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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 workers and other non-shareholder insiders of the firm. The consumer welfare standard adopted by antitrust law in the 1970s requires that firms allocate their profits neither to shareholders nor to workers or other firm insiders. Instead, the standard requires that firms strive to have no profits at all, by charging the lowest possible prices for their products. Such a profit-minimization requirement, which, as federal antitrust 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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INTRODUCTION

The goal of antitrust law 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.[2] 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.[3]

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.[4] Only in recent years has the corporate social responsibility movement (CSR) succeeded at challenging that

1. The more common description of the goal of antitrust law as the protection of consumer welfare, rather than the maximization of consumer welfare, is incorrect. *See infra* text and sources in note 210.

2. As will become clear in just a few more paragraphs, I mean profits here in the economic sense of revenues not necessary to cover any cost required for the firm to operate efficiently. By contrast, increasing accounting profits can increase consumer welfare, if those profits are spent on research and development of better products, for example. But economic profits are by definition net of any such development costs. The distinction between economic and accounting profits is key to the argument of this Article. For more detail on this distinction, see *infra* Part I.C.

3. For the antitrust laws, see, *inter alia*, 15 U.S.C. §§ 1–7 (2018).

4. *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*, 59 STAN. L. REV. 1465, 1529–30 (2007).

orthodoxy.[5] 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.[6] Indeed, by expending great effort on 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.[7]

This 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, reflects the influence of Adam Smith's invisible hand theory on the basic rules governing the economy.[8] That theory holds that self-interested firms, each striving to maximize profits, compete product quality up and prices down, inadvertently leaving consumers with the best products at the lowest possible prices.[9] 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.[10]

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5. *See* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 24–31 (2012) (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, 764–66 (2015) (acknowledging the CSR position but arguing that boards should nevertheless favor shareholders because shareholders can remove them). *But see* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 190–92 (2013) (arguing that CSR gets the law wrong, at least in Delaware). The "corporate social responsibility" label 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 literature from the field of management science. *See* Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, *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. *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.

6. *See infra* note 55 and accompanying text.

7. *See* STOUT, *supra* note 5, at 31.

8. *See* ADAM SMITH, THE WEALTH OF NATIONS 572 (Edwin Cannan ed., Bantam Dell 2003) (1776) (discussing the invisible hand).

9. *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 314, 550 (1995). Smith thought well of competition but attributed the effectiveness of the invisible hand to self-interested behavior generally rather than competition in particular. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 92, 273 (1801). Modern economics has shown that competition is required for self-interested behavior to lead to economic efficiency. *See* MAS-COLELL ET AL., *supra*, at 549.

10. *See* Hansmann & Kraakman, *supra* note 4, at 442 (arguing that corporate law strives to maximize shareholder value and that antitrust law strives to protect "nonshareholder constituencies"); Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 16 (2001) (same).

Almost from the start of the antitrust enterprise, however, scholars have understood that no matter how hard antitrust enforcers work most markets can never be made competitive enough to achieve antitrust law's goal of low prices and high consumer welfare.[11] And yet the peculiar system of a corporate law that pushes prices up and an antitrust law that tries to push them back down was never adjusted to account for competition's enduring shortcomings.[12] The necessary adjustment is to read the antitrust laws to impose an affirmative duty on management to minimize profits, which would ensure 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 possible prices consistent with maintaining efficient levels of quality and output, at least if they wish to follow the law.[13] 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.[14] In the present effort, I defend recognition of such a duty to minimize profits in economic terms and explain how the duty fits into, and, as a legal matter, would resolve, the debate over corporate mission.[15]

Recognition of a duty to minimize profits in corporate law would resolve 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.[16] The rule requires that all of the firm's profits be paid to consumers, through either lower prices or better quality, and that no profits be left over either for shareholders, managers, workers, or anyone else.[17] Firms would be required to earn zero profits.

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.[18] Profits are, by definition, the revenues generated by firms that are in excess of what is necessary to make production in

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

12. *See* Ramsi A. Woodcock, *Inconsistency in Antitrust*, 68 U. MIAMI L. REV. 105, 109–26 (2013) (critiquing the failure to adjust).

13. *See infra* Section II.B.

