

## **Do Merger Restrictions Promote Social Development?**

**William Gissy, PhD**

VP for Planning and Development

Professor of Economics

Kazakhstan Institute of Management, Economics and Strategic Research

Almaty, Kazakhstan

### **Abstract**

*One important aspect of social development is the establishment of standards that serve to promote economic justice. That economic justice is critical to social development is a central theme of Morvaridi (2008). Economic justice is essential to economic growth and development; and Jacobs et. al. (1999) see economic development as essential for overall social development. The issue of economic justice brings in the role of property rights and the protection of property rights are seen as essential for the establishment of economic justice, at least within the neo-classical tradition. Recently several writers have questioned the legitimacy of antitrust legislation, especially those provisions that restrict mergers. These authors see such restrictions as a needless infringement on property rights and therefore contrary to economic justice. This paper argues that limitations on property rights could be justified in the face of market failures and therefore such restrictions enhance economic justice and social development.*

### **Introduction**

As Jeffrey Tucker (1998a) notes, economic issues, and their focus on efficiency, are often coupled with concerns involving property rights, individual liberty and economic justice. He argues that the contemporary economic approach to antitrust legislation results in policy prescriptions that actually violate essential standards of economic justice, specifically the needless violation of property rights. He subscribes to the belief that government should only intervene in the market to prevent forms of conduct such as fraud, theft or breach of contract. Antitrust legislation forces the owners of a business to adopt a management configuration that differs from what they would have chosen in a free market setting. This, in his view, is a police action that represents a violation of the business owner's property rights. Individuals who own one company are at times prohibited from selling their claims to owners of a competing firm. In a subsequent paper (1998b) he refers to antitrust law as institutionalized envy and theft.

Tucker does level some legitimate complaints; unfortunately these points are not in dispute in the economics arena. Being the single seller of a product does not in and of itself generate market power that would permit a seller to "exploit" the consumer. Then again economists don't generally claim that a monopolist exploits the consumer, rather they have the ability to charge a higher price than they would receive in a competitive market. Tucker admits to this conclusion and sees no problem with the result. If a firm restricts production, and uses the artificial shortage as an excuse to charge a higher price then the owners of that firm are merely exercising their property rights. Tucker's claim is no consumer has a right to a particular price to any good so only the owners of the firm have rights involved.

One point overlooked by Tucker in his first paper was the array of topics that fall under the general heading of "antitrust". As Kenneth Elzinga (1998) noted, Tucker never discussed that part of antitrust law dealing with the formation of cartels or the merging of several firms into one dominant producer. Tucker (1998b) did comment briefly on those topics in his reply to Elzinga but merely claimed that a free market would prohibit bad behavior from succeeding in the long run. He claims that the free market will naturally place limits on the size of the firm, a position espoused by Peter Klein (1998) as well as earlier writers like Murray Rothbard (1962), Richard Langlois (1988) and Oliver Williamson (1985). Unfortunately this discussion focuses on the limits of vertical integration and does not formulate any conclusion about economic limits to horizontal integration. Yet the earliest focus of antitrust law was on the accumulation of excessive market share in the final product. Does market power, acquired by dominating the production of a particular product, infringe upon consumer rights?

If the answer to this question is yes, then restrictions on mergers or the formulation of cartels, while limiting the property rights of business owners, may serve to protect rights that are considered to be of greater value. In this case the legal restriction would not be an ethical violation. In the complex organism we call society we are often faced with the conflict of rights. In such cases any decision will favor the rights of one group over the rights of the other. The basis of ethical judgment would rest on protecting the correct set of rights.

Another issue is the theoretical underpinnings of the neo-libertarian approach to the economics of markets. As Morvaridi (2008) notes, this approach lacks an appreciation of the context of the poor, often suggesting that the poor are responsible for their own plight. Morvaridi then continues to discuss economic globalisation and its impact on global social justice. The increasing interdependence caused by economic globalisation challenges the assumptions of a right to development.

The purpose of this paper is to reassess the arguments against antitrust laws in light of a broader vision of economic rights and economic justice and their relation to social development. A theory of social development espoused by Jacobs et. al. (1999) and its connection to economic justice will be discussed in the next section. The third section of the paper will address the concept of economic rights within a general framework of what does or does not qualify as a right. The relationship between economic rights and their corresponding responsibilities will then be related to a concept of economic justice. The fourth section will address specific charges against each particular aspect of antitrust legislation and reconsider the arguments in light of consumer rights and the property rights of competing firms and to what extent antitrust restrictions on mergers, while placing limits on the property rights of one group, serve to promote economic justice and therefore social development. The final section will be the summation and conclusion.

