ANTITRUST AS CORPORATE GOVERNANCE

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ABSTRACT

Consumers have been left out of the great debate over the mission of the firm, in which advocates of shareholder value maximization face off against advocates of corporate social responsibility, who would allow management leeway to allocate profits to groups other than shareholders, such as workers. The consumer welfare standard adopted by antitrust law in the 1970s should be read to require that the firm allocate its profits neither to shareholders nor to workers, but rather strive to have no profits at all, by charging the lowest possible prices for the best quality products. Such a profit minimization requirement, which, as federal law, would bind all state-level corporate law regimes, would preserve incentives for businesses to perform efficiently because any incentive payments necessary for efficiency count as costs, not profits, and could therefore be retained by firms.

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Table of Contents

I. INTRODUCTION

The goal of antitrust is to maximize consumer welfare.[1] The welfare of consumers is inversely proportional, however, to corporate profits, because consumers pay for higher profits with higher prices. One might think, therefore, that it is already well-established that antitrust law, as federal law supreme over state corporate law, imposes a duty on corporate management to minimize profits.[2]

One would, of course, be quite wrong. Instead, for many years it was orthodoxy among professors of corporate law that firms not only have the right to maximize profits but that they ought always to do so.[3] Only in recent years has the corporate social responsibility movement ("CSR") succeeded at challenging that orthodoxy.[4] But although CSR has fought for the right of firms not to maximize profits, even CSR has never suggested that firms be *prevented* from maximizing profits. Indeed, by expending great effort on

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[1] It is more commonly said that the goal of antitrust is to protect consumer welfare. *See, e.g.*, Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 336 (2010). But there is no principled way in which to carry out that goal other than by striving to maximize consumer welfare. For a detailed discussion, see *infra* Section V.D.

[2] 15 U.S.C. § 1–7 (2012).

[3] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2000); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, STAN. L. REV. 1465, 1529–30 (2007).

[4] *See* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 24–31 (2013) (making the CSR case); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763 (2005) (same); Leo E. Strine Jr, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 764–65 (2015) (recognizing the CSR position but arguing that nevertheless boards have an incentive to favor shareholders because shareholders can remove them); *but see* David G. Yosifon, *The Law of Corporate Purpose* 190–92 (2013) (arguing that CSR gets the law wrong, at least in Delaware). The label CSR has been put to many uses across a number of disciplines. *See* R. EDWARD FREEMAN ET AL., STAKEHOLDER THEORY: THE STATE OF THE ART 235 (2010). For example, a recent history of CSR, which dates the modern form of the movement to the 1950s, cites only management literature. *See* Archie B. Carroll, *A History of Corporate Social Responsibility*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19, 20, 43–46 (Andrew Crane et al. eds., 2008). In this Article, CSR refers to those lawyers and economists who argue that the firm has a legal right to do other than maximize shareholder value or that exercising that right is good for the economy. *See* FREEMAN ET AL., *supra*, at 251 (discussing this corner of CSR). CSR and shareholder primacy are not the only constellations in the galaxy of schools of thought regarding corporate mission. A mapping of that galaxy may be found in *Id.* at 30–63.

establishing the related claim that firms are free to distribute their profits to a range of groups, including workers and local communities, rather than to shareholders alone, CSR has seemed to endorse profit-maximization as a legitimate, if not a required, goal of the firm.[5]

The presence of such a stark contradiction within a single legal system, between an antitrust law dedicated to minimizing profits, and a corporate law that permits or even condones maximization of profits, is an extraordinary example of the instantiation of Adam Smith's invisible hand theory in the basic rules governing the economy.[6] Smith argued that self-interested people seeking to maximize their own profits end up inadvertently maximizing the welfare of society, a conclusion supported by modern economics subject to the condition that this self-interested behavior be disciplined by competition, which prevents the charging of excessive prices.[7] According to this updated theory, large numbers of firms, each striving to maximize profits, compete product quality up and prices down, leaving consumers with the best products at the lowest possible prices.[8] Seemingly in an effort to implement this theory, corporate law today protects the right of the firm to strive to maximize profits, while antitrust law attempts to drive prices down and consumer welfare up by promoting competition between firms.[9]

It was realized almost from the start that no matter how hard antitrust enforcers work, however, most markets can never be made competitive enough to achieve antitrust law's goal of low prices and high consumer welfare.[10] And yet the peculiar system of an antitrust law to push prices down and a corporate law to try to push them back up was never adjusted to account for this deficiency. The needed adjustment is to read the antitrust laws as imposing an affirmative duty on management to minimize profits, which ensures that in those many markets in which competition does not prevail, and there is nothing antitrust can do about it, firms will charge the lowest

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[5] *See* STOUT, *supra* note 4, at 31.

[6] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 273 (1801) (discussing the invisible hand).

[7] Smith thought well of competition, but attributed the effectiveness of the invisible hand to self-interested behavior generally, rather than competition in particular. *See id.* at 92, 273. Modern economics has shown that competition is required for self-interested behavior to lead to economic efficiency. *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 549 (1995).

[8] *See* MAS-COLELL ET AL., *supra* note 7, at 314, 550.

[9] *See* Hansmann & Kraakman, *supra* note 3, at 442 (arguing that corporate law strives to maximize shareholder value and antitrust law to protect "nonshareholder constituencies"); Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 22 J. APPLIED CORP. FIN. 32, 16 (2001) (same).

[10] *See* Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890-1955*, 94 MINN. L. REV. 311, 320–21 (2009).

possible prices, at least if they wish to follow the law. I have proposed just such an interpretation of antitrust law in another work and refer the reader to it for a defense of its basis in law.[11] In the present effort, I defend recognition of such a consumer wealth maximization duty in economic terms and explain how it fits into, and, as a legal matter, would resolve, the debate over corporate mission.

Recognition of this rule resolves the legal question of corporate mission in favor neither of those who advocate that profit be maximized for the benefit of shareholders, nor, entirely, CSR, but in favor of consumers.[12] It requires that the firm's entire profit be paid to consumers, through either lower prices or better quality, and that none be left over either for shareholders, managers, workers, or anyone else.

If that prospect inspires fear and panic, that is probably because neither side in the corporate mission debate has done a good job of clarifying what is at stake in deciding the question of corporate mission. Profit is, by definition, that part of the revenue generated by firms that is in excess of what is necessary to make production in some amount and of some quality take place.[13] By definition, then, the profit over which the shareholder primacy advocates and CSR have been fighting is not compensation that is needed to get any contributor to the firm, whether a shareholder, manager, worker, or creditor, to contribute. It is extra, and so no matter who gets the profit, production will continue, shareholders and creditors will continue to invest and managers and workers will be paid the wages they or their union representatives have bargained for. The show will go on.

The shareholder primacy camp, in particular, is guilty of fear-mongering, arguing that unless firms are allowed to maximize profits there will be insufficient reward for innovation, and the extraordinary era of technological improvement that has so improved living standards over the past three

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[11] Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, 39 CARDOZO L. REV. ___ (forthcoming, 2018).

[12] The only two other attempts to connect antitrust and corporate governance highlight connections between the fields but do not bring one under the control of the other, as I do here. *See* Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 501 (1992) (using the antitrust concept of collusion to consider the proper corporate governance approach to takeover bids and other situations in which shareholders may also be competitors); Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833, 885 (2010) (arguing that antitrust can help shareholders by more carefully screening mergers for genuine efficiency gains).

[13] *See* Ramsi A. Woodcock, *Inconsistency in Antitrust*, 68 U. MIAMI L. REV. 105, 127 n.56 (2013) (and sources cited therein); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 86–87 (1983) (observing that when price equals cost, owners and managers of the firm still receive adequate compensation).

hundred years will lurch to a halt.[14] CSR, for its part, has suggested that unless management can allocate profit on an ad hoc basis to workers, or reinvest that profit in long-term projects, workers will not work hard enough, or the firm will perform poorly in the long run.[15] All arguments of this kind have nothing to say about who should get the firm's profit because they are really arguments about cost, expenditures that are necessary for optimal economic performance. But profit, again, is by definition what is left over only after these costs are paid.

The trouble with the corporate mission debate has been the confusion of the problem of wealth distribution, which is what both sides are really interested in, with the problem of efficiency: how to make the economy generate the largest possible amount of wealth.[16] Each side has tried to gain the advantage by appealing to a norm both agree on, that the economy should be made efficient, to establish that side's preferred distributive outcome. But distribution is always a separate question.[17]

Happily, antitrust resolves the debate as a matter of law, relieving both parties of having to step into the swamp of moral argument to establish that owners are more deserving or workers more deserving, as the case may be. The courts already decided that question in the 1970s, when they decided that consumer welfare is the ultimate goal of antitrust.[18] Instead of keeping the profit for shareholders or workers, the firm must pay it to consumers through lower prices or greater quality.[19]

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[14] An extraordinary expression of this view may be found in the work of Michael Jensen, the dean of shareholder primacy in business schools, who has suggested that CSR consists of frustrated partisans of failed "centrally planned socialist and communist economies" whose desire to "use nonmarket forces to reallocate wealth" will "undermine the foundations of value-seeking behavior that have enabled markets and capitalism to generate wealth and high standards of living worldwide." Jensen, *supra* note 9, at 21; STOUT, *supra* note 4, at 18–19 (discussion Jensen's role in shareholder primacy).

[15] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, VA. L. REV. 247, 271–76 (1999).

[16] *See* EUGENE SILBERBERG, THE STRUCTURE OF ECONOMICS: A MATHEMATICAL ANALYSIS 581 (1990) (defining efficiency).

[17] Jensen appears to agree with CSR, for example, that distributing rewards to many different contributors to a firm improves the firm's performance. *See* Jensen, *supra* note 9, at 9; Blair & Stout, *supra* note 15, at 249–50.

[18] *See* Salop, *supra* note 1, at 347–48. As Salop notes, the triumph of the consumer welfare standard was most clearly expressed by the Supreme Court only in the 1990s, when the Court opined that failed predatory pricing is no antitrust concern because, though the failure harms the firm, consumers benefit from the lower prices. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993); Salop, *supra* note 1, at 341.

[19] To abide by a duty to minimize profits, a firm can either bring its prices down to its costs, or bring its costs up to its prices, by spending on improvements in product quality. Inflating costs without delivering improvements in product quality would violate the duty, because

What allows this profit-minimization duty to benefit consumers without destroying business incentives, as shareholder primacy advocates fear that it would, is that the yardstick for calculating the size of the incentive to engage in valuable conduct is the value of the actor's next best alternative, not the magnitude of the value that the actor will create.[20] To get a person to create value, it is not necessary to promise all of that value to that person, because in deciding which jobs to take on, that person will always do the job that is better than that person's next best alternative.[21] Similarly, getting a firm to generate value for consumers does not require that consumers pay that value in its entirety back out to the firm as profit.

Far from being a bit of economic minutiae, this point explains why economic growth is of any worth at all to society. If producers were only willing to work in exchange for all of the fruits of their labor, then they would confer no gains on others, because those others would have to return to them the entirety of what they produce, leaving those others with nothing on net.[22] Only because producers decide based on alternatives, and not based on the value of what they produce, are producers willing to work for less than what they produce and their output capable of improving our lives.

Under a profit minimization standard, a firm may keep for itself only so much as that firm needs to ensure that all of its contributors, including shareholders, managers, workers, and suppliers, are made slightly better off than they would be were they to do their next best alternative jobs instead.[23] But no more. If there is any money left over after the contributors to production are paid that amount, the firm must reduce its prices, or spend the surplus on improvements in product or service quality.[24]

But will the firm have any incentive to improve its products, if any additional profit the firm generates from the improvement must be left to consumers? The answer is yes, because the extra incentive required to improve a product is again cost, not profit, since it is necessary for production, so that extra incentive would not need to be paid out to

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inflated costs are not true costs. *See* Woodcock, *supra* note 11.

[20] *See* E. Earl Burch & William R. Henry, *Opportunity and Incremental Cost: Attempt to Define in Systems Terms: A Comment*, 49 THE ACCOUNTING REVIEW 118, 119 (1974).

[21] *See id.*

[22] This point is often made in the context of markets subject to first-degree price discrimination, in which a monopolist charges each consumer a price equal to precisely the value that the consumer places on the product, allowing the seller to extract from consumers as a group the entire value that those consumers place on the product. *See* DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 306 (1990). If all markets are subject to this kind of value extraction, then *a fortiori* the economy as a whole confers no net gain on consumers.

[23] *See* Woodcock, *supra* note 11.

[24] *See supra* note 19.

consumers.[25] So long as the firm retains a very small percentage of the value of any improvements that the firm confers on consumers, the firm makes itself best off when it makes consumers best off, without needing to hold on to the remaining value of those improvements as profits.[26]

As I discuss in my other paper, a profit-minimization duty should be enforceable only by nominal damages, to avoid putting judges in the difficult position of making pricing decisions for firms, and, more importantly, to ensure that mistakes by judges in determining exactly what counts as cost will not force firms out of business or into underperformance, because firms can simply pay a dollar and carry on if they disagree with the judgment.[27] The absence of a stronger sanction does not, however, mean that the rule would have no force, because people often strive to comply with rules not because the rules are enforced but out of a belief in the importance of following the law.[28] Public opinion, which will take note of any judgment of a federal court that profits are too high, will enforce the rule as well.[29]

Casting the corporate mission debate as a duel over the distribution of corporate value in excess of cost is an exercise in rent theory economics.[30] Rent theory is not so much a separate branch of economics as a perspective that emphasizes the effect of laws on the distribution of wealth at the level of the market, rather than the economy as a whole.[31] Rent theory was popular in

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[25] For a discussion of this point, including a numerical example, see *infra* Part II.F.

[26] This is true if firms can be relied upon actually to take only their costs plus a small percentage of the value they create from consumers. If firms cannot be relied upon to do that, and some outside enforcer must monitor their behavior, then problems arise. The subfield of economics devoted to the principal-agent problem considers how incentives can be designed to induce an agent, here, the firm, to maximize the wealth of a principal, here consumers, when the principal cannot observe with precision the costs incurred by the agent. *See* MAS-COLELL ET AL., *supra* note 7, at 477–79. In such cases, more complicated incentive schemes than conferral of a mere percentage of the profit may be necessary to maximize the principal's wealth, and the maximum levels obtained may still be lower than what could be achieved were the agent simply to be allowed to keep all of the wealth that the agent generates. *See id.* at 487. The profit-minimization duty discussed in the present Article would not involve the use of hard sanctions, and so the monitoring problem does not come into play here. *See* infra note 27 and accompanying text. Firms either do the right thing and give themselves the right, minimal incentives. Or they do not. For a discussion of the principal-agent problem and corporate governance, see *infra* Part III.

[27] Woodcock, *supra* note 11.

[28] *Id.*

[29] *Id.*

[30] *See* BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 145–49 (1998).

[31] *See id.* at 150–53 (contrasting policies designed to alter the relative bargaining powers of market participants, which were favored by rent theorists such as Robert Hale, with "broad scale" taxation as means of redistributing wealth).

the first half of the 20th century, but fell out of favor thereafter as policymakers started hoping to solve all problems of wealth distribution through taxation and transfer payments, instead of by altering the law to ensure a desired distributive outcome to begin with.[32] Rent theory is well-suited to the corporate mission debate because that debate is about distribution of wealth at the firm and market levels, rather than about aggregate distribution of wealth over the population as a whole, which is the level at which tax-and-transfer generally operates.[33]

I proceed by showing first that economics does not require that firms strive to maximize profit, or that firms should keep for themselves any profit that they do succeed at generating.[34] I then show that once the influence of CSR is taken into account, corporate law today permits, but does not require, firms to minimize profit for the benefit of consumers.[35] I then argue that antitrust law should be read to require that firms minimize profit.[36] I show that such an antitrust duty to charge a price equal to cost would preempt state corporate laws, and read the case of *Dodge v. Ford*, which is a touchstone of the corporate mission debates, in light of this duty to maximize the wealth of consumers.[37]

II. THE OBSESSION WITH PROFIT

In antitrust, the rise of the Chicago School is synonymous with the gradual judicial acceptance over the course of the 1970s of the notion that monopoly profits may be rewards necessary to encourage firms to invest in improving their products or reducing their unit costs, both of which can benefit consumers.[38] As acceptance increased, antitrust enforcement declined, with judges and enforcers, worried that attacking anticompetitive practices might deprive firms of those rewards, substituting permissive case-by-case analysis of antitrust claims for actual harm to consumers for what had previously been outright bans on many types of anticompetitive conduct.[39]

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[32] *See id.* at 200.
[33] *See id.* at 152 (referring to the "broad scale" of a tax approach).
[34] *See infra* Parts II & III.
[35] *See infra* Part IV.
[36] *See infra* Section V.A.
[37] *See infra* Sections V.B & V.C.
[38] *See* Hovenkamp, *supra* note 10, at 359, 366; Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1, 2 (1973).
[39] *See* Ramsi A. Woodcock, *Per Se in Itself: How Bans Reduce Error in Antitrust* (2016) (surveying rule changes); Michael A. Carrier, *Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON. L. REV. 827, 830 (2009) (showing that nearly all cases

The Chicago School worked with equal vigor to bring the gospel of profit maximization to the study of corporate governance, which is the study of the firm from an internal perspective, rather than the study of the firm in its relationship to other players in the market, including consumers, competitors, and suppliers, upon which antitrust focuses.[40] That work, perhaps best summarized by the title of Chicago apostle Milton Friedman's 1970 essay "The Social Responsibility of Business Is to Increase Its Profits," paid off with equal success, transforming the accepted view of corporate purpose from that of social progress, typified, perhaps, by the early Ford Motor Company, whose founder declared that his business was the production of men, not cars, to the view that the corporation exists for one thing only: to maximize profits and turn them over to shareholders.[41] This transformation has led to soaring executive compensation, as corporate boards seek to create incentives to maximize profits by giving senior managers larger shares of those profits, and indeed to soaring corporate profits, although the promised investment in innovation has failed to materialize.[42]

The Chicago School's two-pronged attack reflected the wise recognition that maximization of profits can be achieved only if the firm actually tries to maximize profits and antitrust rules that protect consumer wealth against redistribution to firms are torn down.[43] The movement's corporate

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decided by case-by-case analysis fail); JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 158 (2015) (concluding that "significantly more" anticompetitive mergers have been approved as a result of the policy change).