14. Ramsi A. Woodcock, *The Antitrust Duty to Charge Low Prices*, 39 CARDOZO L. REV. 1741 (2018).

15. Two other attempts to connect antitrust and corporate governance highlight connections between the fields but do not show how one may be brought 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 (2011) (arguing that antitrust can help shareholders by more carefully screening mergers for genuine efficiency gains).

16. For the ways in which a duty to minimize profits diverges from CSR's approach to corporate governance, see *infra* Section II.E.

17. *See infra* Section II.B.

18. *See infra* Section I.B.

some amount and of some quality take place.[19] By definition, then, the profits over which the shareholder primacy advocates and CSR have been fighting are not compensation that is needed to get any contributor to the firm, whether a shareholder, manager, worker, or creditor, to contribute what the firm needs to produce. Profits are extra, and so no matter who takes them, production will continue, shareholders and creditors will continue to invest, and managers and workers will be paid the wages for which they or their union representatives have bargained.[20] The show will go on.[21]

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.[22] Each side has tried to gain the advantage by appealing to a norm both agree upon, that the economy should be made efficient, to support each side's preferred distributive outcome.[23] The shareholder primacy camp tries to avoid the distribution problem by 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 increased living standards over the past three hundred years will come to an end.[24] Thus the need for technological advance is made to dictate the distribution of profits to shareholders alone. CSR, for its part, has suggested that unless management can allocate profits on an ad hoc basis to workers or reinvest profits in long-term projects, workers will not work hard enough to maximize those profits, or the firm will perform poorly in the long run.[25] Here, the need to encourage optimal firm performance is made to dictate the distribution of profits to workers.

These arguments notwithstanding, the problem of how to distribute the wealth generated by efficient production is always independent of the problem of how to organize production efficiently and thereby to maximize the amount of

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19. *See* Woodcock, *supra* note 12, at 127 n.56 (and sources cited therein); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 86–87 (1st ed. 1983) (observing that when price equals cost, owners and managers of the firm still receive adequate compensation).

20. *See infra* Section I.C.

21. For limits on the ability to redistribute profits imposed by uniform pricing, see *infra* Section II.D.

22. *See* EUGENE SILBERBERG, THE STRUCTURE OF ECONOMICS: A MATHEMATICAL ANALYSIS 581 (2d ed. 1990) (defining efficiency).

23. *See infra* Section I.B.

24. 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 10, at 21; *see also* STOUT, *supra* note 5, at 18–19 (discussing Jensen's role in shareholder primacy).

25. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 271–76 (1999).

wealth available for distribution.[26] The arguments of both shareholder primacy advocates and CSR have nothing to say about who should receive the firm's profits, whether shareholders, workers, or indeed consumers, because these arguments are really about costs, meaning expenditures that are necessary for optimal economic performance.[27] Arguing that shareholders, workers, or anyone else must be paid the firm's profits because such payments are necessary to make the firm operate efficiently does not actually address the problem of how to distribute the wealth generated by the firm. If the payments really are necessary for the firm to operate efficiently, then they are not payments from profits at all. They are costs. But profits are by definition what is left over after all payments necessary to make a firm run efficiently are paid. Once an efficient choice of which costs to incur has been made, the fundamentally moral question always remains how to divide the wealth that has been maximized by that choice. Neither shareholder primacy advocates nor CSR has directly addressed this unavoidable question.

Happily, antitrust resolves the problem of distribution of profits as a matter of law, relieving both shareholder primacy advocates and CSR of the burden 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.[28] The courts already implicitly decided that question in the 1970s, when they decided that consumer welfare is the ultimate goal of antitrust.[29] The consumer welfare standard requires that, instead of reserving profits for shareholders or workers, the firm pay all of its profits to consumers through lower prices or greater product quality.[30]

The notion that it is possible to have efficient management while still giving profits to consumers seems to violate basic intuition regarding the importance of providing an incentive to managers, or the shareholders who oversee them, to run the firm efficiently. If profits are paid to consumers, who lack managerial control over the firm, then managers or shareholders have no incentive to maximize the firm's profits. But this intuition is wrong. Inducing a firm to maximize profits does not require that the firm be able to keep all of the profits it generates for itself.[31] Because work incentives are tied to alternative employment opportunities, not

26. *See infra* Section I.C.

27. *See infra* Section I.C.

28. *See infra* Section II.B.

