THE SLOGANS AND GOALS OF ANTITRUST LAW

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THE LANGUAGE OF THE ANTITRUST STATUTES IS INCOMPLETE

- Statutory Phrases are very nonspecific: "restrain trade," "monopolize," "substantially lessen competition," "unfair methods of competition," "abuse of a dominant position"
- Many short phrases are offered to add meaning:
- -- "bigness" – large firm size for its own sake
- --"protection of the competitive process"
- -- "consumer welfare"
- -- maximize sustainable output

ANTITRUST SLOGANS VS ANTITRUST GOALS

- **Antitrust Slogans**
- -- intended to produce broad consensus
- -- typically provide little clarity about what is and is not covered, and thus people who differ greatly about outcomes can agree to them.
- --E.g,. “protect the competitive process” – almost impossible to disagree with

ANTITRUST SLOGANS VS ANTITRUST GOALS

- **Antitrust Goals**
- -- provide a more specific target, such as a soccer goal or basketball hoop
- -- as a result, provoke more disagreement
- So what are these?
- “Bigness”
- “consumer welfare”
- Maximum Sustainable Output

BIGNESS – LARGE SIZE WITHOUT REGARD TO MARKET SHARE

- Brandeis, The Curse of Bigness (1937) – "Neo-Brandeisian" antitrust; proposed self-preferencing law?
- Similarities to the 1920s/1930s anti-chain-store movement in the Untied States
- Brandeis's blind spot: trade associations made up of individually small or medium size firms; they are inherently more anticompetitive than firms
- No U.S. decision has ever condemned a merger or found a rule of reason offense simply because the actor(s) were very large

THE RELATIONSHIP BETWEEN ABSOLUTE SIZE, MARKET DOMINANCE, AND THE GOALS OF ANTITRUST

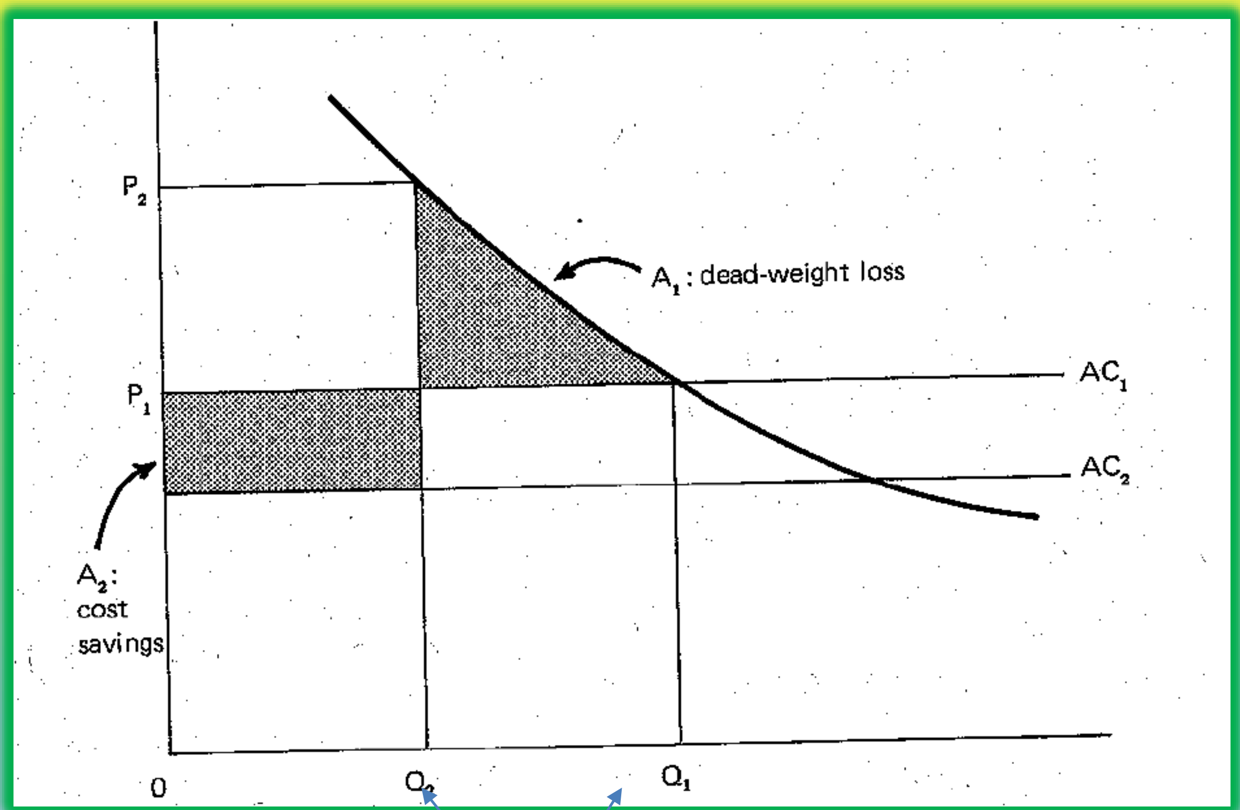
- A merger or other practice that enables a firm to undersell its rivals can cause them harm even if its market share is very small (Brown Shoe cited that harm in a merger that foreclosed less than 2% of the market; the chain stores in the 1920s ruined several smaller firms even though their own market shares ranged from 5% - 20%.
- But if our fear is *higher* prices, then simple bigness cannot provide an explanation; there must also be some reason for thinking that the firm is able to control market output overall, and this is a market share question, not an absolute size question.