[40] Important Chicago School contributions to the study of corporate governance include Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, THE NEW YORK TIMES MAGAZINE, Sept. 13, 1970; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); RICHARD A. POSNER & KENNETH E. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (1980); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1998).

[41] *See* STEVEN WATTS, THE PEOPLE'S TYCOON: HENRY FORD AND THE AMERICAN CENTURY 207 (2009); Hansmann & Kraakman, *supra* note 3, at 446–47 (discussing the "state-oriented model" of corporate governance).

[42] *See* STOUT, *supra* note 4, at 3 (mentioning the effect on executive compensation); Daniel J.H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103, 155 (2006) (arguing that corporate executives, rather than numerous and disorganized shareholders, are the real power behind shareholder primacy, which they use as a cover for taking firm wealth for themselves); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1281–82 (2016) (discussing the persistence of high corporate profits but falling investment).

[43] It is common for shareholder primacy advocates to argue that the profit issue should be left for antitrust to determine. *See* Hansmann & Kraakman, *supra* note 3, at 442. The Chicago School therefore went to antitrust to determine it.

governance campaign was directed at the former, and its antitrust campaign was directed at the latter. Resistance to the Chicago approach has failed to follow this example, however, concentrating almost exclusively on corporate governance, and conceding the antitrust field almost entirely to the Chicago School. It is extraordinary that until very recently, no antitrust scholar was willing to call for a return to the uncompromising pursuit of competition associated with the vigorous antitrust enforcement policies that predated the Chicago revolution.[44] An important group of antitrust scholars has pushed back against the notion that monopoly should be treated with kid gloves lest incentives to innovate be reduced, but this group sees itself as striking a balance between the old way and the Chicago way, a position reflected in the title of an influential collection of the writings of its members: "How the Chicago School Overshot the Mark."[45]

CSR is the locus of corporate governance resistance to the Chicago School. Unlike the antitrust moderates, CSR scholars are not interested in compromising, but want to return to a world in which corporate managers felt free, or even obligated, to pursue social projects instead of profit maximization.[46] The CSR movement has been hampered in its pursuit of this goal, however, by the parochialism of its vision, which has focused on the internal distribution of profits within the firm or between firms and communities, but not on the question of how wealth should be distributed between firms and consumers.[47] That is a problem because the question

[44] The first law review article of which I am aware to advocate a wholesale return to the old approach to antitrust is Sandeep Vaheesan, *Resurrecting a "Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 673–90 (2017). By contrast, CSR dissent against shareholder primacy has been a constant presence since at least the 1990s. *See, e.g.*, David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1375–76 (1993); Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1203–4 (2001); Elhauge, *supra* note 4, at 830–40.

[45] HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008). For example, one member of this group argues that competition is more important for innovation than rewards, but also accepts that mid-century antitrust enforcement was excessive. *See* Jonathan B. Baker, *Evaluating Appropriability Defenses for the Exclusionary Conduct of Dominant Firms in Innovative Industries*, 80 ANTITRUST L.J. 431, 455–56 (2016); Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

[46] *See* STOUT, *supra* note 4, at 32; Elhauge, *supra* note 4, at 745.

[47] A striking example of the failure of CSR to consider the consumer as a sharer in the wealth generated by the firm is the failure of Einer Elhauge, who in his day job is a leading antitrust scholar concerned with the distribution of wealth between firms and consumers, to mention the consumer interest anywhere in his 166-page rejection of shareholder primacy in corporate law. *See* Elhauge, *supra* note 4. Consumers do play a role in this work, but only as citizens

whether to maximize profits is the question whether to allow consumers any share of the wealth generated by production, or to allow firms to take all of that wealth for themselves.[48]

A. A Debate about Distribution

The question of corporate mission has two parts: whether firms should maximize profits and, regardless, which groups, whether shareholders, workers, or others, should get whatever profits that firms are permitted to generate.[49] The distributive character of the question whether shareholders, as opposed to other firm contributors, such as workers, should get the profits generated by the firm is obvious.[50] The distributive character of the question whether the firm should maximize that profit in the first place, however, has been much obscured because corporate governance scholars tend to treat corporate revenues as manna from heaven, instead of what they really are, money transferred from consumers to firms in amounts determined by the prices that firms charge consumers.[51] The total amount of wealth that a firm

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troubled by clear-cutting of forests and the like. *See id.* at 750. Indeed, consumers appear in almost every possible guise in CSR except in their role as claimants on firm wealth. In listing beneficiaries to which corporations are free to distribute their wealth, Lynn Stout mentions charities, employees, creditors, communities, and the environment, but not consumers. She does observe that firms that "take care" of consumers maximize long run profits for the firm, but does not seem to realize that profit maximization, even in the long run, is a zero-sum game played between consumers and firms. STOUT, *supra* note 4, at 69. Taking care of consumers, in Stout's sense in which Stout uses it, means fattening the calf, as will become clear in the next section. Similarly innocent to the economic claim of the consumer to firm value, the American Law Institute sees CSR as protecting consumers only from dangerous products, not high prices. *See* 1 THE AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE, § 2.01 comment h. (1994). Freeman mentions that consumers "exchange resources" but goes on to suggest that the major interest of consumer is in having firms keep promises to them made through advertising. *See* FREEMAN ET AL., *supra* note 4, at 25. An important exception is Greenwood, *supra* note 42, at 113–14, 114 n. 28. Interestingly, the economic interest of consumers in the firm is more explicit in works advocating shareholder primacy. *See* Jensen, *supra* note 9, at 13.

[48] I discuss this claim in detail in the next section.

[49] Most discussions of corporate mission treat this as a single question. *See* Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 661 (1995) (advocating a "shareholder wealth maximization norm"); STOUT, *supra* note 4, at 32 (reject requirement of "maximizing shareholder value").

[50] *See* Brian E. Becker, *Concession Bargaining: The Impact on Shareholders' Equity*, 40 INDUS. & LAB. REL. REV. 268, 268 (1987).

[51] Bainbridge, for example, devotes an entire essay to the defense of "shareholder wealth maximization" without ever mentioning consumers. *See* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1425 (1993).

can transfer from consumers to itself is the total dollar value that consumers place on the firm's products, that is, their total willingness to pay for those products, less the firm's cost of production, which consumers must cover in order to induce the firm to produce.[52] By choosing prices, firms decide how much of that surplus of value over cost to distribute to themselves.[53] Looked at from this perspective, the question whether the firm should maximize profit is fundamentally distributive: it is the question whether firms should take the entire surplus for themselves, which is what happens when profit is fully maximized, or consumers should be allowed to keep some of that surplus.[54]

Suppose that a consumer would be willing to pay up to $1000 for a Model T, that the cost of production is $250, and that the price is $700.[55] Then value is $1000 and surplus is that amount less the $250 cost, or $750, which is divided by the price of $700 into $300 in consumer welfare ($1000 in value less the $700 price tag) and $450 in profit for the firm ($700 earned from the sale less the $250 cost). Profit maximization means setting price equal to value, so that the entire surplus goes to the firm. For the Model T, it means charging $1000 and retaining the entire surplus of $750 as profit.

It is remarkable that even though profit maximization can be accomplished only by redistributing wealth from consumers to producers, it is virtually impossible to find any mention of consumers in the major texts that make up the corporate mission debate.[56] Profit maximization is treated at length without any attention to the glaring question of where the money to increase profit comes from, as if firms operated not in a market economy in which their wealth is derived always from a negotiation with consumers, but in a prehistoric economy in which the firm produces for itself alone, extracting game and berries from the land exclusively for its own consumption.[57] In that world, profit comes from no one.[58] But not in our world.

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[52] *See* 1 ALFRED MARSHALL, PRINCIPLES OF ECONOMICS, 175–77 (1890).
[53] *See* MARSHALL, *supra* note 52.
[54] Firms often fail to maximize profit, even when they try, in which case firms leave some surplus for consumers. This case is discussed in Section II.D.
[55] The price of Ford's Model T was at issue in *Dodge v. Ford*, which I discuss in Section V.C. The actual price charged for the car in that case was $440; I substitute a rounder number. Dodge v. Ford Motor Co., 170 N.W. 678, 683 (Mich. 1919).
[56] *See supra* note 47.
[57] In such an economy, the value of production goods is determined exclusively by the producer, because only the producer enjoys those goods. Consequently, the producer can increase profit only by producing goods upon which the producer places a greater value. Extraction of value from others through the raising of prices plays no role in profit maximization in this case. *See* MARSHALL, *supra* note 52, at 664–65 n.1.
[58] *See id.*

B. The Indeterminacy of Efficiency

No one likes to argue about distribution, however, because there is no common set of distributive norms capable of resolving such debates.[59] Everyone agrees that people should not starve, but beyond that, there is no consensus about who should be allowed to get rich and who not.[60] There is, however, a consensus about the desirability of efficiency. Everyone agrees that efficiency, which is the project of increasing the surplus of value over cost, is a good thing, at least if some of the gains can go to their preferred groups.[61] So both sides of the mission debate strive to transform the distributive question into an efficiency question, by arguing that giving their preferred groups more of the surplus will increase the size of the surplus available for distribution to everyone.[62]

The norm that surplus maximization is a good thing is so uncontroversial because it is not more than the basic utilitarian creed.[63] It says only that production should be organized in order to ensure that, after taking into account all costs, including not only the cost of luring investment and entrepreneurs, but also costs that normally are not considered by firms, such as the cost of pollution to people living on the other side of the globe, the benefit to those who consume the production, measured by their willingness to pay for it, should be made as large as possible.[64] That is, maximize the social value of production, net of true social costs, including externalities.[65] That goal appears to have gained as much acceptance in CSR, which argues for proper accounting for externalities in corporate decisionmaking, as it has

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[59] Which makes those distributive debates "political." *See* James R. Hackney, *Law and Neoclassical Economics Theory: A Critical History of the Distribution/Efficiency Debate*, 32 THE JOURNAL OF SOCIO-ECONOMICS 361, 362 (2003).

[60] *See* Greenwood, *supra* note 42, at 115; WILLIAM BAUMOL, SUPERFAIRNESS: APPLICATIONS AND THEORY 4 (1986). Even Malthus, who saw poverty as natural, advocated the use of private charity to feed the hungry. *See* 2 THOMAS ROBERT MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION, AS IT AFFECTS THE FUTURE IMPROVEMENT OF SOCIETY, 430–31 (1809).

[61] Both the shareholder value advocates and CSR appeal to efficiency to defend their positions. *See* Bainbridge, *supra* note 51, at 1446–47; Blair & Stout, *supra* note 15, at 322; Ian B. Lee, *Efficiency and Ethics in the Debate about Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 538–39 (2006).

[62] *See* Lee, *supra* note 61, at 538–39. Examples may be found in Section II.C.

[63] *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979).

[64] *See* MARSHALL, *supra* note 52, at 175–77.

[65] For the importance of treating externalities, which are injuries inflicted by production that are not suffered directly by the producer, as costs, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 80 (2004).

among shareholder primacy advocates.[66]

One objection to maximization, felt more often than said in CSR, is that social characteristics such as happiness cannot be quantified, much less maximized.[67] But maximization is not grounded in numerical measurement, so much as in the making of choices.[68] Maximization does not require that social characteristics be measured numerically, but only ranked.[69] The problem of what the goal of a firm should be is the question how the firm should decide what to do. In order to make a decision, the firm must choose one set of actions from a list of possible actions, that is, prefer one set to all the rest.[70] But preference can always be represented as a rank ordering. To say that the firm should take this set of actions rather than that set is just to rank this set over that. Maximization requires not measurement of happiness, but only identification of the set of actions that has the highest preference rank.[71] Economists often measure consumer welfare in dollar terms only because economists assume that consumers prefer those goods for which the difference between their willingness to pay and the price of the goods is greatest.[72] Those goods get the highest rank. But if it were possible to survey consumers, asking them to rank combinations of quality, then there would be no need to put a dollar value on consumer welfare at all.[73] To maximize consumer welfare would simply be to choose the combination that the surveys rank highest.

Another, more often voiced, objection is that because society seeks to achieve multiple goals through regulation of corporate behavior, such as improving the welfare of both workers and consumers, there is no one thing for a firm to maximize, whether surplus or anything else.[74] According to this objection, firm behavior should be governed by a balancing of interests, or

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[66] *See* Jensen, *supra* note 9, at 11–12; Elhauge, *supra* note 4, at 735–38 (arguing that corporate law would not prevent a firms from sacrificing profits to prevent the externalities associated with clear-cutting a forest); Werner Hediger, *Welfare and Capital-Theoretic Foundations of Corporate Social Responsibility and Corporate Sustainability*, 39 THE JOURNAL OF SOCIO-ECONOMICS 518, 521 (2010).
[67] *See* THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 71–72 (1996).
[68] *See* KREPS, *supra* note 22, at 22.
[69] *See id.*
[70] *See id.* at 24–25.
[71] *See id.*
[72] In fact, the relationship between those dollar values and preference rankings is only approximate, but economist generally assume that the resulting error is small. *See* MAS-COLELL ET AL., *supra* note 7, at 88–91.
[73] *See* KREPS, *supra* note 22, at 26.
[74] *See* FREEMAN ET AL., *supra* note 4, at 13.

some other approach to decisionmaking, instead.[75] This objection misses that there is always a preferred outcome, which is the maximal outcome, regardless how many competing considerations may go into its choice.[76] A firm might have ten goals or a hundred, but at any given time that firm can only do one set of things.[77] The set might include trying to save the forests by reducing paper usage and trying to help workers by increasing wages. But the firm cannot, say, both reduce paper usage and increase wages and increase paper usage and decrease wages at the same time. In order to choose the unique set of actions that the firm will follow, the firm must rank the sets, and maximization means only that the firm chooses the particular set of actions that the firm prefers the most.[78]

Despite being relatively uncontroversial, surplus maximization can never in itself settle the distributive question, because maximization of surplus is of value to any particular group only to the extent that the group enjoys the increases in surplus associated with maximization.[79] It is all very well to celebrate surplus maximization because it delivers value to consumers as far in excess of the cost of production as possible, but consumers themselves will not celebrate if all of the value created for them is then extracted back from them, in the form of high prices charged in exchange for access to that value. For the consumer who is charged a price equal to willingness to pay, the value of the product could just as well be zero, because the net value obtained by the consumer from buying the product is zero, or very close to it.[80] The

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[75] *See id.* at 28.

[76] *See* Jensen, *supra* note 9, at 10.

[77] *See id.*

[78] Freeman rejects shareholder wealth maximization on the ground that firms do better when they avoid seeing their role as choosing between competing interests of groups holding a stake in the firm, but instead strive to make all stakeholders better off. *See* FREEMAN ET AL., *supra* note 4, at 28. But that choice, to make all stakeholders better off, is just the result of choosing the highest-ranked business plan from a set of plans in which making all stakeholders better off is ranked the highest. That is, Freeman is maximizing, but over a ranking that places equitable distribution of firm wealth higher in the ranking than the distribution of all firm wealth to shareholders. Freeman's quibble is not with maximization itself, but with the ranking over which maximization is conducted.

[79] It is for this reason that economists recognize that there is no guarantee that any two persons bargaining over the distribution of gains from trade will ever reach agreement. Each may hold out interminably for a better deal, with the result that trade never happens and the gains never realized. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 77 n.5 (3d ed. 2000); POLINSKY, *supra* note 13, at 18.

[80] To be precise, such a consumer enjoys no increase in utility as a result of trade. *See* Wassily Leontief, *The Pure Theory of the Guaranteed Annual Wage Contract*, THE JOURNAL OF POLITICAL ECONOMY 76, 79 (1946) (observing that a perfectly price discriminating firm, which extracts all surplus from its counterparty, leaves its counterparty "clinging as closely as possible" to that party's "indifference line").

consumer who pays $1000 for a Model T that the consumer values at $1000 gets nothing. Similarly, surplus maximization is of no value whatsoever to workers or other contributors to the firm if the entire share of that surplus retained by the firm is given entirely to shareholders. Under that distributive arrangement, the worker or other contributor is quite indifferent between working for a firm that maximizes surplus or profit, and one that does not.[81]

This fundamental disconnect between distribution and efficiency has not stopped both shareholder primacy advocates and CSR from striving to establish that only a particular distribution of the surplus is capable of maximizing that surplus.[82] Their hope is that establishing that only allocation of the entire surplus to their preferred groups will maximize that surplus will convince all other groups to relinquish their claims to the surplus for the sake of efficiency.[83] This quest is usually futile because other groups have no reason to sacrifice their interests for the sake of efficiency.[84] Instead, they can and often do reject the proposed distribution of surplus as a socially unacceptable way of achieving efficiency and argue that whatever reductions in surplus are brought about by their preferred distribution are merely the price that must be paid for distributive justice.[85]

C. Confusion about Costs

1. In Shareholder Primacy Advocacy

A large part of the corporate mission debate does not even get as far as establishing a link between a particular distribution of surplus and efficiency,

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[81] *See id.*

[82] That is what these sides are doing when they argue that giving the surplus to shareholders, or spreading it among other groups, makes the firm, and by extension society, better off. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 403 (1983) (giving the "residual" to shareholders maximizes firm value); Jensen, *supra* note 9, at 10–11 (maximizing firm value maximizes social welfare); Blair & Stout, *supra* note 15, at 319–23.