29. *See* 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, 347–48 (2010). 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 Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993); Salop, *supra*, at 341.

30. 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, however, because inflated costs are not true costs. Inflated costs are really profits that have been paid out to suppliers. *Cf.* Woodcock, *supra* note 14, at 1776.

31. *See infra* Section I.C.2.a.

productivity. Offer Steve Jobs a penny more than what he can earn in the next best employment alternative available to him, and he will be ready and willing to run Apple, regardless how much wealth he creates for others by doing so.[32] In other words, 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.[33] Firms can put the interests of consumers first while still retaining the incentive to produce efficiently.

Indeed, the existence of a shortfall between the size of the payments necessary to create work incentives and the dollar value of a firm's output 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 the world would have to return to them the entirety of what they produce, leaving the world with no net benefit.[34] Only because producers decide what to produce based on alternatives, and not based on the value of what they produce, are they willing to work for less than that value and their output capable of improving the lives of others.

Under a rule requiring firms to minimize profits, a firm would be able to keep for itself only so much as the 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.[35] But no more. If there is any money left over after the contributors to production are paid that amount, the firm would be required to reduce its prices.

But will the firm have any incentive not only to operate efficiently in the short run but also to invest in improving its products in the long run, if any additional profits the firm generates from improvements must be left to consumers? The answer is again yes. The extra incentive required to induce a firm to improve a product is cost, not profit, since the incentive is necessary for efficient production, in the sense of long-term efficiency, to take place.[36] As a result, under a rule requiring minimization of profits, the firm would be allowed to retain such extra incentives for itself and would not be required to pay them out to consumers. But the amount of such incentives would be very small. So long as the firm retains any constant percentage, no matter how small, of the value of any improvements that the firm confers on consumers, the firm will be better off executing the

32. *See* E. Earl Burch & William R. Henry, *Opportunity and Incremental Cost: Attempt to Define in Systems Terms: A Comment*, 49 ACCT. REV. 118, 119 (1974).

33. *See id.*

34. 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.

35. *See infra* Section II.B.

36. *See infra* Section I.C.

improvement than it would be doing nothing, and so the firm will have all the incentive it needs to act.[37]

As I discuss in my other paper, the duty to minimize profits should be enforceable only by nominal damages, to avoid putting judges in the difficult position of making pricing decisions for firms.[38] Enforcement by nominal damages alone would also ensure that mistakes by judges in determining exactly what counts as costs will not force firms out of business or into underperformance, because firms could simply pay a dollar and carry on if they disagree with the judgment.[39] 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 out of a belief in the importance of following the law.[40] Public opinion, which would take note of any judgment of a federal court that profits are too high, would enforce the rule as well.[41]

Treating the corporate mission debate as a duel over the distribution of the surplus generated by corporations in excess of costs is an exercise in rent theory economics.[42] Rent theory is not so much a separate branch of economics as a perspective on economics that emphasizes the effect of laws on the distribution of wealth at the level of the market, rather than at the level of the economy as a whole.[43] Rent theory was popular in 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 economy-wide taxation, instead of by using the law to alter the

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37. 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 9, 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 of wealth actually created 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* Woodcock, *supra* note 14, at 1747, 1771. Firms do the right thing and give themselves the right, minimal incentives. *See* JOSEPH NEEDHAM, THE GRAND TITRATION: SCIENCE AND SOCIETY IN EAST AND WEST 312 (1969) ("Confucius . . . said that if the people were given laws and levelled by punishments, they would try to avoid the punishments but have no sense of shame; but that if they were 'led by virtue' they would spontaneously avoid disputes and crimes."). Or they do not. For a discussion of the principal-agent problem and corporate governance, see *infra* Section I.C.2.a.

38. Woodcock, *supra* note 14, at 1747, 1775–76.

39. *Id.*

40. *Id.* at 1772.

