount of time.²² Should the Chinese Communist Revolution be interpreted as the establishment of a nation-state, it is then easy to determine that the primary precondition for take-off was met in 1949. When Rostow wrote *The Stages*, he was under the impression that China had begun an attempt to take off in 1952, as evidenced both by the investment goals of the government's national plan and observable progress that had

²⁰ Rostow, *Stages of Economic Growth*, 10-11.

²¹ *Ibid.*, 12.

²² *Ibid.*, 5.

been made in that regard in the six years leading up to his text's publication in 1960.²³ He was at that time unsure, however, of whether the attempt would reach a successful conclusion.

Since then, of course, much has happened in the People's Republic. Recent periods of growth in China can be traced back to reforms championed by Communist Party activist Deng Xiaoping in the late 1970s, which introduced market principles into the Chinese economy. Since that time, China's Gross Domestic Product has increased more than tenfold.²⁴ In addition, the proportion of this number that is fueled by investments has increased to approximately 50 percent—far above the 10 to 20 percent figure that Rostow offers as a benchmark for the drive to maturity phase.²⁵ Additionally, the proportion of China's population residing in rural areas has fallen extremely fast—from approximately 50 percent in 2003 to almost 35 percent in 2010.²⁶ According to Rostow, and supported by Lewis, these statistics are reasonable indicators that China has left the take-off phase and that it is currently in its drive to maturity. The remainder of this section will therefore attempt to identify the period in which the United States underwent its own drive to maturity. Again, this will help to ensure that any comparison between the two countries in terms of anti-competitive practices will be as relevant as possible.

²³ Rostow, *Stages of Economic Growth*, 38; *Ibid.*, 45.

²⁴ "China Has Socialist Market Economy in Place," *People's Daily Online*, accessed April 29, 2015, http://en.people.cn/200507/13/eng20050713_195876.html.

²⁵ "Why China's Economy is Slowing," *Economist*, March 11, 2015, accessed April 29, 2015, <http://www.economist.com/blogs/economist-explains/2015/03/economist-explains-8>; Rostow, *Stages of Economic Growth*, 9.

²⁶ "Lee Yim: Is China on the Right Development Path?," China Energy Fund Committee, accessed April 29, 2015, <http://cefc-ngo.co/en/expert.php?cid=19&act=con&id=96>.

Post-Civil War America

According to economic historians Robert L. Heilbroner and Aaron Singer, the several decades following the end of the Civil War were a “dazzling period” in which “the face of the country [would] literally be made over.”²⁷ During this time, which Heilbroner and Singer call the “industrialization of America,” the advent of new, industrial technology permeated and began to affect every aspect of life—from individuals’ daily routines and work schedules to the regular, everyday objects that they used. In addition to technology, however, the techniques of industrialization also became more widespread, specifically the decline of apprenticeships and the rise of wagework in factory settings. Lastly, although the pace of economic growth continued to accelerate during this period, it simultaneously suffered from relative instability as production levelled off in older industries, such as agriculture, and began to take place more and more in newer, factory-oriented industries.²⁸ In *The Stages*, Rostow specifically names each of these economic trends as a characteristic of the drive to maturity phase.²⁹

Also according to Rostow, the United States reached economic maturity, and therefore the end of its drive to maturity phase, around the year 1900.³⁰ This conclusion is supported not only by those characteristics that comprise the drive to maturity phase itself, but also by those characteristics that make up the following phase. In Rostow’s model, the age of high mass-consumption phase is signified in part by a shift in the

²⁷ Robert L. Heilbroner and Aaron Singer, *The Economic Transformation of America: 1600 to the Present*, 2nd ed. (New York: Harcourt Brace Jovanovich, 1984), 143.

²⁸ *Ibid.*, 144-5.

²⁹ Rostow, *Stages of Economic Growth*, 9.