[83] *See* Blair & Stout, *supra* note 15, at 327–28; Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 ORGANIZATION SCIENCE 350, 354 (2004).

[84] *See* BAUMOL, *supra* note 60, at 131 (observing that "even though everyone shares in them, the distribution of benefits may be unfair").

[85] That is the content of the consumer welfare standard employed by antitrust law, which requires that antitrust maximize consumer wealth, even if doing so would reduce overall surplus. *See* I HERBERT J. HOVENKAMP, ANTITRUST LAW, 153 (4th ed. 2013). That standard may be understood to reflect a bargained-for concession to consumers as an interest group. *See* Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 515–22 (2006). For another rejection of efficiency on distributive grounds, see David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1005 (2000).

let alone confronting the inability of such a link to resolve distributive debates. Instead, most attempts to link efficiency and distribution founder on a misunderstanding of the nature of cost. These arguments claim that giving the surplus to one group or another is necessary to induce that group to take steps that maximize the surplus, without realizing that anything required to induce production does not count as surplus at all but rather as cost, with the result that these arguments fail to say anything about the proper distribution of surplus.

The most important example is the argument that firms must be allowed to maximize profits in order to pay fixed costs, so named because those costs do not vary with the volume of output, that are necessary to induce entrepreneurs, investors, and engineers, among others, to contribute to the firm in ways that maximize surplus.[86] According to this argument, some portion of the surplus, and maybe all of it, must be set aside to pay the entrepreneur who starts the firm, investors for giving the firm cash to set up operations, and engineers for engaging in the research and development necessary to create products upon which consumers place a high value.[87]

All such parts of the surplus are not really parts of the surplus at all, but rather count as costs, because they are necessary to allow the firm to maximize surplus.[88] Surplus, properly defined, is the value that the firm delivers after such costs have all been paid.[89] And once they have been paid, there is no additional party to the firm, an owner, entrepreneur, inventor, or god of production, who must obtain some additional reward in order to be willing to call forth production. The covering of cost is enough. Investors, entrepreneurs, inventors, managers, suppliers, janitors, loving spouses keeping dinner warm on late nights, and the amazon jungle patiently oxygenating the atmosphere, all contribute to the firm. The payments it takes, or should take, to make them all contribute all count as costs.[90] What is left

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[86] *See* Sundaram & Inkpen, *supra* note 83, at 356. This argument has reached its greatest development in antitrust debates. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004). For a discussion of the economics of fixed costs and innovation, see F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 622–24 (1990).

[87] *See* SCHERER & ROSS, *supra* note 85, at 622–24. According to this argument, the surplus is also necessary to insure against volatility in the firm's revenue stream. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 89–90 (1976).

[88] *See* Greenwood, *supra* note 42, at 112.This follows directly from the notion that the costs of production include the value of all opportunities foregone in order to produce. *See* James M. Buchanan, *Opportunity Cost*, *in* THE WORLD OF ECONOMICS 520, 520 (The New Palgrave, 1991). Whatever must be foregone is necessary. For a discussion of necessity and cost, see Woodcock, *supra* note 13, at 127 n.56.

[89] *See* MARSHALL, *supra* note 52, at 483; Greenwood, *supra* note 42, at 111.

[90] Payments that it should take to make production possible, but which the firm does not have

over once those costs are paid alone constitutes the surplus that is the subject of the corporate mission debate.

Much of the argument in favor of shareholder wealth maximization appears to be based on the failure to realize in particular that returns required to lure shareholders are just costs of the firm and not profits at all.[91] The cash a firm needs to run its operations comes from investors. They may be debt investors, lending money under a contractual right to claim repayment at certain times.[92] Or they may be equity investors, who pay in funds with the somewhat weaker legal right to obtain repayment in a certain proportion to other equity investors, but only if management makes a completely discretionary decision to pay them.[93] In order to induce investment of either kind, the firm must promise, legally in the case of debt, or informally in the case of equity, to repay the money along with some minimum excess amount, known as interest or return, required to make investors better off investing in the firm than in any other. That minimum amount is the cost of capital.[94] Entrepreneurs, too, must be able to expect enough payment to organize the firm. If their compensation is a share in the firm's equity, then, like all equity investors, they must be able to expect the firm eventually to pay out enough to make their contribution worthwhile, or to make someone else willing to buy their shares at a sufficient premium. That, too, is the cost of capital to the firm.[95] Payments beyond that cost are not necessary to maximize surplus.[96] Since profits are precisely such payments, the question who should get them cannot be resolved by the argument that shareholders need compensation to be made willing to invest.[97]

It follows that if a firm charges a price equal exactly to cost for each unit that the firm sells, and cost is properly defined to include all payments required to cause all the various contributors to the firm to engage in production in a way that maximizes surplus, then the firm will maximize surplus, even though the firm will generate no profit at all.[98] The fact that the firm enjoys none of the surplus does not dissuade the firm from engaging in

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to make, are externalities, which must be accounted for in calculating surplus. *See supra* note 65.

[91] *See* Sundaram & Inkpen, *supra* note 83, at 356.

[92] *See* Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 NYUL REV. 1165, 1219 (1990).

[93] *See* STOUT, *supra* note 4, at 40.

[94] *See* Greenwood, *supra* note 42, at 112.

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] *See supra* note 13. That is, the firm charges a price equal to average total cost, inclusive of any fixed costs, which are not attributable to any particular unit.

production because of the way in which cost has been defined.[99] It is true that at a price equal to cost, the firm only just barely makes enough to prefer production to alternatives, but by definition that is enough.[100] Cost is all that matters. Because cost includes all payments necessary to maximize surplus, *all divisions of surplus are efficient*. Whether all divisions are feasible for technical reasons is another story, addressed below.[101]

2. In CSR

CSR, like the advocates of shareholder primacy, has succumbed to the temptation of cost arguments. Unlike shareholder primacy, which suggests that firms would incur the surplus-maximizing level of costs if only firms were allowed access to the surplus from which to incur them, CSR tends to argue that firms fail to spend enough of the surplus allocated to them on costs, distributing too much of that surplus to shareholders. One common version of this argument is that firms that seek to maximize shareholder value often give profits that ought to be invested to maximize surplus in the long run to shareholders, resulting in a long run loss of efficiency.[102] The trouble with the argument is that any surplus needed to maximize long run surplus counts as cost. Surplus is an atemporal quantity, the total excess of value over cost over all time.[103] If an investment is required to maximize that number, then that investment is cost.[104] The argument that firms are not investing enough

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[99] *See* POLINSKY, *supra* note 13, at 86–87.
[100] *See id.*
[101] It is because of the possibility of this infeasibility that some scholars argue that the distribution of wealth should be regulated using a tax and transfer system, rather than by changing legal rules, such as those regarding corporate mission. *See* SHAVELL, *supra* note 65, at 654–56. The persistence of the corporate mission question, and the obviously distributive commitments of its participants, suggest a general lack of faith in the ability of the tax system to carry out redistribution. *See* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics* 1054–55 (2015) (arguing that it is sometimes politically easier to use the law rather than tax and transfer to redistribute wealth). Regardless, because antitrust's consumer welfare standard puts distribution before efficiency, and, I argue, antitrust law imposes that standard on corporate law, the question how corporate law should distribute wealth is unavoidable. *See supra* note 85; *infra* Section V.A.
[102] *See* William W. Bratton & Michael L. Wachter, *The Case against Shareholder Empowerment*, U. PA. L. REV. 653, 691, 703 (2010).
[103] A leading finance textbook draws a distinction between short-run profit maximization, which the book simply calls profit maximization, and the maximization of the net present value of the firm, which is calculated by summing present value and future value discounted to show the extent that the future value exceeds expected returns. *See* RICHARD A. BREALEY ET AL., CORPORATE FINANCE 20–25 (8th ed. 2006). By long-run profit maximization I mean the maximization of net present value. *See also* SILBERBERG, *supra* note 16, at 416–17.
[104] *See supra* note 88.

in the long run because management is giving too much money to shareholders tells an important story about mismanagement, but says nothing about who should get the firm's long-run profits once they have been maximized.

A second CSR cost argument holds that a firm should be free to spend its share of any surplus on compensation for victims of externalities created by the firm.[105] Externalities are costs inflicted on those who, lacking easily-vindicated property rights in the things damaged by the firm, are unable to charge for the damage.[106] Consequently, the firm does not compensate these victims for the damage and therefore does not take the cost of the damage into account. This is a problem because a firm can only maximize surplus if it accounts for all the costs of production, regardless whether the law forces the firm to pay those costs.[107] When CSR forces a firm to allocate surplus to pay victims who otherwise would go without compensation, CSR is not redistributing surplus, but rather ensuring that the firm pays all the true costs that the firm creates and therefore makes production decisions that actually maximize surplus. The surplus that the firm spends on these externalities was never really surplus, but cost, so here too a putatively distributive argument turns out really to be an argument about cost.

A third CSR cost argument is that allowing management to allocate surplus to team members on an ad hoc basis, instead of giving the surplus all to owners, solves the economic problem of how to reward teamwork.[108] It is rarely clear precisely how much of the value of a team effort is due to any particular team member.[109] If the team decides compensation in advance then team members may free-ride on the work of others, but if the team decides compensation after the fact then team members may worry about getting stiffed by other members who want to increase their shares of the profits.[110] Vesting power in management to decide allocation of the surplus on an ad hoc basis creates a neutral arbiter that can monitor shirking and reward hard work.[111]

The team production argument is a cost argument because it holds in effect that the performance of the team, and presumably therefore the surplus it creates, will increase if management can allocate the surplus to different team members on an ad hoc basis.[112] All surplus allocated to team members

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[105] *See supra* note 66.
[106] *See supra* note 65.
[107] *See id.*
[108] *See supra* note 15.
[109] *See* Blair & Stout, *supra* note 15, at 249–50.
[110] *See id.*
[111] *See id.* at 250–51.
[112] *See id.* at 270–71.

to improve performance is never really surplus to begin with, but only cost because this allocation is necessary to induce team members to maximize surplus.[113] The distributive question is what to do with the larger surplus created once the teamwork problem has been solved. Indeed, it is in the interest of shareholders, or any other group entitled to the surplus, properly defined, to ensure that management allocates compensation to team members on an ad hoc basis, precisely because doing so maximizes surplus, and therefore potentially their own wealth if they are able to extract that surplus from consumers as profit.[114]

The heart of the confusion between efficiency and distribution in many of these cost argument variations is a failure to distinguish between profit, which is the share of the surplus that goes to producers, and quasi-profit, which is value less variable costs, meaning costs that are associated with a particular volume or unit of production, rather than fixed costs, which are incurred independently of production volume.[115] Quasi-profit is the pot of wealth that is used both to pay profits and to pay fixed costs.[116] Teamwork costs, and sometimes externalities as well, are fixed costs, alongside research and development, entrepreneurship, and capital costs. Externalities such as pollution harm may not be associated with any particular unit of production, and teamwork costs must be allocated on an ad hoc basis precisely because the contribution of any particular team member to production of any particular unit of production cannot be observed.[117] Each cost argument of this kind really means to assert that more quasi-profit must be spent on some fixed cost in order to maximize surplus. That is, these arguments assert that fixed costs are a larger share of quasi-profits than one might otherwise suppose. The assertion that more quasi-profit must go to cost is not a distribution argument, because quasi-profit is not profit, since part of it may be necessary to induce production. Only once cost has been deducted from quasi-profit does the distributive question what to do with the profit that remains actually arise.

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[113] *See supra* note 88.
[114] *See* STOUT, *supra* note 4, at 80–81 (arguing that shareholders benefit when the board can act allocate surplus to facilitate team production).
[115] An excellent early discussion of these concepts, in which the "prime cost" substitutes for variable cost, and "supplementary cost" for fixed cost, may be found in 1 ALFRED MARSHALL, PRINCIPLES OF ECONOMICS, 434–37 (3d ed. 1895). *See also* Hovenkamp, *supra* note 10, at 324–25. The distinction between profit and quasi-profit is sometimes referred to as the distinction between economic profit and accounting profit. *See* Raj Aggarwal, *Using Economic Profit to Assess Performance: A Metric for Modern Firms*, 44 BUS. HORIZONS 55, 55–56 (2001).
[116] *See* MARSHALL, *supra* note 114, at 434–37.
[117] *See* Blair & Stout, *supra* note 15, at 249 (discussing the "nonseparability" of team output).

D. A True Link between Distribution and Efficiency

The only way to establish a link between distribution and efficiency is to identify a flaw in the mechanism by which to transfer surplus from one group to another that causes any such transfer to inadvertently reduce that surplus.[118] The breakdown in the machinery of distribution forces policymakers to leave a certain share of the surplus with a particular group even though, and this is key, leaving that surplus with that group is not necessary to induce that or any other group to help maximize surplus. The group's share would be cost if it were necessary to induce surplus maximization, and then the argument would collapse into a specious cost argument of the kind discussed above.[119]

The classic example of a genuine link between distribution and efficiency, and a perennial concern of antitrust, is uniform pricing, which to the disadvantage of shareholder primacy advocates happens to link profit maximization with reductions, rather than increases, in surplus.[120] When a firm is able only to charge the same price to each buyer of its product, the firm is constrained in its ability to distribute surplus between itself and consumers.[121] To increase its own share of surplus, the firm must raise price, but because the firm cannot charge different prices, the firm must raise its price to all its customers, including those who cannot afford the higher price.[122] Because those customers are willing to pay a lower price that is still above the cost of production, selling to them at the lower price would increase surplus and is therefore essential to maximizing surplus.[123] By pricing those customers out of the market, raising price therefore reduces surplus, even as it increases the amount of surplus taken by the firm as profit.[124]

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[118] That is the strategy employed by advocates of the use of tax and transfer, as opposed to the changing of legal rules, as a means of redistributing wealth. *See* SHAVELL, *supra* note 65, at 654–55. These advocates argue that the use of legal rules to redistribute wealth also reduces surplus, as when a liability rule designed to redistribute wealth to accident victims forces injurers to take more than the optimal level of precautions to avoid accidents. *See id.* These advocates therefore defend the distribution of wealth that this link between distribution and efficiency suggests is necessary for efficiency, placating distributive concerns by suggesting that the tax system, which they believe to redistribute wealth at lower cost than legal rules, be used to adjust any undesirable distributive results created by the efficient set of legal rules. *See id.*

[119] *See supra* note 88.

[120] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 19–21, 623–24 (4th ed. 2011).

[121] *See id.* at 623–24.

[122] *See id.*

[123] *See id.*

[124] *See id.*

Under uniform pricing a firm must charge a lower price in order to maximize surplus, with the result that consumers must receive a share of the surplus in order for that surplus to be maximized.[125] This link between distribution and efficiency is not a specious cost argument, of the kind discussed in Section II.C above, because the surplus that must go to consumers due to this link would not actually be necessary to induce consumers or anyone else to produce at surplus-maximizing levels if the distributive mechanism were to work flawlessly.[126] If it were possible to give consumers less of the surplus, production would still take place. To the extent that consumers contribute anything to production, it is by making purchases, and consumers would be willing to do that even in exchange for zero consumer welfare, if prices could be tailored to the individual willingnesses of consumers to pay, so that a higher price could be extracted from a consumer willing to pay a higher price without pricing a consumer willing to pay at most a lower price out of the market.[127] Thus the extra amount of surplus that must go to consumers to maximize surplus under uniform pricing is genuinely surplus, and not cost.[128]

The uniform pricing link favors consumers over firms, because it establishes that consumers must be guaranteed a share of surplus as a condition for surplus maximization and is particularly powerful because uniform pricing is common, at least for now, due to the limited ability of firms to guess the willingness to pay of individual consumers and tailor price to that willingness.[129] Accordingly, one might have expected CSR, in opposing shareholder primacy, with its implication that profit should be maximized for the benefit of shareholders, to make great use of uniform pricing to argue that profit maximization is not efficient. Peculiarly enough, the argument has played almost no role in the CSR response to shareholder primacy, probably because of CSR's disciplinary limitation to the study of

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[125] Surplus cannot be maximized under a uniform price unless price is low enough for the good to be affordable to the consumer who places the lowest value above cost on the good. But when prices is lowered to that level, those who place a higher value on the good are able to buy it for a price less than that value, leaving them with a share of surplus.

[126] For a brief discussion of the relationship between necessity and cost, see *supra* note 88.

[127] That is what allows first-degree price discrimination to function. *See* HOVENKAMP, *supra* note 119, at 623–24.

[128] Marshall similarly distinguishes revenues earned by a firm due to "free gifts of nature" from the "cost of production," characterizing the former as "surplus." MARSHALL, *supra* note 52, at 428. Here it is imperfection of uniform pricing as a distributive mechanism, rather than nature, that accounts for the consumer's control over the surplus at the surplus-maximizing price.

[129] *See* HOVENKAMP, *supra* note 119, at 625 (discussing inability of firms to tailor prices to individual consumers).

corporate governance.[130] Uniform pricing is a longstanding concern of antitrust because pricing implicates the distribution of wealth between consumers and firms.[131]

Although uniform pricing suggests that profit maximization is inconsistent with efficiency, it cannot, as discussed in Section II.B, settle the distributive question. Efficiency creates winners and losers. Dropping price to increase surplus reduces profit, making the firm worse off, even as it increases consumer welfare. The losers have no reason to agree to be sacrificed for the sake of efficiency.[132] Still, shareholder primacy advocates, in their guise as the Chicago School of antitrust, as well as many economists more generally, have been at pains to defend against the argument that profit maximization is inconsistent with efficiency.[133]

E. Resisting the Link

1. Competition

Their defense is that markets can be made competitive.[134] They argue that by encouraging firms to strive to maximize profit, and ensuring through antitrust that markets are competitive, then in fact profit will not be maximized, but surplus will.[135] Once markets have been made competitive, each firm that strives to maximize profit by increasing price will fail to do so because competitors will instantaneously expand output to steal the business of the price raiser, hoping themselves to increase their profits by increasing market share.[136] Firms will also strive to reduce costs in order to be able to charge lower prices and take market share from competitors.[137] In a monopolistically competitive market firms will also strive to improve product quality, and therefore the value placed on their products by consumers, in order to take business from competitors.[138] Thus price is kept

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[130] *See supra* note 47 and accompanying text.