41. *Id.*

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

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

structure of individual markets to achieve desired distributive outcomes.[44] Rent theory is well suited to the corporate mission debate because that debate is about how the firms that make up markets should behave.[45]

I show first that economic efficiency does not require that firms keep the profits that they generate for themselves, as opposed to giving their profits to consumers by charging them lower prices.[46] I then show that once the influence of CSR is taken into account, corporate law today permits, but does not *require*, firms to minimize their profits for the benefit of consumers.[47] I then read antitrust law to require that firms minimize profits.[48] I show that such an antitrust-based duty of firms to charge prices no higher than their production costs preempts state corporate law.[49] I next consider some inefficiencies created by the use of antitrust's consumer welfare standard in particular as the basis for a profit-minimization duty and I propose changes to the consumer welfare standard that would eliminate those inefficiencies.[50] Finally, I argue that although a profit-minimization rule would not achieve CSR's distributive goals, such a rule would do some social justice.[51]

I. DISTRIBUTION AND EFFICIENCY IN CORPORATE GOVERNANCE AND ANTITRUST

A. Profit Maximization as a Distributive Problem

Shareholder primacy is about the distribution of wealth. It provides that a firm should appropriate as profits the entirety of the surplus—defined as the margin between the costs of producing a product and the value that consumers place upon the product—that the firm generates, and then turn all of that surplus over to shareholders.[52] CSR's attacks on shareholder primacy are also distributive, in that through those attacks CSR seeks to create legal space for the allocation of surplus to other groups, such as workers.[53]

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44. *See id.* at 200.
45. *See id.* at 152.
46. *See infra* Part I.
47. *See infra* Part II.A.
48. *See infra* Section II.B.
49. *See infra* Section II.C.
50. *See infra* Section II.D.
51. *See infra* Sections II.E.
52. *See* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2066–67 (2001) (treating the "shareholder wealth maximization norm" as mandating maximization of the firm's profits for the benefit of shareholders). For discussions of the nature of surplus, see *infra* notes 59, 158.
53. *See* Elhauge, *supra* note 5, at 745–46 (arguing that the "obligation to make profits is not and should not be exclusive, but that instead managers do and should have some limited discretion to temper it in order to comply with social and moral norms"); Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2005–06 (2013) (discussing the relationship between shareholder primacy and the Chicago School).

Both shareholder primacy advocates and CSR are only half aware of the distributive character of the debate. In their more sober moments, both acknowledge that the question whether shareholders, managers, workers, or some other group should enjoy the profits generated by the firm is distributive.[54] But neither shareholder primacy advocates nor CSR seems to realize that the other part of shareholder primacy, the notion that firms should maximize profits in addition to giving profits to shareholders, is itself distributive in nature. But of course it is, because profits come from consumers and the maximization of profits implies the minimization of the share of the surplus generated by production that consumers can keep for themselves.[55] Most corporate law scholars today, of whatever stripe, tend to treat profits as though they were manna from heaven, and quibble only over which group of firm insiders, whether shareholders, managers, or workers, should take that manna. For them, profit maximization, at least in the long term, is an unambiguous good, rather than what it really is, the redistribution of wealth from consumers to firms.[56] Both sides act as if firms operate not in a market economy

54. *See* Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth*, 68 MOD. L. REV. 49, 70 (2005) ("[T]he growth in shareholder power is best seen as one aspect of the more general shift in the last thirty or so years in the balance of class forces around the world."); Jensen, *supra* note 10, at 13 (recognizing that the problem of corporate mission is the problem "how to choose among multiple constituencies with competing and, in some cases, conflicting interests"); Brian E. Becker, *Concession Bargaining: The Impact on Shareholders' Equity*, 40 INDUS. & LAB. REL. REV. 268, 268 (1987). For the failed attempts to transform this distributive question into an efficiency question, see *infra* Sections I.B, I.C.

55. Most discussions of corporate mission tend not even to distinguish between the profit-allocation and profit-maximization aspects of shareholder primacy. *See* Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 661 (1996) (advocating a "shareholder wealth maximization norm"); STOUT, *supra* note 5, at 32 (rejecting the requirement of "maximizing shareholder value").

56. Michael Jensen, for example, argues that: "Value maximization (or value seeking) provides the following answer to the [distributive] question: Spend an additional dollar on any constituency provided the long-term value added to the firm from such expenditure is a dollar or more." Jensen, *supra* note 10, at 14. With its reference to the "long-term value added to the *firm*" this formulation amounts to a call for profit maximization, as opposed to maximization of the overall surplus generated by the firm. *Id.* (emphasis added). And yet in his use of the label "value maximization" for what he is describing, not to mention in statements he makes elsewhere in his article, Jensen makes clear that by value maximization he means (total) surplus maximization. *See id.* at 13–14. Profit maximization and surplus maximization are identical, of course, only if one forgets that both consumers and firms can share the surplus, and so profits can be increased by redistributing surplus from consumers to firms rather than by increasing the overall size of the surplus. Jensen's failure here to recognize the distributive consequences of profit maximization is all the more surprising in that elsewhere in the same article he does acknowledge that consumers are stakeholders in the firm and want "low prices [and] high quality . . . ." *See id.* at 13.