### **A View of Social Development**

Jacobs et. al. (1999) define social development in broad terms as an upward movement of society from lesser to greater levels in areas such as efficiency, quality, productivity, creativity, choice and enjoyment. The authors see the development of individuals and societies resulting in increasing freedom of choice and increasing capacity to fulfill its choices through its own capacity and initiative.

According to the authors growth and development usually go together, but are subject to different laws. Growth is essentially objective in nature, measured by the quantitative expansion of existing types of activities. Development is more subjective and represents the qualitative enhancement of the organization. Social development is driven by the aspirations or collective will of society for advancement. The social will seeks the fulfillment of a broad range of needs such as security of borders, law and order, self-sufficiency in food and shelter, peace, entertainment, leisure, knowledge, and artistic creativity.

Development of any society occurs when the collective will is sufficiently strong to alter the current course in search of a newer expression. Development strategies will be most effective when they focus on identifying areas where the social will is mature and provides better means for expression. Only those initiatives that are in consistent with this urge will gain the necessary support at the individual level.

Jacobs et. al. define society as the field of organized relationships and interactions between individuals that possesses a huge reserve of human potential that is manifested in its values, physical security, social beliefs and political structures. Policies, strategies and programs that tap this human potential and channel it into constructive activities can direct an entire nation to action at a rapid pace of advancement. The evolution of more complex and productive activities are then woven together by people to form systems, organizations, institutions and cultural values that constitute the fabric of social organization. The essential nature of the development process is the progressive development of social organizations and institutions that harness and direct the society's potential for higher levels of accomplishment. Society develops by organizing all the knowledge, human energies and material resources at its disposal to fulfill its aspirations. The process of formation of organization takes place simultaneously at several levels: the organization of peace and physical security in society; the organization of physical activities and infrastructure; the organization of productive processes through the application of skills and technology in agriculture, industry and services; the organization of social processes we call systems, laws, institutions and administrative agencies; the organization of data as useful information; the organization of knowledge through education and science and the organization of higher social and cultural values that channel human energy into higher forms of expression.

Each aspect of organization depends upon and interacts with the others. Elevating the organization at any of these levels increases the utilization of resources, creates new opportunities and accelerates development. Development requires an enormous investment of time and effort to replace existing patterns of social behavior with new ones.

According to the authors development occurs in those areas where the society becomes aware of new challenges and opportunities and can summon the collective will to respond to them. Development is a process, not a program; an activity of the society as a whole. It can be stimulated, directed or assisted by government policies, laws and special programs, but it cannot be compelled or carried out by administrative or external agencies on behalf of the population. Development strategy should aim to respond to the collective will, not to substitute for it.

Jacobs et. al. see the development of a business, like the development of a society, as a process fueled by the aspiration of its stakeholders. In the case of business, the aspiration of the owners and leaders is a critical determinant of how far and how fast the business grows.

In the case of the society, the role of leadership is played by entrepreneurial pioneers that initiate new activities and the psychological intensity of their pursuit is a critical determinant of success. But in either case, the greater the aspiration of all the people involved, the more powerful the impetus for accomplishment. Authority is a fundamental principle of organization that is essential to the survival and development of both societies and companies. Government, social and cultural authority as expressed through social norms, systems, institutions, laws, customs, and values determine the effectiveness with which surplus energy is converted by society into productive power. Corporate authority is expressed more and more through the discipline of impersonal rules, systems, coordination of activities, policies, corporate culture and values that determine the effectiveness with which surplus energy is converted by a business into productive power, rather than by top down personal exercise of authority by a management hierarchy. But regardless of whether the form is personal or impersonal, this discipline is fundamental to the successful functioning of an organization. For both businesses and societies, values represent that highest form of organization for directing human energies in constructive and productive activities. The quality and height of the values set the limits on the magnitude of developmental achievements.

Within the context of social development espoused by Jacobs et. al. economic development is a critical component of social development. As the authors claim, each element of social development is dependent on the others. Therefore true social development cannot be achieved without economic development. However Morvaridi argues that economic development is dependent upon the establishment of a system of economic justice. Linking these two perspectives results in the case where economic justice serves as an essential element of social development. Therefore whether antitrust legislation serves or hinders social development depends on its impact on economic justice.