[131] And antitrust's consumer welfare standard takes a position on the proper distribution of wealth between those two groups. *See supra* note 85.

[132] *See supra* notes 79 & 85, and accompanying text.

[133] For the relationship between shareholder primacy, the Chicago School, and antitrust, see the text accompanying note 40 *supra*.

[134] *See* Jensen & Meckling, *supra* note 40, at 10–11 (arguing that so long as the government rectifies monopoly and externalities problems, profit maximization is efficient).

[135] *See id.*; Hansmann & Kraakman, *supra* note 3, at 442.

[136] *See* EDWARD H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE 19, 96–97 (7th ed. 1958).

[137] *See* W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 868–71 (4th ed. 2005) (discussing incentives to reduce costs in a competition market).

[138] *See* CHAMBERLIN, *supra* note 135, at 96.

low, while surplus, the difference between value and costs, is maximized.[139]

The power of the competition argument is that it allows shareholder primacy advocates to support profit maximization at the firm level while claiming that even under uniform pricing there is no reduction in surplus at the market or economy level, and indeed no actual profit maximization at all.[140] The trouble with the argument is that in practice it merely enables shareholder primacy advocates to ignore the problem of the uniform pricing tradeoff, by sweeping it over to a different unit of analysis, the market rather than the firm.[141] The picture is not pretty when one goes to look at what actually happens at the level of the market. In practice, markets are almost never competitive, and firms seeking to maximize profit therefore often have the power to raise price and reduce surplus below competitive levels.[142] The exhortation to firms to maximize profit ends up doing real harm to surplus after all.

In order to ensure that there is only one possible price or division of surplus, firms must be able to expand output instantaneously to undersell competitors that have tried to raise price.[143] And the technology needed to compete in the market must be cheap enough to allow numerous firms to earn enough in the market to cover their costs.[144] Many markets lack these characteristics. Often, a small number of firms will have some advantage over

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[139] *See* MAS-COLELL ET AL., *supra* note 7, at 549 (giving this result in the case of pure competition).

[140] That is the magic of the invisible hand. *See supra* note 7.

[141] *See supra* note 9.

[142] They are certainly never competitive in the sense of pure competition, because no two sellers sell an identical product. *See* CHAMBERLIN, *supra* note 135, at 71–74. The competition between differentiated products may be competitive in the sense that each seller is forced to sell its differentiated product at cost. *See id.* at 96–97. But it seems unlikely that this sort of competition prevails in most markets today. Market concentration levels can be an indicator of the competitiveness of a market, because when markets are concentrated, meaning that most of the demand in the market is satisfied by a small number of sellers, oligopolistic collusion is more likely to take place. *See* HOVENKAMP, *supra* note 119, at 564. On average, the top four firms in each industry in the United States increased their combined share of the market from 26% to 32% between 1997 and 2012. *Too Much of a Good Thing*, Economist, http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing. More importantly, profits seem to be running ahead of investment, suggesting that firms are charging prices above cost. *See* Elhauge, *supra* note 42, at 1281–82.

[143] *See* CHAMBERLIN, *supra* note 135, at 19.

[144] In the auto industry, for example, economies of scale in the use of dies to stamp auto body parts gave large auto makers a cost advantage in the 1950s and 1960s that drove smaller competitors from the market, leading to an industry dominated by the "Big Four," General Motors, Chrysler, Ford, and American Motors. *See* F.M. SCHERER, INDUSTRY STRUCTURE, STRATEGY AND PUBLIC POLICY 285, 295 (1996).

others, more talented management teams, or better technology, that competitors cannot reproduce.[145] Or the costs of setting up a production facility will be so high that the amount of money that can be extracted from consumers for the product can support only a very small number of players in the market.[146] Expansion of output in response to price increases can also be a slow and expensive process, involving the purchase of more production or distribution facilities.[147] As a result, in almost all markets, firms retain some power over the prices they charge, meaning that there is more than one possible distributive outcome and the question then remains which outcome should firms be asked to choose. Antitrust law may be used to prevent firms from creating artificial barriers to competition, such as by forming cartels or monopolizing upstream distribution to exclude competitors, but antitrust cannot eliminate these basic structural barriers to competition without reducing surplus.[148]

2. Inelasticity and Tailored Pricing

The rarity of perfect competition makes it a weak tool for undermining the link, unfavorable to the profit maximization case, between efficiency and distribution suggested by uniform pricing. Shareholder primacy advocates can try to address this problem by directly attacking the link between efficiency and distribution created by uniform pricing itself. Under one approach, these advocates might argue that uniform-pricing does not give rise to a link between distribution and efficiency when demand for a good is very insensitive to price. When demand is completely inelastic, meaning that, as in the case of prescription drugs, consumers will buy at almost any price, then consumers will not defect when they are charged higher prices.[149] As a result, all units for which value exceeds cost continue to be sold at higher prices and

[145] *See* Demsetz, *supra* note 38, at 2.
[146] *See, e.g.*, SCHERER, *supra* note 143, at 335 (discussing this challenge in the automobile industry).
[147] *See id.* at 113–14 (discussing the cost of building a new petroleum refinery).
[148] *See* HOVENKAMP, *supra* note 119, at 211–12, 478–80 (discussing the antitrust prohibitions on price fixing and exclusive dealing). Antitrust is loath to treat product or cost advantages as antitrust offenses, lest it deprive firms of revenues that they need to cover the fixed costs of improving their products or reducing their costs, and thereby increasing surplus. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
[149] *See* Gautier Duflos & Frank R. Lichtenberg, *Does Competition Stimulate Drug Utilization? The Impact of Changes in Market Structure on Us Drug Prices, Marketing and Utilization*, 32 INT'L REV. L. & ECON. 95, 106–7 (2012) (finding that demand for drugs is inelastic).

surplus is not reduced as profits rise.[150]

Shareholder primacy advocates can argue that firms sometimes can avoid charging a uniform price for all units that the firms sells. In some cases, buyer and seller may successfully negotiate a different, mutually beneficial price for each unit of production. Then the requirement for efficiency, that all units for which value exceeds cost are sold, will be satisfied, since for each unit there is a price above cost, benefitting the seller, but below value, benefitting the buyer.[151] The prices they negotiate divide the surplus. Negotiation suggests a give-and-take, but the equivalent may be achieved by any firm that has the power to dictate prices on a unit basis that consumers accept so long as the prices fall below the values the consumers place on the units.[152] A firm with that power will always maximize surplus, because the firm can always choose prices at least equal to cost at which to sell all units for which value exceeds cost, and consumers will, by assumption, always buy at those prices.[153] The firm can achieve any desired distribution of surplus by adjusting the individualized prices that it charges.[154] Firms rarely dictate prices on a unit basis today because firms rarely know the precise value placed on a good by an individual consumer.[155] But big data and information technology are changing that.[156]

These arguments suffer from the same narrowness problem as does the competition argument. Demand is often elastic, and most firms still engage in uniform pricing, at least within the segments in which they divide up their markets, even if they are increasingly able to use big data to define those segments finely and charge a different uniform price to each segment.[157]

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[150] It is for this reason that a regulator of a natural monopoly seeking to maximize surplus seeks in the first instance to order a higher price in the market with the more inelastic demand, because doing so prices fewer consumers out of the market. *See* SCHERER & ROSS, *supra* note 85, at 497–98 (discussing Ramsey pricing).

[151] Bowman was a prominent Chicago School proponent of this argument in the antitrust context. *See* WARD S. BOWMAN, PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL (1973).

[152] When the firm exploits this power to charge each consumer the highest price that consumer is willing to pay, the practice is known as first-degree price discrimination. *See* HOVENKAMP, *supra* note 119, at 623–24.

[153] *See* Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371 (2017).

[154] *See id.*

[155] *See* HOVENKAMP, *supra* note 119, at 625.

[156] *See* Ramsi Woodcock, *The Bargaining Robot*, CPI ANTITRUST CHRON. 2 (2017).

[157] *See* HOVENKAMP, *supra* note 119, at 625 (arguing that first-degree price discrimination is difficult to impose but that third-degree price discrimination, in which consumers are segregated into different groups, is "common"); Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77, 79 (1954) (assuming a non-zero elasticity in all markets).

Even were they to apply more generally than they do, these arguments would have limited usefulness in establishing profit maximization as the best distribution of wealth. Doing away with the uniform pricing link between distribution and efficiency does not establish a link between profit maximization and efficiency; all it does is to undermine the foundations for an affirmative case against profit maximization built on uniform pricing.[158]

F. Cost in Overdrive

The final argument for profit maximization is a cost argument in overdrive. Shareholder primacy advocates' Chicago School cousins suggest, though rarely state, that there simply is no surplus at all to be divided because the entire surplus must be paid to firms.[159] The maximum price that the consumer is willing to pay is always just high enough to cover the cost of production, so the consumer must always be charged that maximum price.[160] It follows that any failure to turn all surplus over to firms represents a failure to maximize surplus, because the firm would have spent that extra allocation of surplus on further increasing the size of that surplus.[161] The distinction between this and the argument that profit is needed to cover fixed costs is exclusively one of degree. Under this new argument, not some, but the entire, surplus is required for efficiency.[162]

This argument is a non-starter because, if all surplus should really be cost, then the motivation for maximizing surplus is destroyed. The entire value of an economy is exclusively the extent to which that economy generates surplus. When there is no surplus, engaging in economic activity, whether

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[158] That case is described in the text accompanying note 129 *supra*.

[159] Schumpeter is the father of this view, and its most explicit proponent. *See* SCHUMPETER, *supra* note 86, at 89–90 (arguing that in the "majority" of cases monopolies just cover costs). It is suggested by BOWMAN, *supra* note 150; Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal-Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659, 674 (2001); John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 156 (2000). Brunell provides a number of other examples of this view. *See* Richard M. Brunell, *Appropriability in Antitrust: How Much is Enough?*, 69 ANTITRUST L.J. 1, 27–28 (2001) (sources cited therein).

[160] *See* SCHUMPETER, *supra* note 86, at 89–90.

[161] The argument is often that any additional surplus gained by the firm would be spent on research and development, leading to innovation and a further increase in surplus. This seems to be the implication of work suggesting that intellectual property at present provides firms with insufficient rewards for innovation, making them unable to afford surplus-increasing innovations. *See* Vincenzo Denicolò, *Do Patents Over-Compensate Innovators?*, 22 ECON. POL'Y 680, 682–83 (2007); William D. Nordhaus, *Schumpeterian Profits in the American Economy: Theory and Measurement*, Working Paper No. 10433 (2004) 34–35.

[162] *See* SCHUMPETER, *supra* note 86, at 89–90.

buying or selling, offers no real advantage to buyer or seller. If consumers must pay an amount for a good that is just equal to the value that consumers place on that good, then consumers get more or less zero value from consuming that good.[163] If that price represents cost, then the producer is more or less no better off from engaging in production of the good than the producer would be doing the producer's next best alternative activity.[164] The project of maximizing a surplus that must be spent on its own maximization is like aspiring from producing one dandelion at the cost of one dandelion to producing a field of dandelions at the cost of a field of dandelions. Shareholder primacy advocates succeed at establishing the efficiency of profit maximization only by indulging the absurdity that the economy is incapable of improving lives, which, if true, would eliminate the rationale for pursuing efficiency in the first place.

The argument has a second important weakness that gets at the heart of the faulty intuition that supports profit maximization. That intuition is that the surplus created by productive activity, as the measure of its value, must also be the proper measure of the incentive required to induce that activity.[165] Giving someone the gain that person creates, in other words, is always necessary to give that person an incentive to create that gain.[166] This happens to be quite incorrect. The size of the reward needed to create an incentive to engage in productive activity is determined by the alternatives available to producers, not by the size of the surplus that they create. In other words, to maximize surplus, it is necessary only that whoever has control over production, whether financier, inventor, entrepreneur, worker, or other contributor to the firm, stand to earn more compensation maximizing that quantity than by doing anything else.[167] The scale against which

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[163] *See supra* note 80 and accompanying text.
[164] *See supra* note 88.
[165] This view may have its origin in the analysis of price regulation where the regulator lacks information on the firm's costs and the firm seeks to maximize its profits. In this limited context, "the firm will operate at minimum cost and attempt to satisfy the needs and desires of customers only if it is awarded [by the price regulator] the full surplus that its activities generate." Mark Armstrong & David E.M. Sappington, *Regulation, Competition, and Liberalization*, 44 J. ECON. LITERATURE 325, 331 (2006). If it is possible for price to equal cost, however, whether because the market price just happens to gravitate in that direction, the regulator knows what cost is and imposes a price equal to cost, or the firm undertakes voluntarily to charge only prices equal to cost, this view is incorrect. At cost, price provides sufficient incentive for any firm to produce efficiently, as discussed in detail in this and the following paragraphs.
[166] *See* Jensen & Meckling, *supra* note 40, at 312 (arguing that if the owner manages the firm, then management will maximize the utility of the owner and that once management's ownership stake falls, utility will no longer be maximized).
[167] *See supra* note 88.

compensation must be measured is not the surplus or profit created by the firm but the most money the controller could make doing something else.

Imagine that one consumer places $6 of value on a bar of soap and the other $2, and that the cost of producing a first bar is $0.50 and a second is $1.50. Surplus is total value of $8 less total cost of $2, or $6. Now suppose that a manager may be hired whose best alternative job offer would pay $0.01. To lure this manager and create an incentive for the manager to maximize surplus, the firm must pay the manager $0.01 plus some infinitesimal additional amount to make the manager prefer this job over the alternative. To ensure that the manager maximizes profit, the firm must also ensure that the manager earns more when surplus is maximized than in any other situation. The firm can do this at lowest cost by offering the manager some infinitesimally small percentage of the quasi-surplus. Surplus is preceded by "quasi-" here because it is revenue net of total unit costs, but not of fixed costs, such as the compensation of this manager.[168] Whatever is paid to the manager is deducted from quasi-surplus to leave what is properly called surplus, the difference between total value and all costs. Suppose that the firm chooses to give the manager a penny plus 1% of quasi-surplus. Because the firm now incurs the new cost of hiring the manager, the $6 of surplus is now $6 of quasi-surplus, and the manager is paid $0.01 plus 1% of $6, or $0.06, for a total management cost of $0.07, out of that quasi-surplus. Surplus is now quasi-surplus of $6 less cost of $0.07, or $5.93.

To increase pay, the manager will try to increase surplus, since doing that increases the base against which the percentage portion of the manager's pay is calculated. Suppose that the manager finds a way to increase product quality, causing the first and second consumers to increase the value they place on the product to $8 and $4 respectively. Quasi-surplus is now surplus on the first unit of $6.50 and on the second unit of $3.50, for a total of $10. The manager has an incentive to make this change because compensation rises from $0.07 to $0.01 plus 1% of $10, or $0.10, for a total of $0.11, an increase of $0.04. Surplus is also higher, rising to $10 less $0.11, or $9.89, from $5.93. The uniform price that the firm could charge in order to cover this cost is half of total costs of $4 for production of the two units plus $0.11 for the manager, or $4.11, which comes to just under $2.06. At that price the firm generates enough revenue to make the firm ready, willing, and able to maximize surplus, including paying the fixed costs of a resource, the manager, needed to do that. The rest of the surplus goes to consumers.

In other words, the $9.89 in maximized surplus does not need to be paid to the manager to induce surplus maximization. The $0.11 in compensation actually paid is all the manager needs, because it is more than the manager

[168] *See supra* note 115 and accompanying text.

would earn working elsewhere ($0.01) and more than the manager would earn doing a bad job and failing to maximize surplus ($0.07). Indeed, the reward to the manager could be reduced to $0.08 without destroying the incentive. The $9.89 in surplus does not need to be paid out to the firm to allow it to compensate the manager for maximizing surplus, as shareholder primacy advocates' profit maximization principle mistakenly insists is necessary. Instead, that surplus can be paid to anyone without having any effect on the incentive of the firm to maximize surplus.[169]

One counterargument is that while the firm might have accurate knowledge of its costs, the firm has an incentive to exaggerate those costs to a regulator, in order to obtain permission to charge an above-cost price.[170] Because I am concerned in this Article with an antitrust-based pricing requirement that would be essentially voluntary, as discussed in Section V.A, dissembling is of no concern to me here. If a firm were to decide voluntarily to comply, then it would presumably use its information to charge a price equal to cost.

III. THE INDETERMINATE PRINCIPAL

The question how to distribute surplus between firms and consumers, which is the question whether firms should maximize profit, is only half of the corporate mission debate.[171] The other half is how the share of the surplus taken by firms itself should be distributed. The debate has many of the same elements as the debate over how to divide the surplus between the firm and consumers, only now the question is whether the allocation of the profit is related to the problem of how to maximize that profit, as opposed to the question how the allocation of the surplus is related to the problem of how to maximize that surplus. Shareholder primacy advocates maintain that the

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[169] This argument may be made slightly more formal. Suppose that the benefits to consumers of production effort e engaged in by a particular firm are $b(e)$ and the costs of production to the firm are $c(e)$. Consumers want the firm to maximize the net benefit $b - c$, which takes place when the effort level equalizes marginal benefit and marginal cost: $b'(e) = c'(e)$. Suppose that the firm enjoys a positive fraction x of the net benefit conferred on consumers by production. That is, the firm's profit is $x(b - c)$. Then the firm will choose e to maximize $xb - xc$, which, because x does not vary with effort, takes place when the fraction x of marginal benefit equals the fraction x of marginal cost: $xb'(e) = xc'(e)$. Dividing through by x, it is evident that the firm will choose e to satisfy the same condition that consumers would choose e to satisfy, so the e the firm chooses will still maximize the net benefit. If x is chosen to be very, very small, then the firm's profit will be vanishingly small, and consumers will enjoy that entire maximized net benefit of production.