Consider a second example. Margaret Blair and Lynn Stout argue that their approach to corporate governance "ultimately serves [the] interests [of shareholders] as a class, as well as those of the other members of the corporate coalition." Blair & Stout, *supra* note 25, at 305. Although Blair and Stout do mention consumers a couple of times in their article, it is clear that by "corporate coalition" they mean to include "shareholders, employees, and perhaps other stakeholders such as creditors or the local community," but not consumers. *See id.* at 278. For them, a more equal distribution of surplus among these groups increases the value of the firm—meaning profits—and that can potentially make them all better off. But there is no acknowledgment that this is possible only if the firm extracts the additional 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.[59] Consumers have always been claimants in the corporate mission debate, alongside workers, managers, and shareholders, among others, albeit largely silent ones because neither side has taken up their case.

The Chicago School, which has long been an important source of shareholder primacy advocacy, seems nevertheless to have grasped the distributive nature of profit maximization, however subconsciously, in deciding to lay siege not just to corporate governance, but also to antitrust. The Chicago School seems to have understood that corporate law can be used to induce firms to attempt to maximize profits, but, in order for firms actually to succeed at maximizing profits, antitrust law must be made to desist from using competition to drive prices, and hence profits, down.[60] The Chicago School therefore argued against vigorous enforcement of the antitrust laws and in favor of allowing firms to charge high prices and thereby to seize the greatest possible share of surplus from consumers.[61]

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value created by the firm from consumers. For more on these scholars' view that a more equal distribution of surplus increases surplus by facilitating "team production," see *infra* Section I.C.2.b.

57. In such an economy, the value of goods is determined by the producer, rather than by independent consumers, because only the producer enjoys the fruits of the producer's efforts. *See* ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 684 (8th ed. 1920) ("[I]n estimating the weal and woe in the life of a Robinson Crusoe, it would be simplest to reckon his producer's surplus on such a plan as to include the whole of his consumer's surplus."). Consequently, the producer can increase profits only by producing better goods, upon which the producer places a greater value, and profit maximization therefore has no distributive consequences.

58. *See id.*

59. In economic terms, the total amount of wealth that a firm can transfer from consumers to itself is the total dollar value that consumers place on the firm's products, that is, consumers' total willingness to pay for those products, less the firm's costs of production, which consumers must cover in order to induce the firm to produce. *See* MARSHALL, *supra* note 57, at 103, 668–69 n.1. By choosing prices, firms decide how much of that surplus of value over cost to distribute to themselves and how much to leave for consumers. *See id.* at 668–69 n.1. From this perspective, the question whether the firm should maximize profits is fundamentally distributive: it is the question whether firms should be allowed to take the entirety of the surplus they generate for themselves—which is what happens when profits are fully maximized—or consumers should be allowed to keep some of the surplus.

Of course, firms often fail to maximize profits, even when they try, in which case profit maximization may not spell total redistribution of surplus from consumers to firms. *See* W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 71–73 (5th ed. 2018) (giving a simple example of uniform monopoly pricing in which consumers retain a share of the surplus). But that technological limitation does not make profit maximization any less a project of minimizing the access of consumers to the surplus generated by firms. *See infra* Section II.D.

60. *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 409 (7th ed. 2006) ("In an industry with free entry, profits will be driven to zero by new entrants: whenever profits are positive, there will be an incentive for a new firm to come in to acquire some of those profits.").

61. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7–8, 111 (2d ed. 1993) (decrying the then-current view that "no business structure . . . has any potential for social good" and arguing that so long as business conduct increases surplus it should not be challenged,

CSR, by contrast, seems never to have been troubled by the distributive implications of profit maximization.[62] CSR has never challenged the profit-maximization norm, at least as it relates to the long run.[63] Perhaps as a result, CSR has failed even to try

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even if the conduct reduces consumers' share of the surplus); Stout, *supra* note 53, at 2005–06 (discussing the Chicago School and shareholder primacy).

