The Journal of Markets & Morality 1, no. 1(Spring 1998), 75-82

Controversy: Are Antitrust Laws Immoral?

Jeffrey Tucker
Director of Research
Ludwig von Mises Institute

Most issues in economics raise parallel moral concerns. Should we have a social safety net, or does this merely decrease the incentive to work and increase the incentive to fall into the net? Should the public be taxed to provide "public services," or does this coercively impinge on the value of private property itself? Should monetary policy be used to drive up rates of employment in the short run, or does this approach risk setting off inflation in the long run? In each case, the violability or inviolability of private property, the meaning and application of justice, and the morality of adhering to strict standards of individual liberty are at issue as much as questions of economic efficiency are.

In dealing with all of these issues, economists have been as influenced by moral traditions as they have been by non-normative arguments. Hume contributed to the theory of the balance of payments but also to the idea of what constitutes the public good. Adam Smith celebrated the invisible hand of markets but also investigated the moral basis of civil society. In the pre-Smithian intellectual history of economics, the leading economic thinkers were scholastic theologians known as well among Church historians as historians of economic thought[1]. More recently, the works of John Rawls and Robert Nozick have occasioned much debate in public-choice economics and welfare economics. And all this occurs despite the official status of economic science as being value-free.[2]

What about antitrust laws? Are moral assumptions woven into the fabric of economic analysis—and resulting public policy rules—of what constitutes a monopoly or not? Conservative thinkers have generally made monopoly and antitrust an exception to a preferred general rule against interfering with market relations. In the debates between libertarians and conservatives in American ideological circles in the early 1960s, the validity of the state's antitrust power was always a sore spot. The followers of Ludwig von Mises and F. A. Hayek argued for the laissez-faire position, while the conservatives, grouped around Russell Kirk, favored more economic intervention, particularly the power of the state to break up industrial concentrations.[3] Russell Kirk's own high school economics text makes the case for the free market in nearly every conceivable area save one: the supposed existence of market-generated monopolies, which he labels as dehumanizing. Yet none of these moralistic critiques of industrial concentration deal with economics as such. These critiques have been undertaken at the same level as the anti-monopoly instincts of public opinion, which has usually backed trust busting. These traditions of thought have drawn on a negative response to "bigness" as such, because bigness is associated with power, which is in turn associated with exploitation, a term with a great deal of moral content.

But what is and is not exploitation? One answer is that when a firm, by virtue of its market power, can charge a price that is exorbitantly high and thereby reap "unjust" profits, it has exploited the consumer. But that answer still begs the question: How can we know for sure when a price is exorbitantly high? What is an unjust profit, in an economic sense? Of course, a single supplier can charge a higher price for its valued products in absence of rivalrous competition or close substitutes (for example, monopolistic cable television providers); it is simply a matter of supply and demand. However, the striking empirical fact is that most of the examples given for monopolistic exploitation are not usually market created, but rather, state created, e.g., true monopolies such as the post office, the public schools, utilities providers, and the like.[4] It is only state-connected enterprises that can truly set a price for their services and restrict all substitutes.[5]

The mere presence of a single seller does not imply the presence of exploitation, much less the need for regulatory action, or else consumers would never benefit when a business first provides a product or service. Being the first jewelry store in rural Montana, for example, gives the jeweler a temporary monopoly, but to the extent he makes a go of it, consumers clearly benefit by having more choice of where to buy jewelry than they had before. Moreover, it hardly matters that the single seller's status occurs at the end rather than the beginning of a time period—say there is only one remaining jewelry store in rural Montana. In either case, the degree of market concentration does not demonstrate the existence of exploitation. In a market economy, it demonstrates that, for whatever reason, economic conditions have temporarily dictated that only one seller is necessary to achieve market efficiency.[6] Given the uniqueness of every entrepreneur's product, if a rule against being a single seller of a good were enforced across the board, the economy would be made to conform to a static mode with no entrepreneurship, no risk taking, and no profits above the average rate of return. This would be a world without Bill Gateses, Sam Waltons, or even pension fund millionaires whose mutual funds earn twenty percent returns.