³⁰ *Ibid.*

society's focus from increased production to social welfare.³¹ This shift in American history is embodied by the progressive era, which directly followed the post-Civil War era in the decades leading up to 1920. During this period, American society became much more concerned about the welfare of its citizens, as evidenced by the emergence of unions in response to the poor working and living conditions that plagued the laboring class.³² In other words, it is possible to situate the years following 1900 as the beginning of the age of the high mass-consumption phase—further reinforcing the notion that the period between the end of the Civil War and the turn of the century served as America's drive to maturity in Rostow's stages-of-growth model.

Once again, my purpose in revisiting Rostow's linear-stages-of-growth model is to understand how to gauge China's current level of development accurately and to ascertain when the equivalent period in took place in American history, with the hope that comparing anti-competitive practices in two *similar* phases will lead to a more controlled analysis. Based on investment statistics and changing rural-to-urban population ratios, it is apparent that China currently occupies Rostow's drive to maturity phase. In addition, due to the spread of industrial technology and techniques, as well as the rapid, if unstable, growth of America's economy in the period between the Civil War and the progressive era, it can be deduced that this is when the United States experienced its own drive to maturity. The remainder of this work, then, will focus on a comparison between contemporary China and post-Civil War America.

In the next section of this text, I will specifically examine the kinds of methods used by firms to avoid economic competition in the United States and the People's

³¹ Rostow, *Stages of Economic Growth*, 11.

³² Heilbroner and Singer, *Economic Transformation of America*, 225-6.

Republic during the aforementioned, relevant periods. This will reveal remarkable similarities in the anti-competitive practices used by firms in each setting. Finally, in the last section of this text, I will compare both countries' attempts to curtail these anti-competitive practices through policy, and demonstrate that any evaluation of these policies by Chinese leaders must take into consideration the degree of involvement that its government has historically had in the economy.

Anti-competitive Practices

Of the many forms of economic “unfairness” that President Roosevelt witnessed and pioneered efforts to curtail, which I will discuss further in the next section of this text, perhaps the most prominent was anti-competitive practices on the part of firms. Although there are a number of ways in which firms can engage in anti-competitive practices, they are almost always implemented with the end goal of reducing the amount of competition in one or more markets. A list of basic anti-competitive practices can be divided into three categories: practices on behalf of individual firms, practices within vertical supply chains, and horizontal practices amongst groups of firms in the same market. What follows is a brief description of each category, as well a non-exhaustive list of subtypes.

Individual Practices

Individual practices are those methods of avoiding competition that, as their name suggests, are exercised on the part of individual firms, without collusion. Perhaps the most infamous of these methods is predatory pricing, also known as limit pricing, below-cost pricing and, in the context of international trade, dumping, in which firms sell their goods or services at particularly low prices including, at times, at a financial loss to themselves.³³ Firms generally engage in this behavior as a means of either forcing their competitors out of a market or discouraging potential competitors from

³³ “Anti-dumping,” Office of the United States Trade Representative, accessed April 29, 2015, <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/trade-remedies/anti-dumping>.

entering the market in the first place.³⁴ Other anti-competitive practices on the part of individual firms include refusal to deal and tying the sale of multiple products together. The former of these occurs when firms deny the sale of their goods or services to other firms on a conditional basis—for example, one firm might refuse to sell to another firm that simultaneously buys from the first firm’s competitors, in an effort to lessen the amount of business that said competitor receives.³⁵ The practice of “tying,” on the other hand, is when a firm requires that the purchase of one of its goods or services be accompanied by the purchase of one or more other, perhaps less desirable, goods or services.³⁶ Each of these methods, when used by firms who already possess some degree of market power in at least one market, can help those firms to gain market power in additional markets.

Vertical Practices

Vertical practices affect those markets that make up a single supply chain. The automotive industry is just one, albeit prominent, example of such a supply chain, as the development of cars requires inputs from many individual markets, including engineers for design, steel for production, dealerships for marketing, and others. Some examples of anti-competitive practices that affect vertical markets like the automotive industry include exclusive dealing and resale price management. Exclusive dealing, also known as requirement contracts, is a kind of agreement by which manufacturers are obligated

³⁴ “Predatory or Below-Cost Pricing,” Federal Trade Commission, accessed April 29, 2015, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost>.