### **Rights, Responsibilities and Economic Justice**

Carmine Gorga (1999) determined that there are four rights that are distinctly economic, thus unique from other rights. These rights represent the moral foundation for the formulation of policies related to the production and distribution of goods and services as well as the acquisition and control of wealth. Each of these rights is a right of all people and collectively they represent, in Gorga's view, a set of public rights rather than a set of private rights. The four rights envisioned by Gorga are:

- 1) The right of access to resources
- 2) The right of access to credit
- 3) The right to own the fruits of one's labor
- 4) The right to protect one's wealth

At this point Gorga's reasoning becomes fuzzy. The article was an attempt to distinguish between public rights and private rights where Gorga considered economic rights to be public and property rights to be private. However the third and fourth rights in Gorga's list are essentially property rights which are viewed as private. Despite this short coming in the assessment Gorga does draw attention to the distinction between rights *in posse* and rights *in esse*. The former represent potential, an opportunity to pursue with no guarantee of success. Such rights are available to everyone and are therefore public in nature. Rights *in esse* are those rights granted to a specific individual. The property right to my home is mine and accrues to no one else. Other individuals may have their own right *in esse* to their home. I have a right to free speech even if I choose to remain silent but I do not have a right to property I do not own. My property right to my home prohibits your taking or use without my permission whereas my right to free speech does not prohibit you from engaging in any action. Private rights are restrictive towards others while public rights are liberating.

Perhaps it would be better to characterize the four rights established by Gorga as two public rights, representing the potential to create wealth, and two private, involving the protection of any wealth that was created. In essence property rights, rather than being distinct from economic rights, are a sub-category of economic rights. The first two rights could be classified as participatory rights. Of course where there are rights there is responsibility, where the two bind the individual and society. Responsibilities represent the moral foundation for rights. A system of law that is fully appreciative of the mutual dependence between rights and responsibilities and makes correct assessments of the interconnection will be ethical.

So what corresponding responsibilities does Gorga attach to each of his economic rights? With respect to the first right, the access to resources, he establishes the responsibility of paying taxes. This would be a more reasonable responsibility if Gorga was referring to a right of access to public goods which are paid for out of tax revenues. Natural resources, if they are not the private property of an individual, are a common good rather than a public good. A more reasonable responsibility would be to use but not waste and replenish those resources that can be replenished. Additionally, for resources held in common, payment of an appropriate user fee would be an additional requirement.

With respect to the right to access to credit, with the understanding that the credit is for the acquisition of productive resources, the obvious responsibility would be the obligation to repay the debt at with a fair compensation to lender. This compensation would be the interest charge which includes an inflation premium to cover the depreciation of the principal during the period the loan was outstanding. Since wealth represents an ability to acquire goods in the future one has an obligation to repay the purchasing power one initially borrowed. In addition to the premium to cover the depreciation of the principal there is the cost of the foregone opportunity to use the funds on the part of the lender. Financial intermediaries pay interest to depositors and must be able to cover those expenses as well as a fair return for their services as an intermediary. Contrary to the Aristotelian view that interest or usury is unjust the contrary is true; it is unjust to not pay interest on money borrowed.

The right to own the fruits of one's labor carries the responsibility of diligent effort in those tasks where there is compensation. The fruits must be derived from honest labor. Employment is an implicit contract. If you agree to perform certain tasks for a stated remuneration then you have the responsibility to perform those tasks to the best of your ability. Only then can you fully claim a right to your compensation.

Finally, the right to protect one's wealth carries the obligation to respect the wealth of others. As it will be shown later, those who complain that antitrust laws are unjust in that they limit the property rights of business owners fail to take the corresponding responsibility into consideration.

To incorporate these rights into a theory of economic justice we must first establish that these rights conform to certain legal principles. Are these rights universal and fair? By argument the answer to the first part of that question is yes, these rights are viewed to be universal in that all people have these rights. Even private rights are universal as long as each person in a similar position has the same right. My right to my home is no different from another person's right to their home even though neither of us has a right to the other's home. With respect to the latter part of the question, to assert that all have the same right to pursue productive resources, attempt to create wealth and retain rights over the wealth we create would only seem unfair in a structure that assumes the individual exists for the state. If, however, we hold that the state exists to serve the individual then to claim rights of participation and possession, rights to be protected by the state, given that these rights carry corresponding responsibilities are patently fair. Of course any discussion involving the word "fair" is subjective but the key is the corresponding responsibility. What would be unfair is a system of rights that is void of offsetting responsibilities.