[170] *See* VISCUSI ET AL., *supra* note 136, at 433.

[171] *See supra* note 49 and accompanying text.

entire profit should be awarded to shareholders.[172] CSR argues that managers should be permitted to allocate the profit however managers prefer.[173]

Peculiarly, given its tenacious insistence that firms, as the parties in control of production, should get the surplus in order to maximize it, shareholder primacy advocates have not argued that managers, as the parties in control of production within the firm, should get the profit in order to ensure that it will be maximized. Instead, shareholder primacy advocates have argued that management should be allocated only so much of the profit as necessary to induce management to maximize profit, and that the rest, surplus properly defined, should be allocated to shareholders as "residual claimants."[174] This is shareholder primacy advocates' proposed solution to what they call the "principal-agent problem" of ensuring that managers act to maximize profit on behalf of shareholders.[175]

In other words, in fashioning solutions to the agency problem, shareholder primacy advocates have sought to rely upon precisely the distinction between surplus and cost that finance seems to want to deny in accepting profit maximization as a goal. The shareholder primacy advocates' solution to the agency problem is to give management a share of the profit in order to create an incentive for management to maximize that profit, just as, in the example in the previous Section, the firm maximized surplus by giving the manager 1% of it. Shareholder primacy advocates do not recommend giving management the entire profit, however, because only a share large enough to beat management's alternative options is really needed, just as in the example above only 1% of the surplus was needed to induce management to maximize that surplus.[176] Shareholder primacy advocates would give the rest of the profit to shareholders.[177] This puts shareholder primacy advocates in a difficult position, however, because it contradicts their insistence that to

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[172] *See* Hansmann & Kraakman, *supra* note 3, at 449.
[173] *See* STOUT, *supra* note 4, at 115.
[174] *See* STEPHEN MARTIN, ADVANCED INDUSTRIAL ECONOMICS 384–85 (2002) (describing a basic agency model in which the principal seeks to maximize the principal's utility "net of compensation" to the agent); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301, 302–3 (1983) (assuming that the shareholders in a corporation have the right to "residual claims" defined as "net cash flows").
[175] *See* Fama & Jensen, *supra* note 173, at 302.
[176] *See* MARTIN, *supra* note 173, at 385. Agency models usually assume that the principal has imperfect information about the agent's behavior, causing the costs actually incurred by the agent to be risky from the principal's perspective. *See id.* at 384–85. This does not alter the basic character of these arguments as attempts at minimizing the inducement required to make management maximize profit on behalf of shareholders, but it does make these arguments somewhat more complicated than the simple numerical example described in Section II.F.
[177] *See* MARTIN, *supra* note 173, at 385; Hansmann & Kraakman, *supra* note 3, at 449.

maximize surplus, the entire surplus must be given to the firm.[178] Following that logic, maximizing profit should require that the entire profit be given to management. Shareholder primacy advocates seem quite comfortable with the idea that the way the surplus is allocated has no bearing on the maximization problem when these advocates want to realize their distributive project of rewarding shareholders.[179] But these advocates reject that same idea when it would justify giving the surplus to consumers instead of firms.[180]

Shareholder primacy advocates might at least have hoped that the price of contradiction would be sufficient to buy a sound argument for giving profit to shareholders. Unfortunately, the separability of surplus and cost does not actually justify awarding profit to shareholders. For while separability allows shareholder primacy advocates to argue that a group apart from managers can get the profit without destroying management's incentive to maximize that profit, separability does not impose any restrictions on the identity of that group. Just as in the absence of some peculiar flaws in the distributive mechanism, surplus may be allocated to anyone without jeopardizing the ability of the firm to maximize that surplus, it follows from the separability of profit and cost that profit may be given to anyone, inside or outside the firm, without jeopardizing the ability of the firm to maximize that profit, unless some flaw in the distributive mechanism can be identified.[181] As long as the proper incentives are in place for management, there is no real need actually to award the profit to shareholders. The profit can go anywhere: to workers, inventors, the government, the man on the street, or consumers. Management will maximize profit regardless, so long as it receives the proper incentives.

In the absence of an economic reason for which shareholders in particular should get the profit, shareholder primacy advocates must fall back on the argument that shareholders are entitled to the profit as a legal matter, to which I now turn.[182]

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[178] That insistence is the substance of the efficiency arguments for profit maximization described in Sections II.C.1, II.E & II.F.

[179] Thus the starting point for Jensen's famous article laying the groundwork for agency theory is that the manager sells some shares in the corporation, leaving the manager with less than full claim, in Jensen's view, over the profits of the corporation. *See* Jensen & Meckling, *supra* note 40, at 312.

[180] Which is what would happen were firms to charge a price equal to cost instead of maximizing profit. *See* Section II.A.

[181] *See* Section II.B.

[182] *See* STOUT, *supra* note 4, at 35 (observing that shareholder primacy advocates assume that shareholders have a legal right to the profit); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 24 (1991) (assuming that shareholder are residual claimants).

IV. THE DISTRIBUTIVE SPHYNX OF CORPORATE LAW

A. The Formal State of the Law

Corporate governance orthodoxy holds that the law requires firms to maximize profit and pay that profit entirely to shareholders.[183] The heart of this orthodoxy is the argument that the fiduciary duties of loyalty and care imposed by corporate law upon the board of directors require that the board maximize profit and pay that profit to shareholders.[184] Against this fiduciary duty to carry out shareholder primacy, CSR argues that: (1) any fiduciary duty to maximize profits and pay them to shareholders applies only in the long run;[185] (2) the fiduciary duties in fact permit both charitable donations and board actions intended to comply with ethical rules that either reduce profit or reduce the amount of profit distributed to shareholders, an interpretation strengthened by state corporate constituency and charitable giving statutes;[186] (3) the power of the board to refuse to pay dividends to shareholders reflects the absence of a shareholder right to profits;[187] (4) shareholders have a right to payment by the firm only when the firm declares bankruptcy;[188] (5) any duty to maximize shareholder profits and pay those profits to shareholders exists only when the board is considering an offer to

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[183] *See* Stephen Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 U.C.L.A. L. REV. 601, 604 (2005) ("To be sure, shareholders own the residual claim on the corporation's assets and earnings."); Bainbridge, *supra* note 49, at 697; Hansmann & Kraakman, *supra* note 3, at 468.

[184] *See* POSNER & SCOTT, *supra* note 40, at 90. This argument appears most explicitly in Delaware caselaw. *See* Nacepf v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) ("It is well settled that directors owe fiduciary duties to the corporation. . . . [I]ts shareholders . . . are the ultimate beneficiaries of the corporation's growth and increased value.")(internal citations omitted); In re Rural Metro Corp., 88 A.3d 54, 80 (Del. Court of Chancery 2014) (stating that "directors' fiduciary duties require that they seek to promote the value of the corporation for the benefit of its stockholders.")(internal quotation and citation omitted). Commentators often cite to the Model Business Corporation Act, which states that directors must act "in the best interests of the corporation," even though that language does not mention shareholders. Revised Model Business Corporation Act § 8.30(a); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 285 n. 30 (1997) (citing that language); Elhauge, *supra* note 4, at 769 n.89 (same); Greenwood, *supra* note 42, at 124 n. 66 (same). Smith notes that commentator notes, however, that "the language is generally understood to coincide with the best long-term interests of the shareholders." Smith, *supra*, at 285, 285 n.32 (sources cited therein).

[185] *See* STOUT, *supra* note 4, at 32.

[186] *See* Elhauge, *supra* note 4, at 763–69; THE AMERICAN LAW INSTITUTE, *supra* note 47, sec. 2.01(b)(2), 2.01(b)(3).

[187] *See* STOUT, *supra* note 4, at 40; Greenwood, *supra* note 42, at 121.

[188] *See* STOUT, *supra* note 4, at 39.

buy out the shareholders;[189] and (6) the business judgment rule, pursuant to which courts defer to board business decisions made in good faith furtherance of long-run profit maximization, allows boards, at least in practice, to do whatever they want, so long as they do not engage in self-dealing or fail to prepare entirely for important decisions.[190] Anything else can be justified as a good faith attempt to maximize long run profit.[191]

CSR believes that these arguments establish that the firm need not maximize profit and need not turn whatever profit the firm may have over to shareholders.[192] In fact, these arguments establish only that (1) the board can maximize long-run profit, as opposed to short-run profit, (2) the board can choose to maximize that profit net of externalities, meaning that it can voluntarily compensate others for harm done by the corporation even if the law would not require compensation, and take those compensation costs into account in taking steps to maximize profit, and (3) the board can pay the firm's profits out to anyone so long as those profits are properly calculated by deducting the cost of equity capital, meaning any funds required to give shareholders a return sufficient to induce them to make levels of investment in the firm that are required to maximize the firm's profit.

As mentioned in Section II.A, there are two parts to shareholder primacy, the requirement that the firm maximize profit and the requirement that the firm give that profit to shareholders.[193] CSR has succeeded at establishing that firms need not turn all of their profit over to shareholders, but not that firms have no duty to maximize profit, at least in the long run.[194]

1. Profit Maximization

CSR has failed to undermine profit maximization as a fiduciary duty. CSR's argument that profit may be maximized in the long run of course permits firms only to forego short-run profit maximization, but leaves intact a duty to extract as much surplus as possible from consumers in the long run.[195] Even the benefits of being able to eliminate short-run profit

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[189] *See id.* at 30–31; Elhauge, *supra* note 4, at 848–52; Greenwood, *supra* note 42, at 124 n. 60.
[190] *See* Elhauge, *supra* note 4, at 770–71; Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion*, 67 S. CAL. L. REV. 287, 297–303 (1993).
[191] *See* Smith, *supra* note 183, at 286; Elhauge, *supra* note 4, at 770; STOUT, *supra* note 4, at 29–31.
[192] *See* Elhauge, *supra* note 4, at 763; Greenwood, *supra* note 42, at 121–23; STOUT, *supra* note 4, at 31.
[193] *See supra* note 49 and accompanying text.
[194] I will show, however, below, that this is enough to undermine the profit-maximization duty in practice.
[195] *See* STOUT, *supra* note 4, at 32.

maximization as a goal are limited, because long-run profit maximization requires maximization of profit in the short run whenever possible, as that profit can then be carried forward into the future, further increasing profit in the long run.[196]

The ethical and charitable exemptions to the profit maximization duty do not save CSR's case.[197] The exemptions establish no more than that the board may treat externalities as costs when the board goes about making profit maximization decisions. This means that the board can deviate from profit maximization by increasing its costs, but not by lowering its prices. But lowering prices is the only way in which the distributive effect of profit maximization, which operates by taking wealth from consumers through higher prices, can be altered.[198]

The American Law Institute's interpretation of the ethics limits on shareholder primacy are consistent with this externalities interpretation. The ALI allows firms to do anything that is "responsible" or "reasonable," even if the conduct is inconsistent with profit maximization.[199] The comments show that by "responsible" and "reasonable" deviation from profit maximization the ALI means not the charging of lower prices, which is one way to reduce profits, but rather the internalization of true social costs, including externalities, which reduces profits by increasing the costs deducted from them.[200] The comments provide three examples of ethical obligations the firm may honor even if they prevent the firm from maximizing profit: to produce products that are safe for consumers, honor reasonable employee reliance, and, for a newspaper, respect moral standards of journalism.[201]

All three examples involve internalization of externalities. Defective products and frustrated reliance both inflict unpriced harms, and are therefore properly regarded as externalities.[202] The trouble with selling a defective

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[196] For this reason, the promise of long-run profit maximization for CSR really lies in combining it with the business judgment rule, allowing firms to claim that everything that they do is aimed at long-run profit maximization without worrying that courts will question that claim. *See* Elhauge, *supra* note 4, at 770; STOUT, *supra* note 4, at 31–32; Greenwood, *supra* note 42, at 134 ("The freedom to determine the time frame in which to maximize shareholder returns is the freedom never to return anything at all to shareholders.").

[197] These exemptions are codified in the American Law Institute's influential but nonbinding restatement of corporate law. *See* THE AMERICAN LAW INSTITUTE, *supra* note 47, sec. 2.01(b)(2), 2.01(b)(3); Elhauge, *supra* note 4, at 764.

[198] *See supra* note 54 and accompanying text.

[199] *See* THE AMERICAN LAW INSTITUTE, *supra* note 47, at 2.01(b)(2), 2.01(b)(3), 2.01 comment f; Elhauge, *supra* note 4, at 763–66.

[200] *See* THE AMERICAN LAW INSTITUTE, *supra* note 47, sec. 2.01 comment h.

[201] *Id.*

[202] *See supra* note 65.

product is that the consumer does not know that the product is defective, and therefore buys at a price that does not compensate the consumer for losses inflicted by the defect, unless the law steps in to provide redress, which the law sometimes fails to do.[203] Similarly, failing to honor reasonable employee reliance inflicts costs on employees that are not priced into the wage because employees are naïve.[204] The moral standards of journalism force papers to internalize the harm of bad reporting, which is often unpriced because consumers have no way of independently verifying the accuracy of news reports.[205] The externalities interpretation is also consistent with CSR's own vision of what ethical behavior entails, which seems always to be action that internalizes some externality.[206]

As discussed in Part II.C.2, the internalization of externalities is essential for maximization of surplus, but has no bearing on how that surplus should be distributed between consumers and firms once it has been maximized.[207] CSR's success at establishing the board's legal right to internalize true social costs therefore says nothing about whether the board also has a duty to maximize the firm's share of that surplus, net of true social costs, by charging consumers the highest possible prices.

2. Giving the Profit to Shareholders

CSR's argument that boards can give profits, whether maximized or not, to whichever groups they wish fares much better. The charitable giving exemption to the fiduciary duty to put shareholders first establishes that the board may pay profits to any group consistent with public welfare.[208] The

[203] *See* SHAVELL, *supra* note 65, at 214–15.
[204] *See* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 928 (1985).
[205] This is an example of the general role of social norms of inducing firms voluntarily to internalize externalities. *See* Karl-Dieter Opp, *Social Networks and the Emergence of Protest Norms, in* SOCIAL NORMS 234, 236 (Michael Hechter & Karl-Dieter Opp eds., 2001).
[206] *See* Elhauge, *supra* note 4, at 763 (arguing that the board should be able to forgo profitable clear-cutting of forests, presumably because such clear-cutting inflicts harm on third-parties that outweighs the profits that it would generate for the firm); Hediger, *supra* note 66, at 521.
[207] *See supra* text accompanying note 107. One important consequence of this legal regime is that, in allowing firms to maximize profit net of externalities, the law permits a firm to charge the competitive price in those markets in which the firm must charge a uniform price, even when there is no actual competition in the market that would force the firm to charge that price. Surplus reductions caused by the charging of high uniform prices are nothing more than externalized harms to consumers. A firm seeking to take all externalities into account can charge only the competitive price in order to avoid those harms. A competitive uniform price gives the entire surplus to consumers if unit costs are constant, but otherwise may allow the firm some profit.
[208] *See* THE AMERICAN LAW INSTITUTE, *supra* note 47, sec. 2.01(b)(3).

amount of charitable giving is subject to a reasonableness requirement, but that requirement grants shareholders no right to the firm's profit.[209] The requirement is best understood to protect the right of shareholders to a reasonable return on their investment, which is to say, payment of the cost of capital, because it would be unreasonable, and indeed harmful to the firm, for a board to refuse to pay the cost of capital.

The value that shareholders take from the firm is the sum of all the distributions made by the firm to shareholders, each discounted to reflect the extent to which that distribution exceeds the value the shareholders would obtain by investing in alternative projects.[210] These distributions are created by dividend declarations, dissolution, or bankruptcy.[211] Because the board has discretion not to declare a dividend, and a corporation may live forever if its finances are in order, none of these events need ever occur, so shareholders must further discount each anticipated distribution based on the probability with which the distribution may fail to appear.[212] In order for firms to attract equity investors, they must credibly promise to keep those probabilities low enough to give investors an expectation that the cost of capital will be met.[213] The reasonableness requirement makes that promise by ensuring that the firm will give away only profit, and not the cost of equity capital.[214] That is, the firm may throw off profits to worthy recipients, who need not be shareholders, so long as the firm saves enough to pay the cost of

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[209] *See id.*

[210] *See* Greenwood, *supra* note 42, at 132.

[211] *See* Revised Model Business Corporation Act § 14.05(a)(4) (providing for distribution of assets to shareholders upon dissolution); *id.* at 6.40 (providing for distribution of dividends); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 679 (1993) (observing that shareholders may receive cash as part of a bankruptcy).

[212] *See* STOUT, *supra* note 4, at 40 (discussing discretion of the board to refuse to declare a dividend); Carlos L. Israels, *The Sacred Cow of Corporate Existense Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778, 778 (1951) (observing that "corporate existence is permitted to be perpetual"). For a discussion of the discounting of future values based on the risk that they will fail to appear, see MARTIN PETERSON, AN INTRODUCTION TO DECISION THEORY 65–67 (2009).

[213] *See* Greenwood, *supra* note 42, at 123–24.

[214] Greenwood argues that this promise is illusory, because firms rarely raise cash from shareholders more than once, eliminating any incentive for them to keep their promises to investors to pay the cost of capital. *See id.* at 124–25. Greenwood argues that to the extent that shareholders can expect eventually to obtain the cost of capital, it is only because managers are often also shareholders, and therefore have an interest in ensuring that shareholders eventually get paid. *See id.* at 125, 155. Regardless the reason why firms actually end up keeping their promises to shareholders, the reasonableness requirement in corporate charity giving may be understood as a legal requirement that boards try to keep those promises.

capital.