³⁵ “Refusal to Deal,” Federal Trade Commission, accessed April 29, 2015, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal>.

³⁶ “Tying the Sale of Two Products,” Federal Trade Commission, accessed April 29, 2015, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products>.

to buy inputs from certain suppliers. Insofar as these arrangements are consensual and not coerced, they are generally lawful.³⁷ Resale price maintenance is the practice whereby certain manufacturers have a say in how other firms engage in the reselling of their products. A common manifestation of this practice is a manufacturer-imposed price floor on the reselling of its goods. If a particular reseller fails to observe this price floor, it may result in the manufacturer discontinuing business with them. Although courts in the United States once felt that this sort of resale price maintenance was unquestionably illegal, instances of this practice today are reviewed on a case-by-case basis.³⁸

Horizontal Practices

Horizontal practices include behaviors that directly affect competition between multiple firms in the same market. Just three examples of horizontal practices include price fixing, market division, and mergers. Price fixing represents agreements between multiple firms in a single market either to stabilize, lower, or raise prices at the same time and by the same amounts, and they are almost always illegal. For example, different firms in a single market might agree to raise their prices at a uniform rate—the idea being that, if each firm in the market complies, consumers will be forced to pay the higher prices for lack of an alternative. In some circumstances, then, resale price maintenance, mentioned above, can be thought of as a form of vertical price fixing.

Obviously, this sort of behavior is easier to organize in markets with a relatively small

³⁷ “Exclusive Dealing or Requirements Contracts,” Federal Trade Commission, accessed April 29, 2015, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or>.

³⁸ Joshua Wright, “Economics of Resale Price Maintenance & Implications for Competition Law and Policy” (remarks before the British Institute of International and Comparative Law, London, United Kingdom, April 9, 2014).

number of firms, and is more likely to be successful in those industries whose goods or services have no proper substitutes.³⁹ A second horizontal practice is called market division, whereby two or more firms in a single market will agree to sell their goods in specific areas or geographic regions in order to eliminate the possibility of having to compete with one another. Just as with price fixing, plain agreements among competitors to divide market areas into territories, or to assign customers amongst themselves, are almost always illegal in the United States.⁴⁰ Mergers are a third horizontal practice, wherein one firm will acquire, usually through the purchase of stock, all or part of another firm. Also like price fixing, mergers can occur in both horizontal and vertical senses, in that a firm may merge either with other firms in its own market, or with other firms in its supply chain. In the United States, mergers are subject to governmental review and approval on a case-by-case basis, in order to ensure that they do not “substantially...lessen competition, or...tend to create a monopoly.”⁴¹

Historical Examples in America

The primary anti-competitive practices used in America during the post-Civil War era were predatory pricing, price fixing, and mergers. The first of these initially arose as a response to the instability of economic growth that, as I have already mentioned, is a natural occurrence during the drive to maturity phase. As new technologies and techniques were applied to older industries, they would become

³⁹ “Price Fixing,” Federal Trade Commission, accessed April 29, 2015, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing>.

⁴⁰ “Market Division or Customer Allocation,” Federal Trade Commission, accessed April 29, 2015, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/market-division-or>.

⁴¹ “Mergers,” Federal Trade Commission, accessed April 29, 2015, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers>.

heavily invested in for several years and, as returns to scale eventually diminished, would lose that popularity just as quickly. This pattern of booms and busts forms the foundation of what is known as the business cycle and, although it was not new to the American economy at the time, it became far more erratic in the decades following the Civil War, as industrialization took command.⁴² To exploit the rapid expansion of these emerging markets as much as possible, larger firms began to cut their prices—in some cases to below-cost levels, forcing smaller, less wealthy firms out of the market entirely. Competition became “a process in which firms struggled for shares of the market.”⁴³ For some industrialists, however, this “process” seemed more like an “industrial war” that meant “death to some of the combatants and injury for all.”⁴⁴