Can these rights be enforced in a court of law and do they promote social order? Rights of possession are easily enforced. The trickier part is the enforcement of participatory rights. To assert a right to access of credit cannot be construed to mean a guarantee of a loan. If a loan request is denied has the right been violated? Again we must couple rights with responsibilities. If it can be demonstrated that the person who was denied the loan could not live up to the responsibility of repayment then no violation of rights has occurred. The person was free to participate and the denial was due to their inability to demonstrate a capacity for adhering to the necessary responsibility. If the loan was denied for some other reason then courts could take the necessary action against the offending lender. In short, even rights of participation can be enforced if we accept that a denial unrelated to the inability to perform the corresponding responsibility constitutes a breach.

That economic rights help to promote social order is time and again evidenced by the history of rebellion. When people feel oppressed, politically or economically, they rise in protest. A system of laws designed to protect rights and assure an equality of participation clearly serves to promote social order and social development.

Do these rights serve to enhance economic freedom? As Gorga notes, without the exercise of the four rights under consideration, people are not fully free to participate in the economic process. If people are denied the opportunity to participate in the production process they will be forever disadvantaged in the process of wealth distribution and therefore at a disadvantage in the process of exchange. Without these rights there can be no economic freedom, if we view economic freedom as the pursuit of improving one's economic situation. Those born as "haves" remain "haves" and those born as "have nots" remain "have nots". It is this lack of economic freedom that creates the potential for social unrest. Economic rights promote the social order because they represent the framework for a system of economic freedom. Again it should be emphasized that rights of participation do not constitute a guarantee of outcome.

In order to incorporate economic rights into a system of economic justice we need to consider the various components of the latter. As Gorga notes, since the time of Aristotle economic justice was divided into distributive and commutative components where the latter represents the rules of justice applied to the exchange of goods. Gorga's key contribution was to recognize the need for a third component, namely participatory justice. If people do not have a right to participate in the production process how can they fully participate in the functions of distribution and exchange? Goods may only be exchanged after they have been distributed which first requires that they be produced. How can an individual have justice in exchange if they were denied justice in distribution? Likewise how can an individual have justice in distribution if they were denied justice in production?

The first two rights established by Gorga represent the rights to participate in the creation of wealth. If society adheres to these rights then the economic system exhibits participatory justice. Access to the resources needed to create wealth will not be denied so long as the individual has the means to adhere to the corresponding responsibilities. For a lender to deny credit to an aspiring entrepreneur because the lender does not honestly see how the proposed borrower can repay is not a violation of rights and therefore does not constitute an injustice. However, if the lender refuses to supply credit even though there is clear evidence that the borrower can most likely repay then there has been a violation of economic rights and participatory justice has been violated.

The third right established by Gorga clearly relates to the concept of distributive justice. Those who participate in the production process by offering their labor services are entitled to a level of compensation that is equal to the value of their contribution. Clearly the firm has a rightful claim to some of the proceeds in that the firm provides the worker with the capital necessary to complete the task. Additionally the firm provides the support services necessary to market the product and make it available for exchange. If employers provide wages and benefits that are less than the value of the workers contribution then the worker has experienced a violation of their right and distributive justice does not hold.

Finally, the fourth right in Gorga's list is essential for commutative justice or justice in exchange. The right to my property implies that any exchange of property must be fair. An unfair exchange devalues my property thereby creating a deprivation. In a world of asymmetric information it is far too easy for misstatements of true value to be passed along. If an elderly woman going through the possessions of her recently deceased husband came across a 1912 mint condition Napoleon Lajoie tobacco card and offered it in a yard sale for \$10, not realizing the true market value, and I purchase it with full knowledge of its resale potential then I have taken advantage of her ignorance. If she was fully informed but still decided to sell it for \$10 then that was her informed choice and therefore her rights would not be violated. Now one might counter by claiming that the rights of possession imply a responsibility to know the true value of one's property but in a complex market environment that isn't always possible. A key aspect concerning the role of asymmetric information in a market transaction is that the transaction may not be efficient. If I know there is oil under your property and you don't, and in fact have no legitimate reason to suspect that there is, I have an informational advantage and I would be in a better position to ascertain the true value of the property. This informational asymmetry reduces an otherwise voluntary transaction to an unjust violation of rights and results in a lack of commutative justice. Contrary to the neo-libertarian view, market exchange that is voluntary isn't necessarily just.