62. Einer Elhauge, for example, does not mention the consumer interest anywhere in his 166-page rejection of shareholder primacy in corporate law, even though Elhauge also writes in antitrust and in that realm advocates greater protection for consumers. *See* Elhauge, *supra* note 5 (rejecting shareholder primacy without mentioning consumers); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 435–39 (2009) (arguing that antitrust's mission is to protect consumers). Consumers do play a role in Elhauge's rejection of shareholder primacy, but only as citizens troubled by clear-cutting of forests and the like. *See* Elhauge, *supra* note 5, 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 5, at 69. Taking care of consumers in order to maximize long-run profits, which profits must ultimately be extracted from consumers, means fattening the calf. *See infra* Section I.C.2.b.

Similarly unaware of the interest of consumers in reducing firm profits, the American Law Institute sees the duty of the board to consumers as extending only to product safety, and makes no mention of the problem of high prices. *See* 1 PRINCIPLES OF CORPORATE GOVERNANCE § 2.01 cmt. h. (Am. Law Inst., 1994). Edward Freeman mentions that consumers "exchange resources" with firms, but goes on to suggest that the major interest of consumers is in having firms keep promises to them made through advertising. *See* FREEMAN ET AL., *supra* note 5, at 25. One of the few CSR scholars who acknowledges the consumer interest in firm profits, albeit in passing, is Daniel J.H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103, 113–14, 114 n.28 (2006) (arguing that a firm can pay its profits out as "discounts to customers"). Interestingly, the economic interest of consumers in the firm is more explicit in works advocating shareholder primacy. *See* Jensen, *supra* note 10, at 13. But even there it remains submerged. *See* sources cited *supra* note 56.

63. CSR's attacks on profit maximization are usually really arguments regarding how profits should be allocated, rather than arguments against maximizing profits. CSR argues, for example, that rather than maximize profits, firms should pay workers higher wages. *See* Elhauge, *supra* note 5, at 845 (approving of a rule that would allow "sacrifice . . . of . . . profits" by a firm in the form of keeping unneeded workers employed). But that is really an argument that firms should share more of their profits with workers, by paying workers higher wages. It is not an argument that firms should not strive to charge the highest possible prices to consumers, and extract the largest profits from consumers, only an argument that once the greatest possible profits have been taken from consumers, the profits should be shared with workers.

Other CSR attacks on profit maximization are not directed at profit maximization's effects on consumers, but rather at the use of maximization by firms as a rule of decision regarding how to act. According to this position, 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 profits, surplus more generally, or anything else. *See* FREEMAN ET AL., *supra* note 5, at 13. According to this objection, firm behavior should be governed by a balancing of interests, or some other approach to decision-making, instead of by the maximization of the welfare of one particular group. *See id.* at 28.

This objection misses that society can only ever have one preferred outcome, which is the maximal outcome, regardless how many competing considerations may go into its selection. *See* Jensen, *supra* note 10, at 10. Society might have one goal for a firm, ten goals, or a hundred, but at any given time the firm can only do one set of things. *See id.* 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 both reduce to block the Chicago School's attacks on the antitrust laws, allowing the Chicago School to dominate antitrust for a time in a way that the school, and shareholder primacy advocacy more generally, never quite could dominate corporate law.[64]

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 should select the particular set of actions that the firm, or the society that governs the firm, prefers the most.

Edward Freeman, for example, rejects shareholder wealth maximization on the ground that firms do better when they avoid seeing their role as choosing between the competing interests of firm stakeholders, but instead strive to make all stakeholders better off. *See* FREEMAN ET AL., *supra* note 5, 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.

Profit may not be the proper quantity to maximize, but if firms are to act, then firms must choose how to act, and choice implies maximization based upon some preference ordering. This Article argues that the antitrust laws require that firms maximize consumer welfare, meaning that actions by firms that make consumers better off should be ranked higher than actions that make consumers worse off, and that firms choose the best action according to that ranking. *See infra* Section II.B.