To avoid suicide at the hands of the business cycle and this unfettered, cutthroat competition, groups of firms in particular industries formed “pools” to establish agreements on pricing. By 1880, these pools existed in America’s cordage, coal, whisky, salt, steamboat, and rail industries, among many others. Unfortunately, however, the pools’ attempts to fix prices did not enable them to avoid the business cycle altogether. The situation became a prisoner’s dilemma in which, as soon as a particular market became saturated and began to experience diminishing returns, one firm after another would break its agreement, lowering its prices in order to increase its share of the market and maintain revenue. Even less conducive to the stability of pooling agreements, however, was the fact that participating firms could cheat without the threat of penalty. This was because, even in the post-Civil War era, American law

⁴² Heilbroner and Singer, *Economic Transformation of America*, 197.

⁴³ *Ibid.*, 182.

⁴⁴ *Ibid.*, 196.

held a tradition that firms could not enter into any contracts with the effect of “restraining trade.”⁴⁵

The failure of pools, however, did not stop American industrialists from seeking alternative means to maintain price discipline. Businessman John D. Rockefeller, for example, had a goal to combine all of the oil refineries in America into one supercompany. In order to do this legally, his lawyers developed the concept of a trust, wherein a firm’s shareholders would place their shares in the hands of a board of directors, who could then vote on it as they wished. Through this mechanism, Rockefeller’s own Standard Oil Company would come to control the policies and assets of 40 other firms. By the late 1880s, trusts were an institutional part of American industry.⁴⁶

And yet, even as trusts offered businesses a perfectly legal way for them to control the actions of their competitors, more efficient means to do so would soon become available. This is referring, of course, to the rise of mergers, whereby firms could directly purchase the stock of their competitors. Mergers had been illegal almost everywhere in the country until 1889, when New Jersey was the first state in the union to change this through legislation. Although the purchase of Andrew Carnegie’s steel company, followed by its eight largest competitors, by J.P. Morgan is probably the best historical example of a firm’s use of mergers, the practice quickly became prominent in industries ranging from railways and oil to biscuits and crackers, and everything in

⁴⁵ Heilbroner and Singer, *Economic Transformation of America*, 197.

⁴⁶ *Ibid.*, 199-200.

between. Indeed, by 1904, one or two large firms controlled over half of the output in 78 American industries.⁴⁷

These large firms, however, were not isolated from one another within their respective industries. Indeed, on several occasions, large firms in one industry would actively try to assist large firms in another industry as a form of collusion, in order to establish loyal and mutually beneficial relationships. It was not uncommon, for example, for railway superintendents and managers to be accused of showing “unreasonable favoritism” by “offering rate concessions to large shippers, charging more for short than long hauls, and giving preferential treatment to large corporations in the form of secret rebates and drawbacks.” The Standard Oil Company, in particular, benefitted enormously from this behavior. In fact, some historians contend that the primary force behind Rockefeller’s success was his relationship with the railroad industry, whose favoritism had aided his company and handicapped his competitors to the point where Standard Oil had obtained a monopoly, not only in oil refinement, but in oil transportation as well. By 1881, although Rockefeller’s company only produced two percent of the country’s petroleum, it refined approximately 90 percent of its domestically produced oil and essentially, set the price for all of it.⁴⁸

Recent Examples in China

The most prominent anti-competitive practices in China today are similar to those that existed in post-Civil War America, albeit sometimes for different reasons. In recent years, cracking down on price fixing has been a tremendous focus of the Chinese

⁴⁷ Heilbroner and Singer, *Economic Transformation of America*, 202.