In summary, each of the four economic rights stated by Gorga (1999) relates to one of the components of economic justice and indeed economic justice requires that each of these rights be protected. Economic transactions have parties on both sides and economic rights of each side must be weighed to construct a system that approaches true economic justice.

### **Antitrust Law and Economic Justice**

The focus is now directed toward the relationship between antitrust law and the various components of economic justice. Antitrust legislation covers a wide variety of issues from the control of mergers and cartels to various forms of conduct such as exclusive dealerships, predatory pricing, tying contracts and retail price maintenance. To what extent do these rules enhance and protect economic rights, thereby increasing the level of economic justice, and to what extent do they diminish economic justice by needlessly infringing upon the economic rights of individuals? Certainly those who would be categorized by Andrew Yuengert (1996) as “market defenders” understand that in any complex organization a restriction on one person’s rights is sometimes necessary in order to protect the rights of another person. As Michael Novak (1993) notes an orderly society is based upon a system of checks and balances. The excesses of the market are therefore checked by the state.

Naturally “market defenders” would deny that excesses are possible but as Yuengert (1996) notes market activity tends to obscure moral obligations. Karl Polyani (1944) considers the principle problem of market systems to be the tendency to reduce humans to the status of mere accessories in the economic process. As Elizabeth Anderson (1990) notes market activity tends to be impersonal and egoistic where there is no distinction between needs and wants. Those who are not satisfied with the market outcome have no true means of voicing their complaints. Their only recourse is to simply discontinue their participation in the process. Yet Michael Novak (1982) contends that the market process cannot thrive separate from the virtues and values of the moral culture, while Yuengert (1996) argues that markets are not suited for the formation of virtue. The market system, despite its general efficiency cannot guarantee a full protection of rights, hence cannot on its own ensure economic justice.

Nevertheless market defenders argue that since actions prohibited by antitrust laws do not threaten the rights of anyone there is no valid reason to limit the property rights of business owners. Jeffrey Tucker (1998b) claims that there are four essential facts related to antitrust enforcement. First, he notes that a majority of antitrust suits are brought by disgruntled competitors. That may well be true, although the earliest antitrust suits were brought by the federal government, but that hardly diminishes the validity of the action. If someone crashes into my car I will be disgruntled and I may well file a lawsuit; however the fact that I am disgruntled because of the damage to my property does not mean I do not have a legitimate complaint. Of course the main point Tucker (1998a) makes about companies filing suits against competitors is that they are motivated by envy. While it may well be true that not all suits filed by disgruntled competitors have a valid claim it would be foolish to simply assume that envy is always the cause and no disgruntled competitor has a legitimate case. The reason we have courts is to sort through the claims, a form of Novak’s (1993) checks and balances argument, to determine which ones have merit. However the filing of a claim must have a basis in law so without antitrust law legitimate suits could not be filed. Another weakness with Tuckers argument is his contention that the potential for suits filed solely out of envy is a sufficient reason to negate antitrust law. If that is the case then most if not all law related to civil actions should be eradicated since all civil actions have potential for frivolous filings.

A second point raised by Tucker is that most firms targeted by antitrust actions have legitimate economic reasons for their behavior. This is an odd test to employ for questions of what should or should not be legal since most individuals who commit property crime have valid economic reasons for their behavior and those reasons are usually related to improving their economic well-being.

Tucker’s next claim is that behaviors deemed inappropriate actually serve to make consumers better off through lower prices and higher quality. With respect to this comment I would recommend a paper by Genesove and Mullin (2006) which provides sufficient empirical evidence to refute any claim that the monopolization of the sugar refining industry generated any benefits to consumers. Tucker does have a point that it is possible that a merger will allow the new structure to take advantage of economies of scale thus lowering average costs but it is not always the case. It equally plausible that a merger will create a structure that generates prices that are higher than those generated by a competitive market. Much depends on the level of minimum efficient scale. If two companies are both operating at minimum efficient scale then a merger would fail to generate any cost savings.

