Is the Consumer Welfare Principle Imperiled?

Herbert Hovenkamp

The University of Pennsylvania Law School and the Wharton School

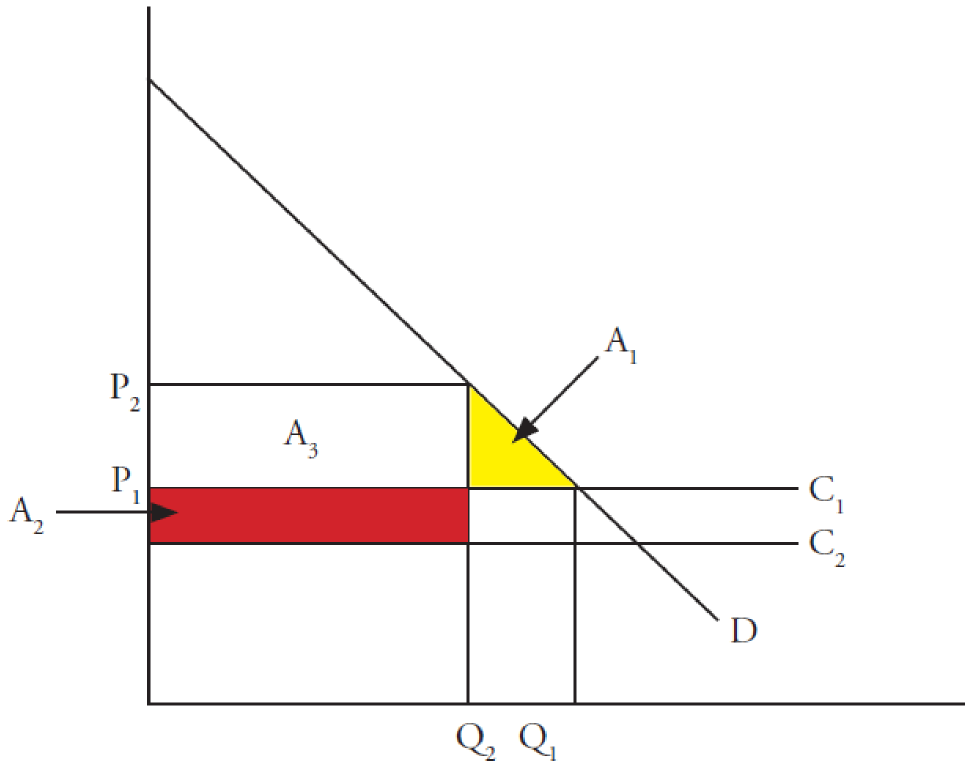
The Consumer Welfare ("CW") Principle

- Competition Policy should encourage markets to produce output as high as consistent with sustainable competition
- Opposes the interests of cartels or other associations who profit from lower output and higher prices
- Opposes the interests of less competitive firms that need higher prices in order to survive.
- Market structure is relevant but contingent – that is, market structure is a concern when it facilitates reduced output or innovation, or leads to higher prices.

CW principle threatened from two sides

- Both side disparage the centrality of high output and low prices
- On the right: a *general welfare* approach that permits efficiency claims as an antitrust defense even when the challenged practice leads to lower output and higher prices, causing consumer harm.
- On the left: an emergent "neo-Brandeisian" approach that often regards low prices as the enemy, at least when they come from large firms at the expense of higher cost rivals. This view often subordinates economic concerns in competition policy to concerns drawn from political theory or interest group politics.