⁴⁸ John Tipple, “Big Businessmen and a New Economy,” in *The Gilded Age: Revised and Enlarged Edition*, ed. H. Wayne Morgan (New York: Syracuse University Press, 1970), 19.

government. In 2013, for example, demand for infant formula produced outside of the country increased as families felt unsafe using Chinese brands that they feared had become tainted. This resulted in a shortage of foreign-sourced formula in China and, as greater numbers of Chinese families began to order formula directly from other countries, resulted in shortages as far away as the United Kingdom. In August of that year, the Chinese government determined that six foreign-sourced formula providers had engaged in coordinated efforts to raise their prices simultaneously during the shortage and, as a result, issued record fines for several of those firms.⁴⁹ Additionally, Mercedes-Benz was found guilty of issuing verbal instructions to several dealerships in the eastern Jiangsu Province, specifying minimum prices at which they were to sell certain luxury vehicle models and certain spare parts between January of 2013 and July of 2014. This is an example of retail price maintenance, which, again, can be interpreted as form of price fixing within the supply chain.⁵⁰

Just as the United States' drive to maturity phase was characterized by the existence of monopolies, like Rockefeller's Standard Oil and J.P. Morgan's U.S. Steel, so too do monopolies exist in contemporary China. As recent as 2010, in fact, monopolies existed in the Chinese banking and oil industries.⁵¹ It should be noted here, however, that the causes that once led to the existence of monopolies in the United States are very different from those that have created the Chinese banking and oil

⁴⁹ Charles Riley, "China Fines Six Companies for Baby Formula Price Fixing," *CNN Money*, August 7, 2013, accessed April 29, 2015, <http://money.cnn.com/2013/08/07/news/china-baby-formula>.

⁵⁰ Neil Gough and Chris Buckley, "Mercedes-Benz to Pay Fine in China to Settle Price-Fixing Claims," *The New York Times*, April 23, 2015, accessed April 29, 2015, <http://www.nytimes.com/2015/04/24/business/international/chinese-regulators-fine-mercedes-benz-over-price-fixing.html>.

⁵¹ "China's Oversized State Monopolies Threaten Its Economy," *People's Daily Online*, June 3, 2010, accessed April 29, 2015, http://www.chinadaily.com.cn/opinion/2010-06/03/content_9928457.htm.

monopolies that I have just mentioned. In post-Civil War America, mergers became popular as a way to “remove the threat of unrestricted price competition that proved so dangerous for a world of large-scale enterprise.”⁵² In contemporary China, on the other hand, monopolies have not become more prevalent, but less so. This is because, as I will discuss in the next section of this text, China’s drive to maturity phase is taking place as it is transitioning from a controlled economy to a market economy. In addition, the next section of this text will also show that recent efforts on behalf of the Chinese government to curb the existence of these anti-competitive practices closely resemble steps taken by the United States to maintain its own economic competition both during and shortly after the post-Civil War era.

⁵² Heilbroner and Singer, *Economic Transformation of America*, 204.

Policy Comparison

One might assume that, because similarities exist between the types of anti-competitive practices that were used in post-Civil War America and that are being used in contemporary China, Chinese politicians stand to gain by studying and implementing the ways in which American politicians addressed these practices in the past. As I will reveal in this section, it would appear as though Chinese legislators have done exactly that. While this approach may be beneficial to an extent, however, Chinese leaders must ultimately realize that any attempt to prescribe and, eventually, to evaluate policies based on what did and did not work in the United States must take into account the context of each country's unique economic history.

Policy in Post-Civil War America

America's reaction to anti-competitive practices took the form of a gradual build-up. Indeed, the federal government only begrudgingly became involved in the situation after the states had exhausted their own options—frequently to no avail. As I have already discussed, both American and British common law had traditions of prohibiting firms from engaging in activity that “restrained” trade.⁵³ As a result, collusion with the intent to fix prices had been illegal long before industrialism took command of the American economy during its drive to maturity. The fact that pools were still able to engage in this behavior, as I have cited, was less indicative of grey area within the law than it was the result of inadequate efforts to enforce it.

⁵³ Heilbroner and Singer, *Economic Transformation of America*, 197.