The last criticism of antitrust laws is that they squelch innovation, force inefficiencies and make property rights insecure. The security of property rights might be threatened if the law is ambiguous; but as Elzinga (1998) notes, many provisions of antitrust laws is quite clear. That a poorly worded law may be bad is a specific condemnation of that particular piece of legislation but it fails to serve as a general criticism of the law as a concept. With respect to innovation, it is generally the product of competitive pressures which might be reduced by unregulated mergers and the legalization of certain prohibitive business practices. As far as inefficiencies, Elzinga acknowledges that restrictions on mergers may result in some efficient mergers from occurring but in this instance we are stuck in a dilemma. Do we restrict mergers knowing that, on occasion, we will deny a merger that would prove to be beneficial or do we allow mergers to occur unchecked and then deal with any adverse effects after they have occurred? Given Novak's (1993) principle that the state serves as a check on the excesses of the market one could argue that preemption is the preferred path. However, size alone does not represent a threat to the rights of consumers, only certain business practices. The fact that a large company might engage in unethical behavior does not make corporate size a problem in general. The problem is the tendency for people to forget that size is a necessary but not a sufficient condition for the exercise of market power. The firm must produce a good for which there is no close substitute and there must be barriers to entry.

### **The Restriction of Mergers**

Although size in and of itself does not mean a firm will engage in unjust practices it creates a potential for improper behavior. Market defenders generally argue that improper behavior that creates above normal profits attracts entry into the market so that in the long-run a monopoly formed through mergers would not be able to sustain a high price over the long-run. On the other hand Genesove and Mullin (2006) provide evidence that size coupled with a reputation for predation can serve as a barrier to entry so the real restriction on the exercise of market power is the substitutability of the product. For a firm supplying a product that is easily substituted by another it would be difficult to maintain a higher price since the loss of customers to other products would offset any potential gain from charging the higher price. However that is an issue for a regulator to examine. The question isn't "is it always ethical to prohibit a merger?", rather the query is properly sated as "is it always unethical to have a law that places limits on mergers?" which is the contention of libertarian writers. The rights involved are in conflict when the potential to dominate production and the creation of wealth is involved. The market may be good at allocating resources and determining which goods get produced and in what quantity (provided the market is competitive) but it was mentioned earlier, the market is no producer of virtue. Even when property rights are clearly defined the market is in no position to determine which property rights deserve the protection. This form of subjective valuation results from a political process. Your right to sell your business to a competitor must be weighed against the rights of those impacted by the merger. To say B may not sell to A does not prohibit B from selling to C. B still has the right to sell, but A does not have the right to buy if the purchase would place A in a position to violate the property rights of others.

Antitrust law, as a rule, does not outlaw mergers but merely requires approval. Owners of a business are not prohibited from selling their company but their choice of buyers may be limited. Additionally no antitrust law requires owners of a firm to sell at a price they find unattractive. Antitrust law does not claim all mergers are bad but that some may represent a potential harm that must be taken into consideration. While there are obvious agency problems associated with the enforcement these issues do not make the law unethical in general. With adequate analysis of data the minimum efficient scale of production could be determined and the proposed merger could be examined to see if there is a potential for cost savings. If two firms seeking to merge are both operating at or beyond that point where average cost is at a minimum then there would be no cost savings from the merger aside from possibly lower advertising expenditures and administrative overhead. The rejection of that particular merger request would not be harmful to consumers since the merger would fail to provide any significant cost savings which could then translate into lower prices.

If there are no cost savings associated with a merger policy, enforcers could still agree to allow the merger or they could choose to deny. Here are we are in a subjective dilemma that relates to a previously posed question. Is it better to prevent mergers because there is a potential for harmful behavior or do we allow mergers and deal with inappropriate behavior when it occurs? Is either approach unjust? Tucker contends that the former approach is a violation of the property rights of business owners, a violation that occurs in an attempt to prevent possible harmful behavior. However his claim on property rights violations is unclear. Consider the earlier example, two firms, A and B, seek to merge with firm A buying out firm B.

If the merger request is denied the owners of firm B are still free to sell, just not to the owners of firm A. Perhaps the deal offered by firm A was the best offer for their company but then the question would turn to why is firm A willing to pay more for the firm. If the merger would grant firm A more market power then the value from the higher offer is offset by the expected future price increase they would be willing to impose thus justifying the higher offer.

The selling firm has rights which imply a corresponding set of responsibilities. The right to sell your property requires a respect for the property rights of others. If a firm has a certain value at prevailing prices and receives an offer that exceeds the true value there must be a reason. Those who claim that the seller is not responsible for the conduct of the buyer after the fact shroud themselves in a convenient veil of ignorance. Since sellers are not likely to question the rational for an above market value offer and would deem it to be in their selfish interest to accept the state, as guardian of all rights, has an obligation to intervene and question why the one company desires to purchase the other. If there is no compelling cost saving reason for the merger then the regulators have a duty to other companies and consumers to inquire as to the reason for the offer. If the proposed purchasing company fails to convince regulators that the offer is not based upon the expected gains from restricting the market then regulators have a responsibility to protect the property rights of others and deny the merger request.