But such a static analysis has nothing to do with the real world, growing economy. In the real world, being first past the post is the very essence of the competitive process because above-normal returns are the motivating force behind innovation and the means for continual improvement in living standards. The distinction, if there is one, between profits and monopoly profits, between market prices and monopoly prices, is not at all obvious to the casual observer.

If public intuition is not a reliable standard of what constitutes monopolistic exploitation, what is? Here is where the economic scientists come in. Economists approach the subject of monopoly from the standpoint of equilibrium-based models purporting to describe an ideal competitive setting. Those models are in turn used as a benchmark against which a particular industrial configuration is measured. They use graphs and equations, with inputs related to market sizes, price, costs, demand elasticities, and much more. They would appear to demonstrate the existence or nonexistence of monopolies as a matter of pure empirical information backed by a rigorous model of an idealized competitive structure.

The very complexity of this enterprise, however, can be seen as a misleading disguise for a deeper moral content associated with the modeling and enforcement of monopoly. After all, in the real world, firms are profoundly affected by these models and the interventions they sustain. Businesses are investigated, required to expend massive amounts of money defending themselves against charges that are often elusive, are dragged through the mud in the media, and forced to rearrange management practices to conform with court judgments.

Since the first principle of a business in a market economy is always to maximize profits (which, in a market economy, requires service to the consuming public above all else), any forced rearrangement of managerial priorities requires a company to work against its very nature and purpose. It must add new priorities—conforming to government decrees—to its other priorities. Oftentimes, the same business practices that regulators regard as monopolistic the company merely regards as profit-maximizing. Conforming to regulator's decrees, then, requires an orientation away from profits and towards obedience, which threatens to reduce consumer welfare as well.

So let us not pretend as if the enforcement of antitrust laws is merely the application of science to market behavior. It may not be that at all. But it most definitely amounts to the use of the government's police power to impose a different managerial configuration on a business than the owners of private property (including stockholders) would have chosen in a pure market setting. In short, it is government intervention in the rights of private property holders, an intervention that market logic suggests should only take place under grave circumstances: fraud, theft, breach of contract, or some other infraction contrary to market ethics. The monopolists who enjoy no government privileges are not necessarily guilty of any of these infractions. They are only guilty of having been *deemed* guilty according to a highly rarified model of viewing the competitive process.

These economic models have been deemed untenable by an increasingly broad number of economists within the profession, most of them drawing insights from the Chicago School, which began its assault on antitrust laws in the 1950s. As a result of this work, antitrust policies have received less and less support from the profession. Yet even fierce critics like Robert Bork, Yale Brozen, Harold Demsetz, George Stigler,[7] and Richard Posner do not go so far as to favor the abolition of any role for the government in managing and regulating industry so as to prevent monopolistic behavior.[8] The Chicago approach also draws from public choice insights into the nature of government regulation; the regulatory process can be captured by special interests who use it as a predatory means of beating their competitors. But this approach does not rule out the need for antitrust and monopoly controls in theory; it is only an argument that they are usually not pursued to the benefit of consumers. Instead, the regulatory machine benefits special interests at others' expense, a normative position deemed unacceptable.

We can see this process working in a recent case of antitrust investigations and judgments. Consider the case of Mr. Potato Head.[9] The toy retailer Toys 'R' Us is dominant in the market (meaning it has the largest market share relative to its competitors) but faces vigorous competition from discount toy stores specializing in offering low-priced products. A key strategy that Toys 'R' Us has used to compete is to become the sole geographic distributor of certain name brands. The company works with manufacturers to become the sole distributor and thereby makes it difficult for discounters to become competitive in offering the same products. Typically, the products they work to restrict are those for which there exists a relatively inelastic demand, that is to say, consumers demand that product even at a higher price than would otherwise be offered by a discount store. Name brands are key here, especially those recognized by parents, most famously G.I. Joe, Mr. Potato Head, and Hollywood Barbie. In each case, competitors could not acquire the product as a consequence of contracts negotiated by Toys 'R' Us.