PROTECTION OF THE "COMPETITIVE PROCESS"

- Consistent with Classical Liberalism? i.e., concerned with process, not outcomes, but liberalism has substance to rely on: property, contract, due process.
- Widely cited by both right and left
- Often articulated in terms of protecting "competition, not competitors"
- Virtually no theory about how certain practices, such as tying, exclusive dealing, strategic pricing, can be anticompetitive.
- A Slogan, not a Goal

ANTITRUST WELFARE TESTS

Williamson/Bork Welfare-Tradeoff Model (*Antitrust Paradox*, p. 107)



Output

WILLIAMSON/BORK WELFARE "TRADEOFF" MODEL

- small efficiency effects offset a large price increase
- -- was it a factor in higher price/cost margins since 1980s??

"Consumer" welfare -- looks only at consumers

- Efficiencies count only if output is no lower (or prices no higher) than before –(Merger Guidelines)
- Bork confused the debate by adopting a welfare tradeoff model but calling it "consumer welfare"

WELFARE-TRADEOFF MODEL UNDERSTATES WELFARE LOSSES

- “Deadweight loss” understates social cost of monopoly
- 2. Assumes a market that was initially competitive and then turns into a monopoly because of the merger
- ---e.g., in a collusion-facilitating merger of two 20% firms, the feared price increase is market wide, but the efficiency gain accrues only to the 40% controlled by the firm; thus DWL could be 2 ½ times higher