Will regulators sometimes make errors in judgment? Certainly, in a world where law is enforced by humans errors will occur but that hardly serves as a basis for undoing the law. Should we abolish laws against murder and rape simply because some individuals were wrongly convicted? An unjust application of the law does not make the law itself unjust. Firm A has a right to request to buy firm B but has no right to a guarantee of success. Likewise firm B has a right to sell but no right to a particular buyer. If B wishes to sell to a buyer where the transaction then represents a legitimate threat the rights of others the state has an ethical duty to intervene and determine which right carries the greatest weight. Unlike Tucker most of us live in a world where there is a constant conflict of rights. To characterize a situation as one sided, only the parties involved have rights, is intellectually dishonest. Libertarians may not appreciate the concept of third party effects but they nevertheless exist.

Of course Tucker and other followers of the libertarian credo would argue that no consumer has a right to a specific price and they would be correct. Unfortunately they would also be irrelevant. The issue isn't about a specific price but whether the price is a competitive or non-competitive price. The right to access resources for the creation of wealth carries the responsibility to properly use those resources. To restrict production in order to charge a higher price and hence more profit, a power that can be obtained by controlling a market, constitutes a misallocation of resources and therefore represents a violation of economic justice. Under proper resource allocation, the kind generated by true economic competition, prices would be lower except in cases where there are substantial economies of scale in production. Absent these economies of scale, mergers increase market power and increase the likelihood that a firm will charge a non-competitive price. Any price above what a competitive market would generate results from a deliberate misallocation of resources and underproduction of the good.

Therefore if, as members of society we have a reasonable expectation of proper resource use we have a reasonable expectation of competitive prices. To require me to pay a price resulting from an inefficient allocation and use of resources is to devalue my wealth thus violating one of my economic rights. We as consumers may not have a right to a particular price for any good but we do have a right to a competitive price. When firms use market power to restrict production and charge non-competitive prices an injustice in exchange occurs and firms are ignoring their economic responsibilities concerning resource use. A law designed to limit unjust behavior maybe applied in an unjust manner but the law itself remains valid.

### ***Conclusion***

Rights are involved in any economic transaction and there are rights on both sides of any exchange. One role of society is to referee conflicts that arise and make assessments that require both objective and subjective analysis. The economic rights discussed in this paper exist as explicit rights. However since rights carry responsibilities there are also implicit rights that can be reasonably derived. The right to access productive resources carries a responsibility of utilizing them in an efficient manner. Since competition results in an allocatively efficient use of resources and therefore the socially optimal level of production, the resulting price consumers are willing to pay in a competitive environment becomes an implicit right.



Now there is no guarantee that all consumers would be happy with a competitive price but as long as competitive prices imply efficient resource allocation then creators of wealth have a duty to charge competitive prices. Better stated, the implicit right derived from the responsibility to efficiently employ resources is the right of all economic stakeholders to a competitive outcome. Given that mergers could result in the formation of market power resulting in prices exceeding the competitive level, the state, as the protector of rights, has an ethical duty to ensure that mergers do not threaten the welfare and property rights of consumers or competing enterprises. Surely regulators have an ethical responsibility to properly examine the potential consequences of a proposed merger in a fair and objective manner and not dismiss simply because the result will be a larger firm with a larger market share. Libertarian critics of antitrust law claim that consumers do not have a right to any particular price and they are correct. Likewise no firm has an inherent right to a particular market share. For society to say that market share may be obtained by producing a more desired product but not necessarily by acquiring competing firms is societies right to protect its own interests

To allow mergers to occur without restriction and deal with unjust behavior after the fact is one possible approach to unjust business practice but an alternative to that policy does not then become inherently unethical. Certainly a law that simply outlawed mergers without consideration would be an excessive infringement on the property rights of the sellers but that is not nor has it been the approach embodied in the merger provisions of U.S. antitrust law. Improper application of the law may be unethical but that does not make the law itself unethical. If a prosecutor successfully frames an innocent suspect for murder the prosecutor has acted in an unjust manner but the law against murder remains a sound policy.