64. In antitrust law, for example, state legislatures did not fight back against the Chicago School approach, as they did in corporate law, when dozens of states adopted anti-takeover legislation designed to weaken shareholder primacy. *See* Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 846, 848 (1989) ("to protect non shareholders from the disruptive impact of the corporate restructurings that are thought typically to result from hostile takeovers"). And CSR dissent against shareholder primacy has been a constant presence since at least the 1980s. *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, 1203–04 (2002); Elhauge, *supra* note 5, at 830–40.

By contrast, until very recently, no antitrust scholar was willing to call for a return to the vigorous antitrust enforcement policies that predated the Chicago revolution in antitrust. Indeed, the first law review article of recent decades, 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). Resistance to the Chicago School in antitrust has historically been much more compromising, a position summed up by the title of an influential collection of resistance writings: "How the Chicago School Overshot the Mark." 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 more modest antitrust resistance advocates greater antitrust enforcement today, but also accepts that pre-Chicago-School 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, 1 (2015). As a result, while corporate law has continued to permit such manifestly shareholder-unfriendly conduct as the making of donations to charity, antitrust enforcement, and the limits on profit maximization that enforcement implies, fell off a cliff starting in the 1980s and has not recovered. *See* Elhauge, *supra* note 5, at 830–40 (discussing the law of corporate donations); Ramsi A. Woodcock, *The Hidden Rules of a Modest Antitrust*, 105 MINN. L. REV. (2021) (forthcoming 2021) (manuscript at 28–38) (surveying Chicago-School-driven antitrust rule and enforcement changes); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON. L. REV. 827, 830 (2009) (showing that nearly all cases 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).

Fortunately for consumers, however, some in antitrust did resist the Chicago School's attempts to kill antitrust by establishing the rule that a firm may extract as much profit as possible from consumers.[65]

The Chicago School's response to this resistance gave rise to the consumer welfare standard followed by antitrust today, a development that will loom large in Part II. In response to the resistance, the Chicago School pressed the argument that large rewards for firms today may be necessary to induce firms to create products that confer even higher rewards on consumers tomorrow.[66] This allowed the Chicago School to use the possibility of offsetting consumer gains in some vague and distant future to justify profit maximization today.[67] But this strategic gambit, and its acceptance into mainstream antitrust, also introduced into the antitrust laws for the first time the notion that the ultimate goal of the laws is to help consumers, not firms.[68]

In triggering the creation of the consumer welfare standard in antitrust, the Chicago School inadvertently laid the groundwork for the demise of the entire shareholder primacy norm, both the part dedicated to profit maximization and the part dedicated to the allocation of profit to shareholders. For the consumer welfare standard enshrines the maximization of consumer surplus as the goal of the antitrust laws.[69] That was a major departure from earlier approaches to antitrust, which

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65. *See, e.g.*, Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy Symposium: Anticipating Antitrusts Centennial*, 75 CALIF. L. REV. 797, 800–801 (1987) (arguing that "economic analysis problems do not warrant a severe retrenchment in the scope of antitrust law").

66. *See* Ramsi A. Woodcock, *Personalized Pricing and the Return of Wealth Redistribution at the Market Level* (2019) (unpublished manuscript). Probably the most famous statement of this position is Justice Scalia's: "The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004). The implication of the qualifier that the monopoly prices will be charged only "for a short period" is that consumers will benefit from the innovation after that period ends. To be sure, the Chicago School has simultaneously continued to press for the rule that antitrust should not care whether the surplus goes to firms or consumers. *See* Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 453–54 (2008) (arguing that the courts have actually rejected the consumer welfare standard in favor of the Chicago School's proposed "total welfare standard").

67. *See* BORK, *supra* note 61, at 396; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (arguing that antitrust should err "on the side of excusing questionable practices" because they are likely ultimately to benefit consumers); David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries*, 43 ANTITRUST BULL. 801, 819–22 (1998) (arguing that monopoly profits are "generally necessary to induce investment in the creation of . . . knowledge assets").

68. *See* Salop, *supra* note 29, at 336–37; John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192–93 (2008); John B. Kirkwood & Robert H. Lande, *The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 89, 90 (Robert Pitofsky ed., 2008); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68–69 (1982).