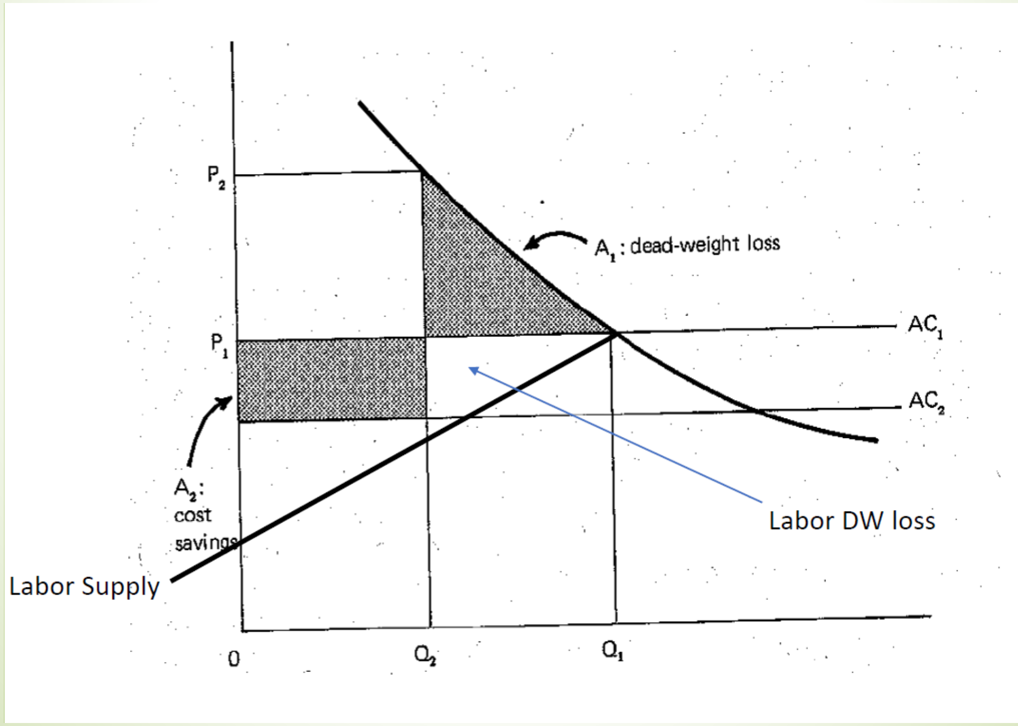
WELFARE TRADEOFF MODEL: OUTPUT ASSUMPTIONS

- Williamson/Bork assumed significant efficiencies occurring at much lower output (about ½ in Bork's figure)
- Is this a real thing, or "BlackBoard Economics"?
- Most relevant economies are economies of scale
- What about fixed costs?

Antitrust Welfare Tests and Labor

- Labor, particularly at the lower end, is a variable cost; product output a useful proxy for labor welfare.
- Williamson/Bork: inputs a black box: (1) perfectly competitive; and (2) unaffected by the restraint
- If a merging pair or joint venture has any degree of monopsony power, however, the result will be lower output and price suppression in that market.
- The welfare loss from the merger must equal the sum of losses on the demand side and the supply side
- E.g., merger between the only two hospitals in a town might suppress the wages of nurses

Welfare Losses – consumers + labor if buy side power is present, total deadweight loss will be larger



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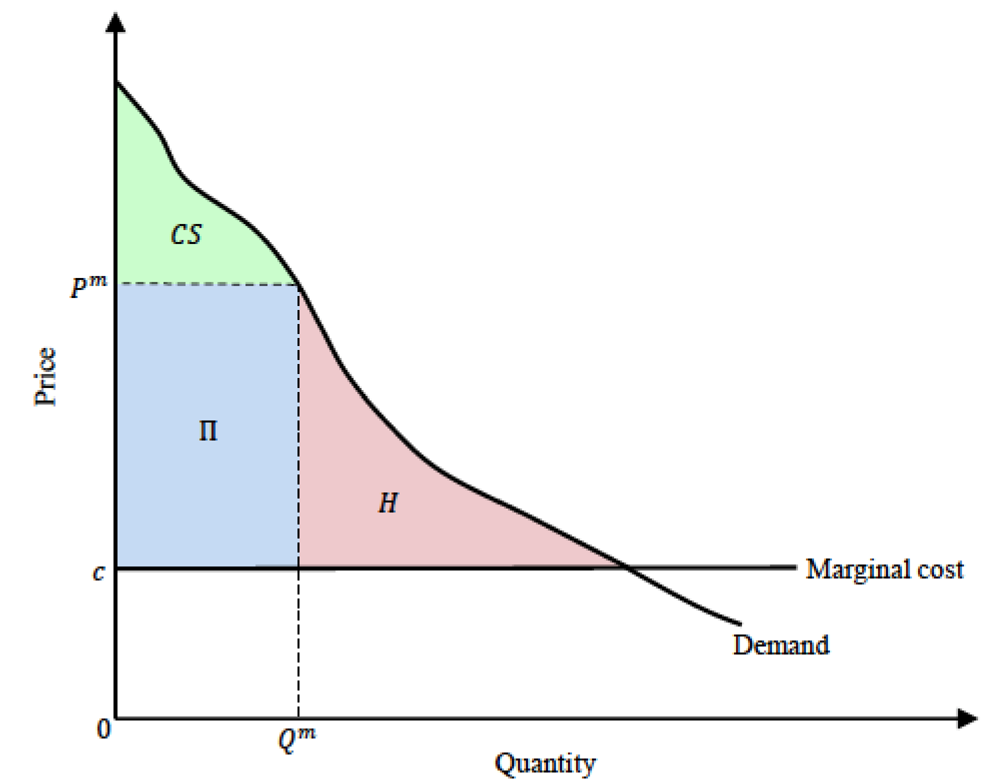
“MAXIMUM SUSTAINABLE OUTPUT”