The rule requiring the board to maximize shareholder wealth when the board receives bids to buy out existing shareholders is consistent with this reading.[215] The identity of shareholders changes as investors trade into and out of stocks. Unless these changes of shareholder identity influence the management of the firm, they should have no effect on the value of the shares themselves, because that value is alone determined by the amount and probability of distributions, which are determined by the board.[216] Thus if the board has resolved to pay out only so much cash to shareholders as is necessary to cover the cost of capital, but no part of the firm's profits, then the value of the shares will equal the cost of capital regardless who happens to own the shares. An offer to buy out existing shareholders is just another change of shareholder identity, and, unless it promises to result in a change of board policy regarding how much to pay shareholders, the resulting purchase of shares should have no effect on the value of those shares.[217] If the firm will be managed after the sale without the distribution of profits to the new shareholders, then the value of the firm to those new shareholders, which is determined by what the board will pay to the new shareholders in the future, will not include any profits. The buyers, who will be the new shareholders, will not be willing to buy the firm for a price that includes profits and so their offer will cover no more than the existing shareholders' cost of capital. The maximization requirement ensures only that the board will not deny shareholders their best offer, not that shareholders will get an offer that includes the firm's profits.

This interpretation of the charitable giving exemption establishes the

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[215] *See supra* note 189.

[216] The board has discretion to declare dividends. *See* STOUT, *supra* note 4, at 40. The board also has discretion to allow voluntary dissolution of the firm. *See* Revised Model Business Corporation Act § 14.02. The board also has discretion to prevent involuntary dissolution or bankruptcy by managing the firm to avoid the triggers thereof, such as insolvency. Revised Model Business Corporation Act § 14.30(3)(i) (providing for judicial dissolution due to insolvency).

[217] For a discussion of the power of shareholders to influence the board, see Strine Jr, *supra* note 4, at 766. The new shareholders may put more competent management into place, driving up the probability that the firm will remain solvent and capable of making payments to shareholders in the long run. All else equal, that in turn would drive up the value that shareholders place on their shares. But if the shareholders' risk-adjusted expectation of future payment was already sufficient to cover the cost of capital, then the increase in value created by the greater probability of solvency would amount to a transfer of profit to shareholders, since it would be in excess of the amount that the firm had to promise shareholders to induce them to invest. *See supra* note 88 and accompanying text. In that case, the board could reduce the amount it plans eventually to pay shareholders, or increase the riskiness of its management style, to drive shareholders' expected value back down to the cost of capital and in this way recapture that excess profit for distribution to others.

authority of the board to allocate profits as it sees fit, eliminating any need to engage with CSR's dividend and bankruptcy arguments.[218] That is fortunate because, despite CSR's claims to the contrary, the board's right to refuse to declare a dividend, and the right of shareholders to the residual in bankruptcy, do not answer the question whether shareholders have a right to the firm's profits.[219] Both rights merely regulate the means by which a firm may pay cash to shareholders, but say nothing about whether that cash should include profit or just the cost of capital. CSR's appeal to the business judgement rule is also of no help.[220] The business judgment rule requires that the board manage the firm in good faith compliance with fiduciary duties, including the duty to maximize profit and give it to shareholders.[221] That the business judgment rule makes it possible for boards to flout those duties is no argument that boards have a right to flout them. The corporate mission question must be answered by examination of the content of those duties, and identification of exceptions to them, not by appeal to the failure of courts to enforce them.[222]

B. Reading the Rules Together

CSR's failure to undermine the profit maximization duty as a formal matter does not, however, prevent firms from minimizing profit as a practical matter, because the right of the board to allocate profit as it sees fit extends to allocation of profits to consumers.[223] Because firms can turn the profit over to consumers, firms can comply with the profit maximization rule by maximizing profit, and then turn around and rebate that profit back to consumers, effectively minimizing profit, even while complying formally with the requirement that profit be maximized before it is distributed to the board's favored group. Of course, when the board wants consumers to get the profit there is no reason for the firm to go to the expense of collecting profit and then paying it back out to consumers. The board should be able to

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[218] *See supra* text accompanying notes 187 and 188.
[219] *See supra* notes 187 and 188.
[220] *See supra* text accompanying note 190.
[221] *See* Gevurtz, *supra* note 189, at 296–303 (identifying good faith as a requirement in each of three interpretations of the business judgment rule); Smith, *supra* note 183, at 285–86 (discussing the shareholder primacy fiduciary duty).
[222] Greenwood argues that the judicial deference to business decisions created by the business judgment rule is analogous to the courts' post-*Lochner* deference to determinations made by legislatures regarding the boundaries of their own powers. *See* Greenwood, *supra* note 42, at 135. But unlike in the case of the business judgment rule, the courts do not require that legislatures construe their powers in good faith.
[223] This discretion was discussed in the preceding Section IV.A.2.

dispense with that formality by simply directing the surplus to consumers through the charging of lower prices.[224]

The board has the legal right to allocate profits to consumers, notwithstanding the paucity of references to consumers in discussions of the allocative discretion of firms.[225] These discussions do rarely mention consumers. For example, the ALI contemplates profit allocation for "[p]ublic welfare, humanitarian, educational, and philanthropic purposes" and the ALI mentions consumers only in the context of internalizing externalities, such as those inflicted on consumers because of product defects.[226] This failure of allocative imagination does not have a legal basis, however. Consumers can take the surplus as a matter of "public welfare" under the ALI's standard, because consumers are the public. If there are limits on who can receive the board's charity, it is hard to imagine consumers falling beyond them.[227]

Reading allocative discretion to undermine profit maximization threatens to violate the old canon of statutory interpretation that requires that two rules be read to give effect to both.[228] The threat is illusory. The profit maximization requirement would retain substance, even when profits are redirected to consumers through lower prices, because it would force the firm to continue to engage in two activities associated with profit maximization: the minimization of costs and the maximization of product value.[229] Without the profit maximization rule, firms seeking to direct all profits to consumers could allow costs to rise and product value to fall, because their duty would be to give any profits to consumers, but not to maximize those profits.[230] Thus the profit maximization rule ensures that firms wishing to direct their profits to consumers maximize consumer welfare. That hardly amounts to reading

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[224] Dispensing with the formality would increase the welfare conferred by the firm on consumers when pricing is constrained to be uniform. In that case the charging of a competitive price, as opposed to the profit-maximizing price, creates more surplus for allocation to consumers. *See* Section II.D.

[225] For the paucity of references, see *supra* note 47.

[226] THE AMERICAN LAW INSTITUTE, *supra* note 47, sec. 2.01(b)(3) & comment h.

[227] *See* STOUT, *supra* note 4, at 31 (arguing that the only real limitation on corporate charity is that board members cannot "take . . . assets for themselves").

[228] *See* Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Assn., 491 U.S. 490, 510 (1989); William N. Eskridge Jr, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1040–41 (1988).

[229] These "dynamic efficiencies" are essential to maximizing surplus. *See* Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L.J. 569, 571–74 (1994).

[230] That is, profit maximization forbids firms to waste, even when they turn their profits over to consumers. *See* VISCUSI ET AL., *supra* note 136, at 88–89 (discussing waste of this kind in the monopoly context). The rule requires that boards provide managers with the proper incentives to continue to optimize operations. For a discussion of incentives and their difference from profits, *see* Section II.F & Part III.

all content out of the profit maximization rule.

It is now possible to describe all at once the peculiar answer that the law today gives to the question which group should get the surplus. The answer is that the board can choose to maximize profit, even just short-run profit, and ignore externalities.[231] Alternatively, the board can choose to maximize long run profit or to maximize profit net of externalities.[232] Either way the board can allocate whatever profit that the board happens to generate to whomever the board wishes, including consumers.[233] But the board is not required to maximize consumer welfare.[234] It is my contention, detailed in the next Part, that in contrast to corporate law antitrust law requires precisely that board maximize consumer welfare.

V. ANTITRUST AS CORPORATE GOVERNANCE

A. A Duty to Charge Cost

In the middle of the 20th century, courts and enforcers understood the goal of antitrust to be the promotion of competition, regardless of the consequences for consumer or total welfare, distribution or efficiency.[235] That changed in the 1970s, when courts started to embrace a new mission, to maximize the wealth of consumers, that is now the accepted mission of antitrust today.[236] This new mission implies that antitrust must both maximize surplus, which is the difference between value and cost, and minimize prices, to ensure that consumers receive the most surplus possible.[237] In practice, however, courts and enforcers have implemented the new mission only by reducing the vigor with which they condemn anticompetitive practices, to ensure that excessive competition does not prevent firms from charging prices high enough to cover fixed costs, including the costs of innovation.[238] Courts and enforcers have done nothing

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[231] *See* supra note 183 and accompanying text.
[232] *See* Section IV.A.1.
[233] *See* Section IV.A.2.
[234] The right of the board to favor nonshareholders is not a duty to do so. *See* STOUT, *supra* note 4, at 32 (stating that maximizing shareholder value is a "managerial choice").
[235] *See* Northern Pacific R.R. Co. v. United States, 356 U.S. 1, 4 (1958); Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 386 (2014).
[236] *See* Salop, *supra* note 1, at 338–47; Vaheesan, *supra* note 234, at 395–99.
[237] Of course, there may be a trade-off between price minimization and surplus maximization, as discussed in Section II.D. In that case, the two variables must be chosen to maximize consumer welfare subject to the constraint imposed by the tradeoff. For a graphical example of such a constrained maximization procedure, see Woodcock, *supra* note 13, at 126–33.
[238] *See* Woodcock, *supra* note 11 (manuscript at 19-20).

to prevent the rolling back of competition in those markets from allowing firms to raise prices above costs.[239]

For example, to ensure that firms can pay the costs of being the best, antitrust does not consider the sale of a superior product to be a violation of law.[240] Selling a superior product allows a seller to charge a high price for the product that competitors cannot compete away because those competitors lack equally appealing offerings.[241] The high price the seller charges might allow the seller not only to cover costs, however, but also to extract part of the surplus from consumers.[242] This extraction of surplus conflicts with antitrust's goal of maximizing consumer welfare, but antitrust does nothing about it.[243] Antitrust also refuses to condemn vertical restraints and research and development joint ventures in order to allow firms to charge prices high enough to cover costs, but does nothing to prevent firms from exploiting these practices to charge prices above cost.[244]

Antitrust must do more to remain faithful to its mission of maximizing consumer welfare, by imposing a duty on businesses to choose prices to minimize profit and maximize consumer welfare.[245] That is, antitrust must

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[239] *See id.* (manusript at 19).
[240] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).
[241] *See* Demsetz, *supra* note 38, at 2.
[242] *See id.* at 3.
[243] *See supra* note 240.
[244] For a discussion of the efficiencies of vertical integration see HOVENKAMP, *supra* note 119, at 414–20. Sometimes vertical integration allows firms to cover costs by reducing those costs, as when integration eliminates the costs of contracting at arm's length with suppliers, in addition to allowing firms to charge higher prices. *See id.* Vertical mergers are almost never condemned by courts. *See id.* at 430. Exclusive dealing, a soft form of vertical integration, is treated with less severity than it was in the 1970s. *See id.* at 484–86. And the courts have done away with bans on all forms of restrictions imposed by manufacturers on their distributors. *See* Leegin Creative Leather Products v. Psks, Inc., 551 U.S. 877, 2721–22, 2725 (2007). Research and development joint ventures, and many joint ventures more generally, are not subject to a ban. *See* HOVENKAMP, *supra* note 119, at 222–28. In contrast to the fielding of a superior product, all of these practices are subject to antitrust review, even if they are not banned outright. *See, e.g.*, *Leegin Creative Leather Products v. Psks, Inc.*, 551 U.S. at 2725 (imposing rule of reason review on minimum resale price maintenance). Under the prevailing "rule of reason" standard of review, the practice is approved if it realizes potential benefits while resulting in the lowest prices among available alternatives. *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, COLUM. L. REV. 937–39 (2016). However, a practice that results in a level of competition insufficient to drive price down to cost may be approved, because no version of the restriction may lead to competition sufficient to drive price down to cost. *See* Woodcock, *supra* note 13, at 161–62. Only if the decision of the firm to simply charge a lower price were treated as an alternative would the standard mandate at-cost pricing.
[245] *See* Woodcock, *supra* note 11 (manuscript at 31-32).

impose on firms a duty to price at economic cost, where cost is defined as the lowest price that makes a firm ready, willing, and able to produce in quantities and ways that maximize consumer welfare.[246] To avoid putting the courts in the position of setting prices, this duty would be enforceable with nominal damages alone, influencing behavior primarily by drawing the attention of the public to high pricing and by prevailing on the sense of duty of firms to follow the law.[247] This approach, which I defend in detail in another article, would exert pressure on all firms to comply with the antitrust goal of maximizing consumer welfare, but avoid driving price below cost, by allowing firms to pay nominal damages and pursue their preferred pricing policies if they believe that judges are failing to measure their costs correctly.[248]

Were antitrust to recognize such a duty to choose a consumer-welfare-maximizing price, the consequences for the debate over corporate mission would be profound. Antitrust has always imposed on management, as a matter of federal law, which is superior to all state corporate law regimes, the duty to run the firm without engaging in certain anticompetitive practices, such as price fixing, that might give the firm the power to raise price and redistribute surplus to itself.[249] Under my proposed pricing duty, antitrust would now also require that management choose prices to maximize consumer welfare and minimize profit.[250] That is, if antitrust's consumer welfare mission is taken seriously and a duty to price at cost is imposed, then profit maximization is illegal, and punishable by nominal damages under the law and general opprobrium in the court of public opinion.[251]

In this way, antitrust would resolve the long running debate over

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[246] *Id.* (manuscript at 31-32).
[247] *See id.* (manuscript at 31-32).
[248] *See id.* (manuscript at 34-36). Imposing a restriction on price, without requiring that firms strive to maximize product value, might be thought to create an incentive for firms to reduce cost by degrading product quality in order to recapture profits lost due to the pricing restriction. *See* David E.M. Sappington, *Regulating Service Quality: A Survey*, 27 JOURNAL OF REGULATORY ECONOMICS 123, 130–31 (2005). Firms are unlikely to degrade quality in response to a pricing duty because the duty requires that firms price at cost, so any cost reductions created by degrading quality would force the firm to reduce price, preventing the firm from recapturing profit. More importantly, the weakness of the sanction for violating the pricing duty, which is no more than nominal damages, means that firms wishing to avoid the duty need not resort to quality degradation, but may simply ignore the rule and continue to charge an above-cost price.
[249] *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 596–97, 607–10 (2003) (discussing antitrust supremacy); HOVENKAMP, *supra* note 119, at 158–59 (discussing price fixing).
[250] *See* Woodcock, *supra* note 11 (manuscript at 31-32).
[251] *See id.* (manuscript 31-33).

corporate mission by requiring firms to choose price to minimize profit. This would resolve the debate because without profit there is no question which constituent of the firm should get the profit.[252] The answer is: none. Because there should be no profit. All of the surplus generated by the firm's productive activities should go to consumers, not shareholders, management, or workers. This does not mean, however, that these non-consumer contributors to the firm would abandon their posts, or work less hard. They would still need to be paid cost, defined as the minimum that would be required to make them contribute with alacrity.[253] There might also still be shareholders and a possibility of dividends. To the extent that dividends would be necessary to encourage equity investment, the dividends would be cost, not surplus.[254] Any costs that management might need to incur on an ad hoc basis in order to reward teamwork would also be covered; the teamwork concerns of CSR would still be accounted for.[255] Management would still be able to decide how to divide up that part of quasi-profit that is necessary to maximize surplus, because that part would count as cost.[256] The only difference is that now management would also need to choose price to ensure that consumers would get all of what is left over.

The problem of externalities under an antitrust pricing duty is more complicated, because in antitrust distribution comes before efficiency: consumers are entitled to the entire surplus, even if giving the surplus to consumers reduces the size of that surplus.[257] Externalities are true social costs in the sense that they reflect actual losses imposed by production, but they are not costs in the sense that they are necessary for the firm to call forth production.[258] If antitrust's consumer welfare standard does not treat

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[252] For a discussion of why the corporate mission debate amounts to a debate about which group should get the firm's profit, see Section II.A.
[253] For the distinction between cost and profit, see Section II.C.1.
[254] *See supra* text accompanying note 93. The continuing need under my proposed pricing duty for the corporation to pay this cost of capital to shareholders would maintain the distinction between for-profit and non-profit corporations. Non-profit corporations are prohibited from paying the cost of capital to investors; they may not declare dividends and may not distribute funds remaining after creditors are paid to investors. *See* 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 68.05 (2012) (stating that a "nonprofit corporation is prohibited from having or issuing shares of stock, paying dividends or distributing any part of its income to its members, directors or officers, except reasonable compensation for services rendered"); Model Nonprofit Corporation Act Third Edition § 14.05(d) (2008) (barring any member or affiliate of a charitable corporation from receiving a distribution upon dissolution other than as payment for services rendered).
[255] *See supra* text accompanying note 108.
[256] *See supra* text accompanying note 113.
[257] *See* Salop, *supra* note 1, at 336.
[258] For a discussion of the relationship between necessity and production cost, see *supra* note 88 and accompanying text.

externalities as costs, then that standard would require that firms ignore true social costs and charge lower prices in order to increase consumer welfare, reducing overall surplus because the failure to take true social costs into account would lead firms to make surplus-reducing business decisions.[259]

This difficulty is not completely new. Even when firms are allowed to generate profits, they may not generate enough profits to cover the true cost of externalities, and traditional antitrust rules would prevent them from using anticompetitive practices, such as price fixing, to raise prices in order to pay the difference.[260] That would not change under my proposed rule. But to avoid making the situation worse by driving prices down when a lack of competition would otherwise allow the firm to pay for externalities, my proposed rule would allow firms to count voluntary payments to victims as part of costs for purposes of determining the price that the firm must charge.