By saying, in effect, "it is either us or them," is the company exercising undue market power to reap monopoly profits? The Federal Trade Commission thought so, as is clear from its judgment against the firm. But, in fact, these kinds of deals are only successful as long as efficiency prevails in the market. The manufacturer takes the risk of selling only to Toys 'R' Us in hopes that its exclusive arrangement will bring it the most profit. But the manufacturer could also freely sell its goods to the discounter, provided it is willing to sacrifice Toys 'R' Us as a customer. Certainly the option of coercing Toys 'R' Us into purchasing a producer merely because it is being offered by the discounter does not accord with market ethics. Yet so long as exclusive distributorships offer greater profits—the indicator that something is going right—than other arrangements, coercion will be the only option. If the market and the right of contract are left to prevail, nobody is being coerced; certainly competitive discount stores possess no natural right to purchase all varieties of products from manufacturers and sell them at a discount price.[10] The F.T.C. said that the exclusive deals were stunting the growth of discount toy outlets, an accusation to which Toys 'R' Us can only respond "we hope so," but only the will of the consuming public, which continues to buy from its stores despite alternatives, makes it possible.

By preventing this mode of competition, regulators are not only impeding the evolution of the most efficient market arrangements for the distribution of goods and services, they are also denying businesses the right to negotiate the most profitable contracts. In this sense, there are two cases of plunder occurring: one, the present value of property, which can no longer be put to its most profitable use; and two, the profits in the future that will no longer be earned as a result of the intervention imposing a less efficient allocation of resources. These are the moral costs of antitrust rulings, which force companies to make management decisions under the duress of regulatory police tactics.

The consumers, who have no say in the outcome of antitrust investigations, may end up paying in the form of fewer choices in the long term (plenty of businesses, after all, have been destroyed through government's regulatory actions). There is also the crucial matter that the regulators have weighed in on behalf of one firm against another firm, distorting the rule of law in order to benefit less competitive companies (often the most active lobbyists) over the more competitive companies with deep pockets.[11] This is no more consonant with basic ethical standards than a court system that is a respecter of persons in the application of criminal law. The imposition of antitrust regulations is a form of legal discrimination that punishes successful companies for doing what businesses are supposed to be doing in a market economy: working to maximize profits through consumer service. Making matters worse, antitrust regulations are a classic example of *ex post facto* law.[12] The managers of a business can only know with certainty that they are guilty of monopolistic practices when the regulators or the courts say that they are.

The case of Mr. Potato Head—and the market pressure applied by the practices of Toys 'R' Us—hardly exhausts all the varieties of market behavior deemed anti-competitive by government regulators. In the case of Microsoft,[13] regulators have deemed the practice of selling Windows 95 and MS Explorer as a package deal to be an illegal "tying agreement." This is said to exist when a buyer's purchase of one product is conditioned on the purchase of another product. Famous cases of other tying agreements are the salt company that sold its processing package with its canning package, a newspaper that sold advertising to its morning and evening editions as a package unit, a chicken company that sold its fryers with its spice mixes, and many others.[14]

The *Microsoft* case is only the most recent installment in this saga of the absurd. The case is notable because the technologies that the government regulators analyzed were not even twelve months old when the judgment came down against the software company. Likewise, Microsoft's method of sale had hardly routinized in that time, but it did not keep regulators from pronouncing on it. This is sheer abuse of power. And making matters worse, the complainers against Microsoft were not consumers, but Microsoft's own competitors who feared the company's inroads into the web browser market. But rather than play fair and square within the framework of the market economy, the competitors filed suit and lobbied for government to skew the law against Microsoft's business interests.[15]

Here we see another normative factor driving the imposition of antitrust judgments: envy. Envy is not a valid motive force in competitive relations because it seeks the destruction of one's enemies and betters through any available means, including coercion. Envy is different from jealousy, which merely fosters the desire to emulate and improve. Envy, in contrast, blinds a person to ethical considerations. It tempts a person to subvert the rules of the game and instead to seek unfair advantage[16]. Yet this is the moral subtext to nearly every antitrust case brought under American law since the signing of the Sherman Antitrust Act.