As the practice of pooling failed due to chronic cheating, trusts emerged as an alternative mechanism through which firms could avoid their competitors. They too, however, were met with disdain. In fact, many states filed lawsuits against trusts on the grounds that, similar to the pools that existed, they too were engaging in behavior that qualified as the restraint of trade, specifically by charging “exorbitant rates.”⁵⁴ And although these states usually won their cases, their victories in the courtroom did little to address their true concerns, as firms either moved their headquarters to more trust-friendly states or achieved the same predatory pricing capabilities through mergers.

Only after states had tried and failed to address anti-competitive practices on their own did the federal government become involved. In 1887, Congress passed the Interstate Commerce Commission Act, establishing an agency with the ability to regulate commerce between the states—a role that the Constitution explicitly reserves for the federal government. In practice, this act was specifically used to compel railway firms to publish their rates, and required that they be “reasonable and just.” The problem with this approach, of course, was that the act did little to specify what constituted a “reasonable and just” pricing schedule. The Commission’s only recourse, then, was to sue firms that it suspected of engaging in predatory pricing and price fixing in federal court. The federal courts, however, unlike their state counterparts, were suspicious of the new Interstate Commerce Commission, and generally sided with the corporate defendants. As one historian says, “The Fourteenth Amendment, whether intended for such purposes or not, was used by the courts to protect the corporation and

⁵⁴ Heilbroner and Singer, *Economic Transformation of America*, 207.

to prevent attempts by the states to undermine its position of power.”⁵⁵ Between 1887 and 1905, for example, the Supreme Court issued rulings in favor of the railway industry in 15 out of the 16 cases that the Interstate Commerce Commission had brought before it.⁵⁶

It was not long after the creation of the Interstate Commerce Commission, however, that the federal government turned its attention from railroad trusts to trusts in every industry. In 1890, Congress overwhelmingly passed the famous Sherman Anti-Trust Act, which declared that “every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade among the several States...is hereby declared to be illegal,” and that “every person who shall monopolize or attempt to monopolize...shall be deemed guilty of a misdemeanor.”⁵⁷ In other words, the Sherman Act did not persecute or prohibit specific anti-competitive practices, such as the predatory pricing that the Interstate Commerce Commission was initially tasked with exposing. Instead, it outlawed the mere existence of trusts and monopolies. And yet, most business owners simply ignored the Sherman Antitrust Act altogether. In fact, it was not until after its passage that the merger movement reached its peak.⁵⁸ As with the Interstate Commerce Commission Act, this failing was the result of a Supreme Court that interpreted the legislation very conservatively. In 1895, for example, the Court ruled that the American Sugar Company’s control of effectively all of the sugar refineries in the United States was legal because it pertained specifically to the manufacture of sugar, as opposed to commerce between the states—the precept on

⁵⁵ Tipple, “Big Businessmen,” 15.

⁵⁶ Heilbroner and Singer, *Economic Transformation of America*, 208.

⁵⁷ *Ibid.*, 209-10.

⁵⁸ *Ibid.*, 210-1.

which the federal government derived almost all of its regulatory authority.⁵⁹ Indeed, America's efforts to curb monopolistic operations did not gain significant progress or legal precedence until 1904 when, in a landmark lawsuit, President Roosevelt triumphed over the Northern Securities Company, dismantling the monopoly that it had obtained over railway transportation in the western United States, and earning himself the title of "trust-buster."⁶⁰ It is notable, however, that this portion of American history represents a shift from less government involvement in the economy to more. As I will now discuss, this has not been the case in contemporary China.

Policy in Contemporary China

Between 1949 and 1978, China's economy was controlled, almost entirely, by its own communist government. For much of that time, as the result of inefficiencies and bad investments, the Chinese economy performed quite poorly relative to other East Asian countries, including Japan, South Korea, and what is now Taiwan.⁶¹ Following the death of Chairman Mao Zedong, however, the Communist Party of China began to turn away from a controlled system and toward market principles.⁶² Championed by party activist Deng Xiaoping, this program of economic reformation, known as "Socialism with Chinese characteristics," occurred in what can roughly be broken into a set of two waves. The first of these waves, occurring during the late 1970s and early 1980s, lessened the amount of agricultural planning that was conducted by the central government, opened the country to investment by foreign entities, and provided

⁵⁹ Heilbroner and Singer, *Economic Transformation of America*, 210-1.