Laws are rarely if ever created as a lark, rather they are a response to observed conditions. Eichner (1969), Genesove and Mullin (1998, 2001), McCurdy (1979) Zerbe (1969) and Weiman and Levin (1994) all discuss cases where firms used market power to their advantage in the period just prior to the passage of the first antitrust law through the earliest days of antitrust enforcement. Rather than the product of envy on the part of disgruntled competitors, antitrust laws were constructed as a response to observed behaviors by some firms. The notion that market power might create an ability to restrict production and raise the price is not restricted to the domain of chalkboard theory. It is the product of observation and the laws derived were not based on conjecture but real experience. Laws designed to regulate behavior that violate the basic tenets of economic justice may not always be well written and may not always be properly enforced but the intent is to protect the rights of one group which will always require some restriction of the rights of the other party. Misapplication of the law does make the law itself unjust. Economic theory claims that market power leads to market failure. Full social development, therefore, depends on an institutional framework that will protect the economic rights of consumers from the injustice that might arise from mergers that result in an excessive degree of market concentration.

## References

- Anderson, E. (1990), "The Ethical Limitations of the Market", *Economics and Philosophy*, 6, pp. 179-205
- Eichner, A.S. (1969), *The Emergence of Oligopoly: Sugar Refining as a Case Study*, Baltimore: Johns Hopkins Press
- Elzinga, K.G. (1998), "Are Antitrust Laws Immoral?: A response to Jeffrey Tucker", *Journal of Markets and Morality*, 1, pp. 83-89
- Genevose, G. and W.P. Mullin (1998), "Testing Static Oligopoly Models: Conduct and Cost in the Sugar Industry", *RAND Journal of Economics*, 29, pp.355-377
- Genesove, D. and W.P. Mullin (2001), "Rules, Communication and Collusion: Narrative Evidence from the Sugar Institute Case", *American Economic Review*, 91, pp.379-398
- Genesove, D. and W.P. Mullin (2006), "Predation and its Rate of Return: The Sugar Industry, 1887-1914", *RAND Journal of Economics*, 37, pp.47-69
- Gorga, C. (1999), "Toward the Definition of Economic Rights", *Journal of Markets and Morality*, 2, pp.102-113
- Jacobs, B. and H. Cleveland (1999), "Social Development Theory", working paper, World Academy of Arts and Sciences
- Jacobs, B., H. Cleveland, R. MacFarlane, A. Natarajan and R. van Harten (1999), *Human Choice: The Genetic Code for Social Development*. Minneapolis: World Academy of Arts and Science
- Klein, P.J. (1996), "Economic Calculation and the Limits of Organization", *Review of Austrian Economics*, 9, pp. 3-28
- Langlois, R.N. (1988), "Economic Change and the Boundaries of the Firm", *Journal of Institutional and Theoretical Economics*, 144, pp.635-657
- Langlois, R.N. (1994), "The Boundaries of the Firm", in P. Boettke ed. *The Elgar Companion to Austrian Economics*, Aldershot, UK: Edward Elgar, pp.173-178
- McCurdy, C.W. (1979), "The Knight Sugar Decision of 1895 and the Modernization of American Corporate law, 1869-1903" *Business History Review*, 53, pp.304-342
- Morvaridi, B. (2008), *Social Justice and Development*, Basingstoke: Palgrave-MacMillan
- Novak, M. (1982), *The Spirit of Democratic Capitalism*, New York: Touchstone
- Novak, M. (1993), *The Catholic Ethic and the Spirit of Capitalism*, New York: Free Press
- Polanyi, K. (1944), *The Great Transformation*, Boston: Beacon Press
- Rothbard, M.N. (1970), *Man, Economy and State: A Treatise on Economic Principles*, Los Angeles: Nash
- Tucker, J. (1998a), "Are Antitrust Laws Immoral?", *Journal of Markets and Morality*, 1, pp.75-72
- Tucker, J. (1998b), "Are Antitrust Laws Immoral?: A Reply to Kenneth G. Elzinga", *Journal of Markets and Morality*, 1, pp.90-94
- Weiman, D.F. and R.C. Levin (1994), "Preying for Monopoly?: The Case of Southern Bell Telephone Company, 1894-1912", *Journal of Political Economy*, 102, pp.103-126
- Williamson, O.E. (1985), *The Economic Institutions of Capitalism*, New York: Free Press
- Yuengert, A.M. (1996), "Free Markets and Character", *Catholic Review of Social Sciences*, 1, pp. 99-110
- Zerbe, R.O. (1969), "The American Sugar Refining Company 1887-1914: The Story of a Monopoly", *Journal of Law and Economics*, 12, pp. 339-375