Even leaving aside the economic critique of antitrust, these laws must be rejected on normative grounds as well. Antitrust regulations, as they harness the envy of less successful companies to interfere with the voluntary, contractual arrangements of producers and consumers, represent an unnecessary use of the violent police power of the state and are thus contrary to a common sense notion of justice, equal application of the law, and the moral integrity of private property rights. There may indeed be cause to use such power to impede market transactions, but none of the commonly cited reasons to control the supposed tendency of markets to erect monopolies qualify as just cause. The moral burden of proof is on the side of those who advocate antitrust policies, and that burden has yet to be born.

Notes

[1] Joseph Schumpeter, *A History of Economic Analysis* (New York: Oxford University Press, 1954), 73-142.

[2] For a fascinating discussion of this issue from two perspectives, see Murray N. Rothbard, "Antimarket Ethics: A Praxeological Critique," in *Power and Market* (Menlo Park, CA: Institute for Humane Studies,1970), 203-55; and Gary North, "Economics: From Reason to Intuition," in *Foundations of Christian Scholarship*, R. J. Rushdoony, ed. (Vallecito, CA: Rose House Books, 1979), 75-101.

[3] See George H. Nash, *The Conservative Intellectual Movement in America,* 2nd ed. (Wilmington, DE: Intercollegiate Studies Institute, 1996), 158-71; also Russell Kirk, *Economics and Prosperity* (Pensacola, FL: A Bega Book, 1992).

[4] Thomas DiLorenzo and Donald Boudreaux, "The Protectionist Roots of Antitrust," *Review of Austrian Economics* vol 6, no. 2 (1993): 81-96.

[5] Israel M. Kirzner, *Competition and Entrepreneurship* (Chicago: University of Chicago Press, 1974), 104-19.

[6] Dominick Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (New York: Wiley and Sons, 1982), esp. 5-48.

[7] Who once told an interviewer, "I like the Sherman Act." *Reason Magazine* (January 1984): 46.

[8] For a free-market critique of the all-but-abolish position, see Fred S. McChesney, "Antitrust and Regulation: Chicago's Contradictory Views," *Cato Journal* 10, No. 3 (Winter 1991): 775-98.

[9] The information on this case is drawn from "Toys 'R' Us Led Price Collusion, Judge Rules in Upholding F.T.C.," *The New York Times,* 1 Oct. 1997, and "Flat Christmas Sales Spur Fall in

Toys ‘R’ Us Shares,” *The New York Times*, 7 Jan. 1997. Cf. Llewellyn H. Rockwell, Jr., “Reno and the Potato Heads,” *The Free Market* (January 1998).

[10] Ironically, in another setting the discounter’s behavior might be called “predatory pricing.”

[11] In Hayekian terms, antitrust regulation has the character of legislation, not law. F. A. Hayek, *Law, Legislation, and Liberty, Vol. 1* (Chicago: University of Chicago Press, 1973), 124-44.

[12] This point is made by Murray N. Rothbard, *Power and Market* (Menlo Park: IHS, 1970), 60, who also argues that it would be vain “to call simply for clearer statutory definitions of monopolistic practice. For the vagueness of the law results from the impossibility of laying down a cogent definition of monopoly on the market.”

[13] Cf. Rich Karlgaard, “Silicon Valley's Politics of Envy,” *Wall Street Journal* 20 Oct. 1997); also http://www.microsoft.com.

[14] For the details on the absurdities of these cases, see Armentano: 198-229.

[15] For more on this case, see Francois Melese, “Pile on Microsoft,” *The Free Market* (February 1998); Rich Karlgaard, “Silicon Valley’s Politics of Envy,” *Wall Street Journal* 29 Oct. 1997; D. T. Armentano, “Curb law, not Microsoft,” *Journal of Commerce* 19 Nov. 1997; “Gates Bristles at Monopoly Accusations,” *The Washington Post* 21 Nov. 1997.

[16] Helmut Schoeck, *Envy: A Theory of Social Behavior* (Indianapolis, IN: Liberty Press, 1966), 277-308, 402-4.