⁶⁰ *Ibid.*, 212.

⁶¹ Loren Brandt and Thomas G. Rawski, *China's Great Economic Transformation* (Cambridge: Cambridge University Press, 2008), 7-8.

⁶² *Ibid.*

entrepreneurs with the ability to start their own businesses. Most of China's larger industries, however, remained owned by the state.⁶³ In the second wave of reforms, which took place in the late 1980s and early 1990s, the Chinese government allowed for the contracting out, and in some cases the privatization, of numerous state-owned industries, as well as the elimination of many price controls, tariffs, and other regulations. Whereas American history is characterized by a gradual increase in government control, then, recent trends in the People's Republic suggest that the opposite is true for China—that is, over time, the Chinese government has relinquished more and more of its control over the economy. And yet, to this day, the Chinese government still owns monopolies in the petroleum and banking industries. This becomes even more perplexing, however, in light of the fact that the Chinese government has, in the past decade, enacted sweeping legislation to end the use of anti-competitive practices, including a number of strong anti-monopoly provisions.⁶⁴

The first significant piece of Chinese legislation aimed at curtailing anti-competitive practices was the Anti-Unfair Competition Law. In 1987, China's Legislative Affairs Office of the State Council assembled a drafting team to develop a law combining both anti-monopoly and other anti-unfair competition characteristics. The first draft of this law was completed in 1988, but it was vetoed shortly thereafter because it was deemed that, at the time, monopolies were not prevalent enough to warrant such legislation. As a result, the drafting team cut out the anti-monopoly portions of the law and, in 1993, the remaining sections were adopted as China's Anti-

⁶³ Brandt and Rawski, *China's Great Economic Transformation*, 9.

⁶⁴ *Ibid.*, 17-8.

Unfair Competition Law.⁶⁵ Because the initial goal with this piece of legislation was for it to be all-encompassing and comprehensive, it pertains to a variety of anti-competitive practices, including “tying” and price fixing, as well as less apparent practices such as bid rigging, deceptive advertising, bribery, crony capitalism, and the appropriation of business secrets. In the years following the passage of the Anti-Unfair Competition Law, smaller, more focused pieces of legislation would also be enacted, including the Commercial Banking Law of 1995, the Price Law of 1997, and the Procurement and Bidding Law of 1999—each of which supplemented and expanded upon those regulations promulgated by the aforementioned Anti-Unfair Competition Law.⁶⁶

Shortly after the initial anti-monopoly, anti-unfair competition hybrid legislation was vetoed in 1988, an anti-monopoly law team was assembled in order to draft a new version of the failed anti-monopoly portions of the law, for passage at a later date. This second draft was finished in 1994, but it was not introduced to the National People’s Congress until 2004, after a special report was released by the State Administration for Industry and Commerce, warning that foreign firms might soon come to monopolize certain Chinese markets. In response to this report, the Anti-Monopoly Law was passed by the National People’s Congress in August of 2007.⁶⁷

⁶⁵ Wentong Zheng, “Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control,” *University of Pennsylvania Journal of International Law* 32 (2010): 718, accessed April 29, 2015, <https://www.law.upenn.edu/journals/jil/articles/volume32/issue2/Zheng32U.Pa.J.Int%27IL.643%282010%29.pdf>.

⁶⁶ Bruce M. Owen, Su Sun, and Wentong Zheng, “China’s Competition Policy Reforms: The Anti-Monopoly Law and Beyond,” *Antitrust Law Journal* 75 (2008): 233-4, accessed April 29, 2015, <http://www.jstor.org/stable/27897577>.