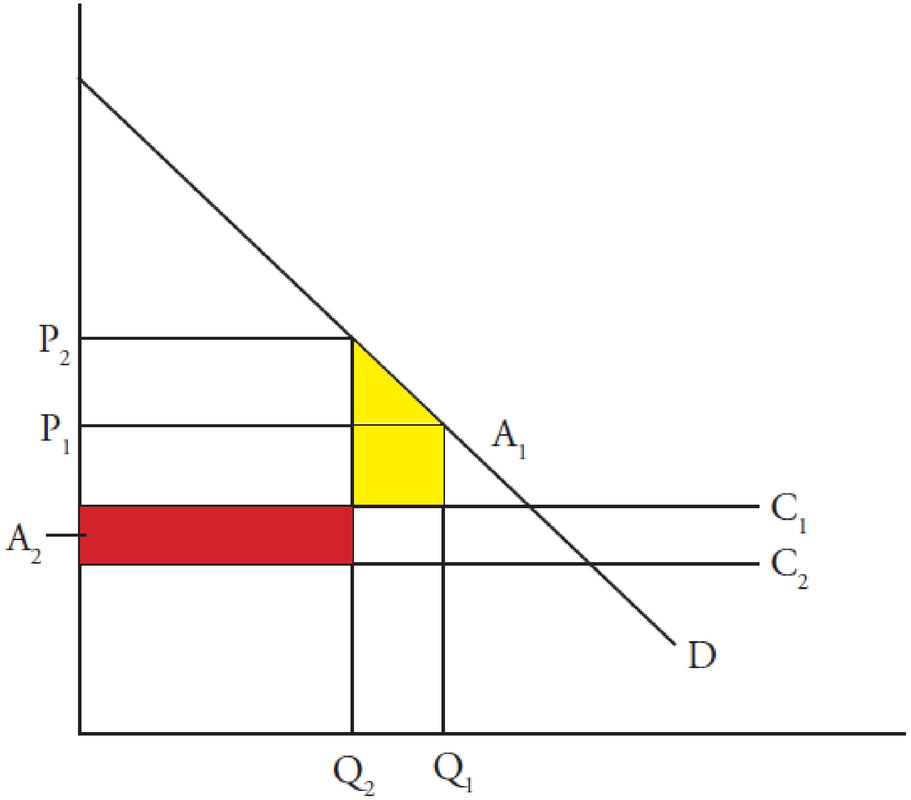
The Welfare Tradeoff Model



The Williamson Welfare Tradeoff Model

- 1. Assumes Pre-Restraint Perfect Competition (small consumer surplus at the margin)
- 2. Efficiencies requiring a tradeoff must occur at lower levels of output (critical, because most important merger-specific economies relate to scale)
- 3. Efficiencies apply only to the post-merger (or other post-restraint) firm, while collusive price increase occurs across the market
- 4. Administrability; taken literally, requires cardinal measurements of efficiency gains and deadweight losses

Pre-Restraint Price Above Cost



Consumer Welfare Model

- 1. Uses Price (actually, output) as a measure of competitive effect
- 2. Requires a tradeoff only when market power is exercised but offsetting efficiencies are sufficiently large to reverse any price increase (cf. 2010 U.S. Horizontal Merger Guidelines, §10.); even then the "tradeoff" pertains only to the direction of the price change.
- 3. By contrast, the Bork model tolerates a great deal of monopoly, provided that efficiencies are also thought to be high

Dealing With Amazon, Google, Facebook et al

- 1. Neither bigness as such nor low (but nonpredatory) prices are a legitimate target
- 2. Anticompetitive (exclusionary or discriminatory) provisions in advertising or other contracts
- 3. Acquisitions, particularly of small, highly innovative firms (competitors or complements?)

“New Brandeis” Antitrust Policy

- “Populist”
- Source of Antitrust is Political Theory Rather than Economics
- Dubious About Markets
- Suspicious of Intellectual Property Rights
- Critiques copied from U.S. Progressive Critique Literature, 1890-1950
- Defines Power politically rather than Economically (e.g., large size rather than high price-cost margins)
- Relatively unconcerned about high prices

“New Brandeis” Antitrust Policy #2

- SPECIFIC PRACTICES
- ----product development as predatory pricing
- ----Structuralism for its own sake
- ----stronger actions against vertical restraints, especially tying
- ----tradeoff: lower prices against curbing of excessive political power
- ----”Platform Paranoia”