My proposed rule would not displace current antitrust limits on anticompetitive conduct but would add to the law's kit for maximizing consumer welfare a new, complementary tool.[261] When the source of a firm's advantage is something that increases surplus, such as being able to make a superior product, a pricing duty is appropriate because banning improvements as anticompetitive harms consumers. But in cases in which the source of advantage over the competition does not increase surplus, that is, when the conduct is not efficient, competition is available to help antitrust maximize consumer welfare.

B. Preemption

My proposed antitrust duty to charge a price equal to cost would be grounded in Section 2 of the Sherman Act, which prohibits monopolization.[262] As federal antitrust law, the duty would preempt the power of the board under state corporate law to maximize profit for the benefit of shareholders.[263] The Supremacy Clause of the U.S. Constitution gives the federal government authority to invalidate state laws.[264] The courts

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[259] *See* COOTER & ULEN, *supra* note 79, at 151.

[260] That is, I am aware of no court that has recognized a "covering the cost of externalities" antitrust defense.

[261] For an overview of current limits on anticompetitive conduct, see RICHARD A. POSNER, ANTITRUST LAW 33–43 (2d ed. 2001).

[262] 15 U.S.C. § 2; Woodcock, *supra* note 11 (manuscript at 31).

[263] Part IV discusses the power of firms to maximize profits under state corporate law.

[264] U.S. Const. Art. VI § 2. The courts recognize three kinds of exercise of Supremacy Clause power: express invalidation of state law, as when a federal statute declares a particular state law void, invalidation implied by pervasive federal regulation of a particular field of law, as when a federal law that regulates every aspect of the design of a particular piece of equipment

have held that the federal antitrust laws invalidate a state law only when that state law authorizes conduct that always violates a rule of federal antitrust law.[265] The authorization given by state corporate law to the board to maximize profit meets that standard, because boards almost always use that authorization to charge prices in excess of cost, in violation of my proposed federal antitrust pricing duty. Whenever a corporate board is not seeking to direct profit to consumers, the board's duty to maximize profit requires that the board charge above-cost prices wherever possible, regardless the identity of the non-consumer group to which the board chooses ultimately to turn over the profit.[266] State corporate law therefore compels a violation of my proposed rule except in cases in which a board chooses to direct corporate profits to consumers. It is unlikely that any board today seeks to direct corporate profits exclusively to consumers.

Even if there are a few odd cases in which, like Ford a hundred years ago, boards seek to direct profits to consumers, there is still preemption.[267] The language of the preemption rule employed by the courts in fact requires only that the authorized conduct be "per se" illegal under the antitrust laws. Conduct is per se illegal in antitrust when the conduct is almost always, but not necessarily guaranteed to be, harmful to consumers.[268] The instances that may exist of firms refusing to exercise their power under corporate law to maximize profits are likely few enough to justify treating the pricing conduct authorized by state corporate law as per se illegal under my proposed pricing duty. Moreover, there is some authority for the proposition that preemption requires only that the authorized conduct *possibly* violate antitrust law, not that it must almost always violate antitrust law.[269] The profit-maximization

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precludes state regulators from imposing their own design standards, and invalidation implied by the existence of a conflict between a federal law and a state law, as when a state law would prevent the federal government from achieving its purposes in adopting a particular federal law. *See* Barnett Bank of Marion Cty., NA v. Nelson, 517 U.S. 25, 31 (1996); Kurns v. Railroad Friction Products Corp., 132 S. Ct. 1261, 1266 (2012). Because the antitrust laws were intended to supplement state laws, they trigger neither explicit nor field preemption. *See* Richard Squire, *Antitrust and the Supremacy Clause*, STAN. L. REV. 77, 101 (2006) (sources cited therein). The antitrust laws can therefore preempt state laws only when the two conflict. *See id.* The rules discussed in this Section determine when antitrust and state law are considered to be in conflict, permitting antitrust law to displace state law.

[265] *See* HOVENKAMP, *supra* note 119, at 794–95 (sources cited therein).

[266] *See supra* text accompanying notes 195 & 224.

[267] For a discussion of that case, see Section V.C.

[268] Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982) (using the "per se" phrase); HOVENKAMP, *supra* note 119, at 795 (same); Leegin Creative Leather Products v. Psks, Inc., 551 U.S. 877, 877–78 (2007) (stating that a per se rule applies where "almost all" conduct to which it applies would otherwise violate antitrust law).

[269] *See* HOVENKAMP, *supra* note 119, at 796. The trouble with drawing preemption so

authorized by state corporate law would meet that broader standard because the power to maximize profit certainly does make above-cost pricing possible.

The existence of preemption does not end the inquiry, however, because the courts have read antitrust law to confer immunity from preemption on conduct that amounts to state action, on the premise that antitrust law is not meant to prevent state governments from suppressing competition if they wish to do so.[270] Immunity attaches only if the action has the appearance of state bureaucratic work, as opposed to the appearance of private behavior bearing no more than a state imprimatur.[271] The courts have held in particular that private behavior that is not actively supervised by state bureaucrats lacks the required appearance of state action and enjoys no immunity from preemption.[272] For example, in *California Retail Liquor Dealers v. Midcal Aluminum*, the Court refused to grant immunity to a state law regime that authorized firms to engage in resale price maintenance because the state

> neither establishes prices nor reviews the reasonableness of the price schedules . . . . The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition

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narrowly as to apply only to state laws that authorize conduct that would always violate the antitrust laws is that such a narrow understanding permits the states to make virtually any state law escape preemption. Under this narrow approach, states can save all their laws from preemption by drawing each law broadly enough to authorize some action that does not violate the antitrust laws. For example, a state wishing to authorize price fixing, which violates antitrust law in all cases, might pass a law authorizing competitors to enter into both price fixing agreements and research and development joint venture agreements, which are not always prohibited by antitrust. *See id.* at 158–59, 222 (discussing price fixing and joint venture agreements). According to the narrow reading of preemption, this law would not be preempted because the inclusion of authorization for research and development joint ventures brings some potentially legal conduct within the law's ambit. The state law no longer authorizes conduct that always leads to a violation of the antitrust laws, and therefore does not qualify for preemption.

[270] *See* California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 102–5 (1980); HOVENKAMP, *supra* note 119, at 794. This is known as "state action" immunity from the federal antitrust laws. *See id.* at 797.

[271] *See* Parker v. Brown, 317 U.S. 341, 351–52 (1943); HOVENKAMP, *supra* note 119, at 800, 805–10.

[272] Immunity requires not only active supervision of the otherwise illegal conduct but also clear authorization of the conduct by the relevant state law. *See* HOVENKAMP, *supra* note 119, at 800. This clear authorization requirement insists that the state action be rooted in statute, rather than in the regulations issued by administrative agencies, such as cities, before the action can qualify for immunity. *See id.* at 801–2. For purposes of argument, I assume in this Article that state corporate law statutes create the requisite clear authorization for boards to charge above-cost prices in violation of an antitrust duty to charge cost.

> cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement[.][273]

By allowing firms to choose their own prices, state corporate law regimes authorize precisely this kind of unsupervised private conduct. State regulators engage in no active supervision of corporate governance, often lacking authority even to reject the filing of a corporate charter on the ground that it does not conform to law, let alone to engage in regulation of corporate pricing decisions.[274] Although the courts do sometimes regulate corporate behavior, corporate pricing decisions are subject to the business judgment rule, pursuant to which courts allow firms almost unlimited discretion in making business decisions.[275] State corporate law regimes are identical to the regime in *Midcal*, quoted above, except that unlike the regime in *Midcal*, state corporate law regimes do not even require firms to report the prices they charge to the state, making supervision impossible.[276] State action immunity does not apply, and my proposed antitrust pricing duty would therefore preempt state corporate law.

C. Dodge v. Ford

The case of *Dodge v. Ford* is a touchstone in the corporate mission debate because it is the only case outside of the takeover context in which the court blocked an attempt to deviate from, and delivered a clear statement of, the shareholder primacy rule.[277] *Dodge* should be read not as a contribution to the canon of corporate law, however, but as an antitrust case, albeit decided in covert fashion on corporate law grounds. The case was wrongly decided both under corporate law and my proposed pricing duty.

The Dodge brothers were early Ford chassis suppliers who also had a minority stake in the Ford business.[278] When the Dodges started to use the dividend from that stake to finance manufacture of their own competing

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[273] *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. at 105–6.

[274] *See* 1A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 159 (2012) (discussing the inability of the Secretary of State in "many jurisdictions" to reject filing of a corporate charter).

[275] *See* Gevurtz, *supra* note 189, at 295–303 (providing three formulations of the rule for which at most the board's subjective belief that its actions are in the best interests of the corporation plus some minimum level of process in making decisions are required for immunity under the rule).

[276] *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. at 99.

[277] *See* Dodge v. Ford Motor Co., 170 N.W. 678, 683–84 (Mich. 1919); STOUT, *supra* note 4, at 24–27.

[278] Rock, *supra* note 12, at 520–21.

brand of car, Ford reduced the dividend and its car prices, and announced a plan to invest $58 million in accumulated profits in expanding output.[279] In their suit, brought in state court in Michigan, the Dodges argued, first, that the plan to expand output amounted to an attempt to monopolize the car market and, second, that as a matter of corporate law Ford was required to maximize short-run profit for the benefit of shareholders, and therefore was allowed neither to cut prices nor to reduce the dividend.[280] Both claims were means toward the end of financing the Dodges' entrance into the car market.[281] The Michigan courts chose to unlock that financing by rejecting the monopolization claim, but affirming the corporate law claim, forcing Ford to stop the price cut and continue to pay the dividend.[282]

The ruling prevented Ford from moving to maximize consumer welfare by charging a price equal to cost for Ford cars, a practice that would be legal today as a matter of corporate law, so long as shareholders were to receive their cost of capital.[283] Henry Ford himself seemed to argue that the dividend cut was calibrated to meet that cost, stating, "in substance, that as all the stockholders had received back in dividends more than they had invested they were not entitled to receive anything additional to the regular dividend of 5 per cent. a month," which percentage may have been Ford's estimate of the cost of capital.[284] Ford's move to lower prices would not only be permitted today under corporate law, but required under my proposed antitrust pricing duty.[285]

Only the conventional approach to antitrust, which seeks to maximize consumer welfare exclusively by prohibiting anticompetitive practices, but would impose no duty to charge cost, supports the result in *Dodge*.[286] Ford sought to exclude the Dodges from the car market by denying the Dodges access to dividend financing, and the court responded by opening the market to competition, precisely the result required by the conventional approach. The Michigan courts likely chose not to decide the case explicitly on antitrust grounds because of their respect for the right of a firm to refuse to deal with competitors.[287] The Dodges' complaint was that Ford was refusing to deal

[279] *Id.* at 521–22.
[280] *Dodge v. Ford Motor Co.*, 170 N.W. at 673, 678–79.
[281] *See* Rock, *supra* note 12, at 522–23.
[282] *Dodge v. Ford Motor Co.*, 170 N.W. at 685 (affirming the corporate law claim). The monopolization claim was rejected by a lower court, and the Michigan Supreme Court considered only the corporate law claim on appeal. Rock, *supra* note 12, at 522.
[283] *See supra* text accompanying note 214.
[284] *Dodge v. Ford Motor Co.*, 170 N.W. at 671.
[285] *See* Section V.A.
[286] For a discussion of conventional antitrust, see *supra* text accompanying note 238.
[287] *See* HOVENKAMP, *supra* note 119, at 321.

with them, by denying them a large dividend.[288] Because the right to refuse to grant access to one's property seems to some to be constitutive of the institution of property, or economic freedom, courts are rarely willing to condemn refusals to deal with competitors, no matter how anticompetitive they may be.[289] That forced the Michigan courts to take the corporate law route to eliminating the anticompetitive conduct, by establishing in effect that the Dodges had a property right to those dividends to begin with.

Perhaps in recognition of the complication presented by the right to refuse to deal, the antitrust claim actually filed by the Dodges did not even challenge Ford's refusal to deal, but argued instead that Ford wanted to exclude the Dodges from the market by offering more cars at lower prices.[290] The government won a case against Alcoa on precisely that ground decades later, but Dodge was decided in 1919, when the antitrust laws had not yet achieved their mid-century vigor, and indeed the courts today would once again reject that claim because lower prices are good for consumers.[291]

There is something peculiarly grotesque about watching the court in *Dodge* order a company to raise prices in the hope that those prices will later be competed back down once they have been used to finance the entrance of a competitor. Grotesque because the action so clearly causes unnecessary delay and waste. It is always much quicker and less expensive for a firm to make a voluntary decision to cut prices, as a pricing duty would ask firms to do, than for courts to encourage that firm to charge the highest possible prices and then to make the market sufficiently competitive to force that firm, kicking and screaming, to bring prices down to cost. For a competitive market to achieve a price equal to cost, many competitors must enter the market, otherwise duopoly or oligopoly ensues, and prices may fall only very little.[292] The cost of market entry is often too high to permit the required number of firms to enter. Indeed, in the decades following *Dodge*, competitive pricing proved impossible in the car market because of the huge costs of entry.[293] Moreover, whatever price reductions actually do result from competition

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[288] *See* Rock, *supra* note 12, at 522–23.
[289] *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 n. 46 (1989) ("Do we really want to assume that everything we have is up for grabs?"); HOVENKAMP, *supra* note 119, at 321–24; Woodcock, *supra* note 13, at 108, 120–23. The case credited with establishing the right to refuse to deal in antitrust was decided in the same year as Dodge, *see* United States v. Colgate & Co., 250 U.S. 300, 307 (1919), but the sentiments that animate the right no doubt predate that case.
[290] *See* Dodge v. Ford Motor Co., 170 N.W. 678, 673 (Mich. 1919).
[291] *See* United States v. Aluminum Co. of America, 148 F.2d 416, 430–31 (2d Cir. 1945); HOVENKAMP, *supra* note 119, at 296; Elhauge, *supra* note 4, at 774 n. 113 (concluding that the antitrust claim was properly rejected).
[292] *See* SCHERER, *supra* note 143, at 12.
[293] *See id.* at 279–80, 312.

usually come at unnecessary cost, because competition often leads to redundancy of operations.[294] The Dodges needed their own separate office space and design staff to build their cars, for example, none of which Ford would have needed in order to expand output to meet demand at its new low prices.

D. To Maximize Rather Than to Protect Consumer Welfare

The absence of a pricing duty in antitrust has forestalled a debate about the precise contours of antitrust's consumer protection goal. When antitrust succeeds at stopping anticompetitive conduct, the best result it can deliver for consumers is the share of the surplus associated with competitive pricing. That may be all of the surplus, if cost is constant or firms are able to price discriminate, but if cost is rising, and price uniform, then producers retain some of the surplus.[295] My proposed pricing duty would permit antitrust to do better than competitive pricing, extracting additional surplus from producers, but only if the consumer welfare standard is understood to require consumer welfare maximization and not merely to guarantee consumers the level of welfare that they would enjoy under competition with uniform pricing.

The consumer welfare standard must be understood to require consumer surplus maximization and profit minimization, not just maintenance of consumer welfare at the competitive level, because the amount of consumer welfare at the competitive level is an arbitrary function of the structure of costs.[296] If costs rise slowly for low levels of output and then spike, while demand is relatively elastic, then consumer surplus at the competitive price will be low relative to profit. In such a circumstance competition itself offers little protection for consumers, at least then firms are constrained to charge uniform prices. A standard that puts consumers' welfare first must do better than competitive pricing. The focus on the distribution that prevails at the competitive price is a relic of the days when antitrust's goal was the

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[294] *See* SCHERER & ROSS, *supra* note 85, at 97–102.

[295] At a competitive uniform price with rising unit costs, the firm earns a profit on those units with costs that fall below the uniform price. *See* MARSHALL, *supra* note 52, at 428–29, 429 n.1 (discussing "producer's surplus"). There must be such profitable units, because, if unit costs were never to fall below price for any unit, then, since unit costs are rising by assumption, cost would exceed price for some units. But a firm will not produce at a price that either equals or exceeds cost for all units, because then the firm would make a loss. This argument also holds when the firm has fixed costs, unless the firm's costs are inelastic at the firm's chosen level of output and price just covers all costs.

[296] *See* FRIED, *supra* note 30, at 134 (observing that the "actual incidence of rents" depends on the "shape of the cost curve").

promotion of competition, rather than consumer welfare.[297] The consumer welfare maximization standard has been endorsed by other scholars.[298]

When pricing is uniform and competitive pricing does not maximize consumer welfare, a maximization standard would require firms to charge prices below the competitive price. A sub-competitive price causes price to fall below cost for some units for which value exceeds cost, causing the firm to cease production of those units, thereby reducing surplus.[299] But if the gains to consumers who continue to be able to buy exceed the value lost by those who now have nothing to buy, then consumer welfare increases.[300] This is known as the case of monopsony, or buyer power.[301] Antitrust's consumer welfare standard requires that the consumer interest be chosen over efficiency, thus when that standard is understood to require consumer welfare maximization that standard requires firms to create monopsony inefficiency whenever the constraint of uniform pricing forces antitrust to choose between consumer welfare and surplus.[302]

This monopsony requirement in retail markets should not be confused with antitrust's interest in limiting monopsony in supply markets.[303] That interest applies only when a large seller uses its power over suppliers to drive prices down below competitive levels, and only when it is thought that the monopsony will harm consumers downstream in retail markets.[304] Where, as here, firms are asked to treat consumers as if the consumers have monopsony power and consequently maximize their welfare by charging the lowest possible prices, monopsonistic pricing is consistent with antitrust's consumer welfare goal.