⁶⁷ Zheng, “Transplanting Antitrust in China,” 719.

This landmark piece of legislation prohibits monopoly agreements, as well as other abuses of dominant market position, and institutes mandatory reporting and government approval of merger and acquisition deals.⁶⁸ In order to enforce these provisions, the Chinese government has enlisted the help of three separate administrative agencies. The Antimonopoly Bureau of the Ministry of Commerce, for example, is responsible for reviewing and approving mergers and acquisitions. The Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission, on the other hand, is responsible for investigating price-related anti-competitive practices. Lastly, the Antimonopoly and Anti-Unfair Competition Bureau of the State Administration for Industry and Commerce is responsible for investigating non-price-related behaviors.⁶⁹

These policies obviously bear a number of similarities to those that were enacted both during and shortly after the post-Civil War era in America. For one, both countries' legislation seems to address largely the same set of anti-competitive practices, namely price fixing and predatory pricing, as well as mergers and their monopolistic products. In addition, parallels can be noticed in each country's use of administrative and regulatory agencies as a primary mechanism for enforcing these laws, embodied by the Interstate Commerce Commission in America and the Ministry of Commerce, the National Development and Reform Commission, and the State Administration for Industry and Commerce in China. The remaining question, then, is how to evaluate these similarities. China has clearly been influenced by Western

⁶⁸ Xiaoye Wang, "Highlights of China's New Anti-Monopoly Law," *Antitrust Law Journal* 75 (2008): 135, accessed April 29, 2015, <http://www.jstor.org/stable/27897572>.

⁶⁹ "Competition Policy and Enforcement in China," US-China Business Council, accessed April 29, 2015, <https://www.uschina.org/reports/competition-policy-and-enforcement-china>.

history in its efforts to address the issue of anti-competitive practices. Is this a good thing? Any answer to this question, of course, must consider the historical trend of government involvement in each country's economy.

Conclusion

It would appear as though China's policies to restrain anti-competitive practices have met with relatively more success in a relatively shorter amount of time than the American laws that they resemble. As I have already mentioned, whereas the United States enacted the Interstate Commerce Commission Act in 1887, President Roosevelt did not meaningfully affect the existence of monopolies in America until the Northern Securities Company case in 1904. China, on the other hand, although it enacted its Anti-Monopoly Law as recently as 2007, has been cracking down on price fixing and non-government owned monopolies ever since.

The success of Western-style antitrust legislation in China, however, is not as clear as one might be tempted to believe. Indeed, the mere notion that anti-monopoly legislation exists in a country whose economy has been dominated almost exclusively by state-owned monopolies for the better part of the past century, and where state-owned monopolies still exist in several very important industries today, can be quite confusing. It is thought that the true impetus for the introduction and passing of China's Anti-Monopoly Law, then, was to protect its domestic markets from monopolization by foreign firms.⁷⁰ If this is true, though, then time has yet to tell how the legislation will apply to China's remaining state-owned banking and oil monopolies. Some scholars have suggested that, for now, state control of the aforementioned industries has been allowed only as the result of ambiguities in the law's language.⁷¹

⁷⁰ Zheng, "Transplanting Antitrust in China," 719.

⁷¹ *Ibid.*, 720.

This is very fortunate for China, but it should by no means be comforting. It is not difficult to imagine what may have happened if, for example, Chinese courts had been as conservative in their readings of the Anti-Monopoly Law as the Supreme Court of the United States was when it decided the ultimate fate and limitations of America's Interstate Commerce Commission Act. It is not difficult to imagine the chaos that might have ensued if China's remaining banking and petroleum monopolies had suddenly been declared illegal, sending those critical industries into a free fall that the market may not have been able to make up for in time. If the similarities that exist between the anti-competitive practices used by firms in America's and China's drive to maturity phases yield any insight for Chinese lawmakers today, it is the importance of taking their own economic history into consideration when crafting and evaluating policies to address those practices. There is no one-size-fits-all approach to competition law.

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