- Most consistent with traditional “restraint of trade” standard
- Measurement difficulties: units, quality, or innovation
- Nevertheless, output is easier to measure than welfare
- “sustainable” output -- rules out below cost pricing
- Favors consumers and downstream intermediaries, as well as labor and other upstream suppliers
- Typically provides a good working proxy for welfare

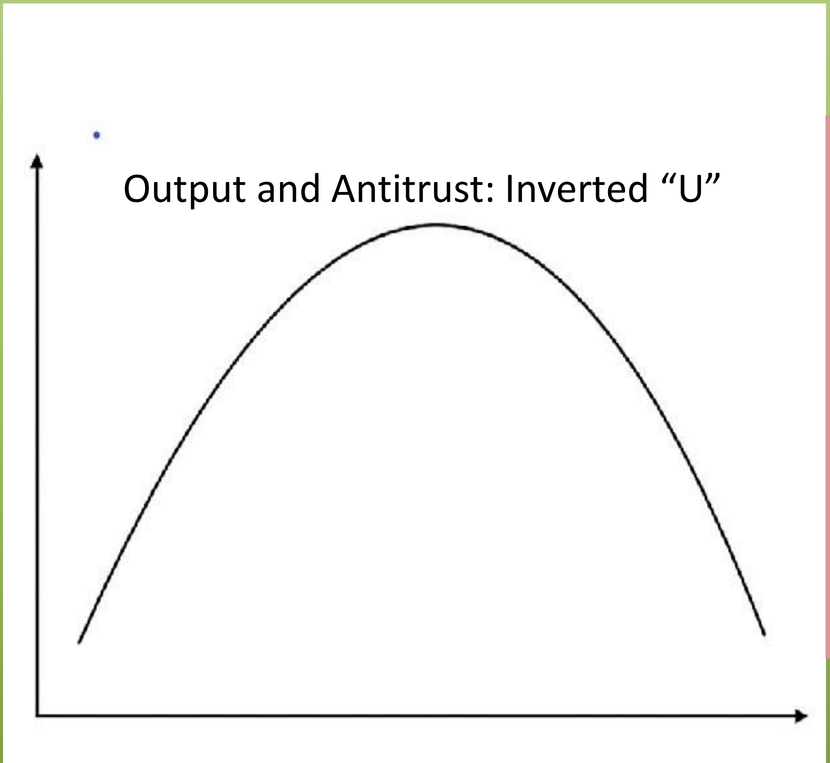
Change in Output as Proxy for Consumer Welfare

- We speak of "welfare" but our measurement is usually limited to price or output
- Even with Empirically Generated (irregular) demand, welfare improves as (1) output increases or (2) price decreases



Output: Antitrust's Inverted "U"

Left-leaning (**neo-Brandeis**) Antitrust favors low output solutions by its hostility toward bigness and indifference to Economies of scale and scope



Right-leaning antitrust (**neoliberal**) Policy (esp. Bork) favored Low output solutions By treating profits as part of consumer welfare and tolerating much higher margins

- Ouput is generated by consumer choice
- Labor, largely a variable input, rides along

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The End

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