Another striking result of a maximization standard is the proscription of the extraction of rent in the traditional economic sense.[305] Rent is the profit generated when price is used to ration access to a good that is in limited

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[297] *See supra* note 235 and accompanying text.
[298] *See* Hemphill, *supra* note 243, at 975–76 (suggesting that the alternative would lead to absurd results); Aaron Edlin et al., *The* Actavis *Inference: Theory and Practice*, 67 RUTGERS U. L. REV. 585, 609 (2015) (assuming a maximization standard in evaluating reverse payment patent settlements).
[299] *See* HOVENKAMP, *supra* note 119, at 14–15 (discussing monopsony).
[300] *See id.*
[301] *See id.*
[302] *See* Salop, *supra* note 1, at 336 (observing that the consumer welfare standard puts consumer welfare before total welfare); HOVENKAMP, *supra* note 84, at 164–65 (same).
[303] *See* HOVENKAMP, *supra* note 119, at 15–16; John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, 60 ANTITRUST BULL. 358, 373 (2015).
[304] *See* HOVENKAMP, *supra* note 119, at 15.
[305] *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 412–13 (7th ed. 2006) (defining economic rent).

supply.[306] A classic example is land. The supply of land is fixed, and the cost of land is zero, since no one produces land, it is just there, but at a price equal to this cost of zero, there are likely to be many more prospective buyers of land than there are available parcels, forcing landowners to devise a way of deciding which prospective buyers should be allowed to buy.[307] By charging a higher price, however, some buyers can be driven from the market and the number of buyers brought down to the number of parcels available.[308] Because price must be set above cost for the number of buyers to be winnowed down to the number of available parcels, the seller must generate profit at that market-clearing price. An antitrust pricing duty would require that the firm give that profit up, by charging a price equal to cost and finding some other way of rationing access to the land.

E. The Role of Self-Interest

An important objection to a pricing duty is that human beings are by nature self-interested, so firms asked to maximize consumer welfare will just fold, or do a poor job, because they have nothing to gain from working for consumers, instead of themselves.[309] There are two problems with this

[306] *See* MARSHALL, *supra* note 52, at 493–94; VARIAN, *supra* note 304, at 412–13.

[307] *See* VARIAN, *supra* note 304, at 7 (considering what happens when price is so low that demand exceeds supply).

[308] *See id.* at 8. It is no objection that the cost of the land is in fact this ration price because this ration price can be obtained for sure from the market, and therefore a sale at any lower price would have the ration price as an opportunity cost. *See* FRIED, *supra* note 30, at 120 (discussing the view that land rents are "a true cost of production"). The ration price is here the variable to be chosen. Opportunity cost enters into the question only as the alternative value the seller could get from the land were the seller not to sell the land on this particular market (i.e., into this particular demand curve). *Cf.* VARIAN, *supra* note 304, at 413. By assumption, that cost is zero. If it were not, the rent would be the difference between the cost and the ration price charged.

[309] This is a species of the cost-argument-in-overdrive discussed in Section II.F because it holds in effect that all profit is necessary for performance. This position is latent in the view that non-profits fail to respond to demand because they do not need to offer profits to investors in order to attract investment. *See* Henry Hansmann, *The Changing Roles of Public, Private, and Nonprofit Enterprise in Education, Health Care, and Other Human Service*, *in* INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILDCARE, EDUCATION, MEDICAL CARE, AND LONG-TERM CARE IN AMERICA 245, 249–50 (Victor Fuchs ed., 1996). The fact that the non-profit does not pay investors the cost of capital should reduce its access to capital, but has no necessary effect on the firm's willingness to increase its revenues by expanding in response to increases in demand, so long as access to capital does not hinder expansion. If the non-profit provides the proper incentives to management to respond to demand, then management will respond to demand. *See id.* at 249 (suggesting that managers of both for-profit and non-profit firms often have no stake in the firm's net earnings and therefore cannot be expected to manage the firm to maximize those earnings).

objection, the first of which is that the objection fails to recognize that the pricing duty requires only that surplus go to consumers, allowing cost, including any incentive required to make self-interested managers of firms willing to operate the firm in ways that maximize consumer welfare, to go to firms.[310] The duty is drawn to ensure that it is in the self-interest of managers to maximize consumer welfare.[311] The second problem with this objection is that it ascribes self-interest to groups, rather than individuals.

The proposition that self-interest governs behavior applies to individuals, rather than groups. Economics is replete with models in which groups made up of rational self-interested people fail to behave in a self-interested fashion.[312] Perhaps the most famous example is the Tragedy of the Commons, in which self-interested individuals overuse the services they need as a group, causing the group to act against its own interest.[313] The uniform-pricing monopoly is another example, in which the self-interested decisions of the monopolist reduce surplus, which is just the welfare of the group, including both consumers and the firm, as a whole.[314] Indeed, the entire science of economics might justly be characterized as the study of this disconnect between group interest and group behavior.[315] Nothing about self-interest suggests that the firm, which is, after all, just a collection of different people, should be expected always to act in its own interest or that there is anything unnatural about asking individual members of the group to go against the group's aggregate interest by causing the group to forego the opportunity to earn a profit. If those making business decisions for the firm have the proper incentives to act against the interests of the firm by charging a price equal to cost then the firm will do that.[316] Charging a price equal to cost by definition

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[310] *See* Sections V.A & II.C.1.

[311] *See supra* text accompanying note 246.

[312] *See* Gerald D. Keim, *Corporate Social Responsibility: An Assessment of the Enlightened Self-Interest Model*, 3 THE ACADEMY OF MANAGEMENT REVIEW 32, 35–36 (1978) (discussing the distinction between individual and group self-interest).

[313] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (New Series, 1968).

[314] *See* Section II.D.

[315] All microeconomics, and most macroeconomics, starts from a model of individual behavior and then considers the consequences of that model for group behavior. *See* MAS-COLELL ET AL., *supra* note 7, at 3 (stating that microeconomics "aims to model economic activity as an interaction of individual economic agents pursuing their private interests"); S. Abu Turab Rizvi, *On the Microfoundations of Macroeconomics*, *in* 2 THE OXFORD HANDBOOK OF POST-KEYNESIAN ECONOMICS 45, 46 (G. C. Harcourt & Peter Kriesler eds., 2013) (observing that macroeconomists have sought microfoundations for their work in general equilibrium theory). If the group could always be relied upon to act in its own self-interest, there would be no need to start with such "microfoundations." *See id.* at 45 (associating "microfoundations" with the modeling of individual behavior).

[316] The power of incentives to cause managers to fail to maximize profits is the source of

generates enough revenues to provide managers with such incentives.[317]

F. The New Agency Problem

A great deal of work has been done by economists and corporate law scholars to find ways to ensure that management acts on behalf of shareholders to maximize shareholder wealth, a project known as the principal-agent problem.[318] Under a pricing duty, the agency problem remains, but now it is consumers, rather than shareholders, for whom management must be made to work effectively.

The challenges faced in both cases are similar. Consumers, like shareholders, are often numerous and their ability to organize to monitor management behavior is limited.[319] Consumers, like shareholders, often also have only a short-term relationship with the firm, or one that involves a small financial interest, making them unwilling individually to invest the resources necessary to supervise management.[320] Consumers, like shareholders, often influence the firm only by making purchase and sale decisions.[321] But in some respects the consumer agency problem differs from the shareholder agency problem. Unlike shareholders, who have the right to vote to remove the board of directors, corporate law gives consumers no direct authority at all over management.[322] Antitrust, with its two enforcement agencies, compensates for this lack.[323]

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what economists call agency costs. *See* Jensen & Meckling, *supra* note 40, at 308–10; David E.M. Sappington, *Incentives in Principal-Agent Relationships*, J. ECON. PERSP. 45, 45 (1991).

317 *See supra* text accompanying note 98.

318 *See generally* Sappington, *supra* note 315 (discussing work by economists on the principal-agent problem and noting connections to corporate governance); EASTERBROOK & FISCHEL, *supra* note 40, at 8–10 (discussing legal arrangements that reduce agency costs).

319 *See* Bainbridge, *supra* note 182, at 613 (observing that shareholders have a "collective action" problem).

320 *See* Henry Hansmann, *Ownership of the Firm*, 4 J.L. ECON. & ORG. 267, 283 (1988) (observing that the smallness of corporate investors is an obstacle to monitoring of boards); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1414 (1993).

321 *See* Hansmann, *supra* note 319, at 283 (expressing skepticism that the market for corporate control allows shareholders to discipline managers); Green, *supra* note 319, at 1414 (noting that shareholders can sell their shares at any time).

322 *See* Strine Jr, *supra* note 4, at 766 (emphasizing that the voting rights of shareholders give them the power to compel managers to maximize shareholder wealth).

323 *See* HOVENKAMP, *supra* note 119, at 642–45 (discussing the enforcement roles of the Federal Trade Commission and the Antitrust Division of the Department of Justice). Consumers may also sue firms directly to enforce the antitrust laws. *See id.* at 667.

G. Other Groups

One of the major motivations of CSR appears to be to transform the national political question how wealth should be distributed among all the groups in society, including workers, managers, and pollution victims, into a question for the corporate board to answer in the first instance.[324] Hence CSR's insistence that the board has the power to share wealth based on the board's own sense of social justice.[325] By contrast, the shareholder primacy position, in identifying shareholders as the only beneficiaries of the surplus created by firms, and referring critics seeking distributive justice for other groups to other legal regimes, antitrust for consumers, labor law for workers, and so on, wants to absolve boards of distributive responsibility.[326]

Despite shifting the identity of the beneficiary from shareholders to consumers, my proposed pricing duty does not depart from the shareholder primacy project of denying the responsibility of boards to resolve the question of how the nation's wealth should be distributed.[327] For example, because cost is defined to be what is necessary to induce each factor of production to produce, a firm obeying a duty to charge cost would be obliged to pay workers the lowest possible price, which could be very low if labor supply is plentiful, tax and transfer provides little in the way of a safety net, the minimum wage is low, and unions are weak.[328] To the extent that society would condemn such low wages, society would, under my proposed pricing duty, be forced to seek relief through some means, such as minimum wage legislation, other than convincing the board to drive a softer bargain.[329]

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[324] That, certainly, is what the Chicago School fears that CSR is trying to do. *See* Friedman, *supra* note 40 (arguing that management should not be permitted to redistribute wealth because "[w]e have established elaborate constitutional, parliamentary and judicial provisions to control these functions, to assure that taxes are imposed so far as possible in accordance with the preferences and desires of the public—after all, 'taxation without representation' was one of the battle cries of the American Revolution"); Jensen, *supra* note 9, at 21 (suggesting that CSR is an attempt to implement socialism through the firm).

[325] *See* Elhauge, *supra* note 4, at 739–40; Green, *supra* note 319, at 1419; STOUT, *supra* note 4, at 31; FREEMAN ET AL., *supra* note 4, at 28. For a discussion of the CSR case for board discretion to allocate wealth, see Section IV.A.2.

[326] *See* Hansmann & Kraakman, *supra* note 3, at 442; Friedman, *supra* note 40 (arguing that a manager acting according to CSR principles is assuming the roles of "legislator, executive and jurist"); Jensen, *supra* note 9, at 12 (stating that "resolving externality and monopoly problems . . . is the legitimate domain of the government in its rule-setting function").

[327] For consumer primacy under my proposed rule, see text accompanying note 252.

[328] For this definition of cost see *supra* note 88 and accompanying text.

[329] *Cf.* Hansmann & Kraakman, *supra* note 3, at 442 (arguing that the interests of workers are protected by non-corporate-law legal regimes, such as "law of labor contracting, pension law, health and safety law, and antidiscrimination law"). Antitrust's consumer welfare standard has been attacked for failing to take the interests of other groups, including workers,

This problem does not exist under current law, which would allow a firm to shift profits to make up for the weak bargaining power of one group or another.[330] What CSR has done in defending the board's authority to allocate wealth is to save the board from a sharp distinction between profit and cost, which would otherwise force the board to leverage bargaining power to extract maximum advantage for whichever group the law happens to favor, whether shareholders or consumers. Under current law, the board can mix profit and cost, by giving a needy group more than the board could get away with in bare-knuckle negotiations.

A pricing duty, like any legal rule that would pick a distributive favorite, lacks that feature. But a pricing duty still has some distributive justice advantages relative to either a shareholder primacy rule or the current rule of board discretion. A pricing duty likely would spread wealth more evenly across society than would shareholder primacy, because shareholders are likely on average wealthier than consumers.[331] And, so long as the bargaining power of corporations is not too strong, a pricing duty likely would spread wealth more evenly than would the current regime of board discretion, because a firm's consumers are usually more numerous than other groups that the firm's board is likely to use its discretion to favor, such as workers, managers, or creditors. I take this argument up in detail in the next section. Finally, the picking of a favorite has the virtue of ensuring that groups that society may not want to enrich further, such as shareholders and managers, have less access to the corporate pie.[332] By contrast, board discretion has been justly criticized for imposing no affirmative duty to take distributive justice into account, but merely giving boards the option to do so, allowing them to

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into account. *See* Vaheesan, *supra* note 44, at 664–65, 684. Amazon has explicitly invoked consumer interests in refusing to negotiate better employment terms with workers. SIMON HEAD, MINDLESS WHY SMARTER MACHINES ARE MAKING DUMBER HUMANS 37–39 (2014) (decrying the "quasi-religious cult of the customer" at Walmart and Amazon).

330 For the CSR-influenced state of current corporate law, see Section IV.A.2.

331 *See* Woodcock, *supra* note 152, at 1391 n. 111 (discussing the consequences for wealth distribution of shifting wealth from consumers to "producers," meaning shareholders in this context); Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth*, 68 THE MODERN LAW REVIEW 49, 57–62 (2005) (discussing evidence that shareholders in the United States tend to be wealthy).

332 Because my proposed pricing duty would be weakly enforced, many firms would likely fail to comply. *See* Woodcock, *supra* note 11 (manuscript at 31). Nonetheless, the pricing duty would be a legal rule directing wealth away from shareholders and managers, whereas board discretion contains no requirement that boards in fact take distributive justice into account in operating the firm, but merely permits them to do so. *See* Section IV.B. It is reasonable to suppose that there will be more compliance with a weakly enforced requirement than with no requirement at all. *See id.* (manuscript at 32-33).

choose to enrich management or other favored constituencies instead.[333]

H. Consumer Welfare as Diversification

If firms were actually to obey a pricing duty in all cases, the duty would create a world in which people expect to get rich not from their participation in production in any capacity, because they would be unable to enjoy windfall profits from such participation, but from their role as consumers of valuable products sold at low prices. In this sense, a pricing duty is fundamentally more democratic than any rule that would maximize profit and turn that profit over to a group that participates in production, such as shareholders, managers, creditors, or workers. A person tends to rely on one or a few businesses in a lifetime for income, but to participate as a consumer in many more over the course of that lifetime.[334] As a result, when surplus is concentrated in firms, the individual faces a riskier wealth lottery. By forcing firms to pay the value they create to consumers through lower prices, rather than distributing that value to groups that contribute to production, whether shareholders, managers, or workers, a pricing duty reduces the risk any given person faces of being left behind by success. When any business gets rich by reducing costs or increasing value, any given person is now more likely to get a share of that wealth. That is the world in which the duty of business is to maximize the wealth of consumers.

VI. CONCLUSION

The problem of corporate mission is fundamentally a problem of how the wealth generated by firms should be distributed, once all the costs, including externalities, have been taken into account.[335] The debate over corporate mission has been characterized by the attempt, particularly by shareholder

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[333] *See* Bainbridge, *supra* note 51, at 1445–46 ("No informed corporate lawyer can doubt the very real risk that some corporate directors and officers will use nonshareholder interests as a cloak for actions taken to advance their own interests."). An alternative to picking a distributive favorite that would retain the virtue of compelling the board to act according to some scheme for achieving distributive justice would be mandating the particular share of wealth that each group should receive.

[334] To be sure, a diversified investor may obtain value from many more firms than even a consumer with broad appetites. But even the poor are diversified consumers, in that they buy a range of goods, from food to television, whereas only a fraction of the population invests, either actively or through a retirement fund. *See* Ireland, *supra* note 330, at 57–62 (discussing share ownership); U.S. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURES IN 2015, at 17–18 (BLS Reports, Report 1066, 2017) (showing that the average consumer making less than $5,000 per year spent on everything from cereal to enterntainment).

[335] *See* Section II.A.

primacy advocates, to transform a moral question regarding distribution of wealth into a technical problem of how to maximize the surpluses generated by production.[336] These advocates attempt to treat the entire surplus generated by production as if it were cost, necessary to compensate the firm for its productive efforts.[337] There is, however, no necessary relationship between economic performance and how the surplus generated by that performance is allocated, because surplus is just what is left over after what is needed to guarantee performance is paid out to shareholders, managers, workers, and other contributors to the firm.[338]

Imposing a duty of profit minimization on the firm, as required if antitrust's mission of promoting maximization of consumer welfare is to be taken seriously, poses little threat to economic performance.[339] The only danger is that courts might fail properly to identify costs, and suggest that firms lower prices below optimal levels, but that danger is averted by a rule that would impose only nominal damages as a penalty.[340] The chief power of such a rule lies in the mere recognition itself of the duty, which would send a signal to managers regarding the proper priorities for firms, and produce compliance, at least from managers of good faith.[341]

An antitrust profit maximization rule would resolve the debate over corporate mission in favor neither of shareholders, nor of other insiders, but in favor of consumers.[342] By requiring that firms take only enough from consumers, through pricing decisions, to meet their costs, the rule would leave the other constituencies of the firm with no profit over which to squabble.

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[336] *See* Section II.B.
[337] *See* Sections II.C.1 & II.F.
[338] *See* Section II.B & II.C.1.
[339] *See* Section V.A.
[340] *See supra* note 247 and accompanying text.
[341] *See* Woodcock, *supra* note 11 (manuscript at 32-33).
[342] *See* Section V.A.