69. *See infra* note 210.

focused on the pursuit of competition for its own sake.[70] The consumer welfare standard, by contrast, extends far beyond that, to require that firms charge not competitive prices, but the lowest possible prices.[71] The standard requires, in short, that all of the surplus generated by firms be given to consumers alone, as will become clear in Part II. This explosive principle has so far remained bottled within antitrust by the narrowness of antitrust remedies, which for the most part extend to promoting competition, rather than dictating prices.[72] But, as I show elsewhere, that can be made to change.[73]

B. *The Appeal of Efficiency*

If shareholder primacy is a distributive doctrine, deciding both how surplus is allocated between firm insiders and—in conjunction with antitrust—how it is allocated between firms and consumers, and CSR, as antagonist of shareholder primacy, is equally concerned with distributive outcomes, then why do both sides debate corporate mission in the language of efficiency, rather than distribution?[74] Why does the Chicago School argue, for example, that shareholders should take all of the surplus firms generate because that will give shareholders an incentive to compel managers to run the firm efficiently?[75] And why does CSR counter that workers should be given part of the surplus because that will induce workers to labor efficiently?[76] The answer is that the two sides argue that their own preferred distributions of surplus are necessary for efficient production to take place in order to achieve rhetorical advantage in the debate over the mission of the firm. But any advantage they do obtain is, alas, of dubious long-term use.

Efficiency, understood to mean production that results in the largest possible surplus, is a superficially appealing crutch for distributive arguments because both sides tend to agree that maximizing the size of the surplus is a good thing, and that makes efficiency a neutral rule of decision.[77] No other rule that might be applied to

70. *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.").

71. *See infra* Section II.D.

72. *See* Woodcock, *supra* note 14, at 1755–58.

73. *See id.* at 1760–72.

74. For examples, see *infra* Section I.C.

75. *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 10, at 10–11 (maximizing firm value maximizes social welfare). This argument is discussed at length *infra* in Section I.C.2.a.

76. *See* Blair & Stout, *supra* note 25, at 319–23. This argument is discussed at length *infra* in Section I.C.2.b.

77. *See* Jensen, *supra* note 10, at 11–12; Elhauge, *supra* note 5, at 735–38 (arguing that corporate law would not prevent firms from sacrificing profits to prevent the externalities associated with

determine who should take the surplus attracts the same consensus.[78] Some believe that surplus should be distributed based on the principle of equality.[79] Others that surplus should be distributed unequally based on the principle of talent.[80] Others believe that surplus should be distributed based on effort or wisdom.[81] And so on. But both shareholder primacy advocates and CSR seem to agree that, if the answer to the technical question how to maximize surplus turns out to be that the entire surplus must be turned over to a particular group, then that group should take it, because both sides agree on the desirability of efficiency.[82]

Except that they likely both do not. Despite the focus of both sides on efficiency as a rule of decision, efficiency's power to settle the distributive question has always been limited. For at the end of the day, it is difficult to imagine that anyone committed in the first instance to a particular distributive outcome, with all of the moral fervor that entails, would be willing to sacrifice that outcome for cold, technical, efficiency.[83] If the Chicago School were to succeed at proving that surplus can only be maximized by turning it over, in its entirety, to shareholders, CSR would not simply concede the field.[84] CSR would fall back on the argument that justice demands that workers, managers, suppliers, and others obtain a fair share of surplus, even if that means reducing the overall amount of surplus generated.[85] The

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clear-cutting a forest); Werner Hediger, *Welfare and Capital-Theoretic Foundations of Corporate Social Responsibility and Corporate Sustainability*, 39 J. SOCIO-ECON. 518, 521 (2010).

78. *See* WILLIAM BAUMOL, SUPERFAIRNESS: APPLICATIONS AND THEORY 4 (1986) ("[W]e have of course no agreement upon what decisions deserve to be considered just."). Which makes distributive debates "political." *See* James R. Hackney, Jr., *Law and Neoclassical Economics Theory: A Critical History of the Distribution/Efficiency Debate*, 32 J. SOCIO-ECON. 361, 362 (2003).

79. *See* Greenwood, *supra* note 62, at 115 ("[A]s a general rule, no one has a moral entitlement to rents.").

80. *Cf.* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 3 (1973) (arguing against antitrust enforcement against large firms because large firms' power may be due to "superior ability").

81. *See* 2 THOMAS ROBERT MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 368–72 (1826) (arguing that the "idle and improvident" should be the last to receive charity).

82. That would explain why both shareholder value advocates and CSR appeal to efficiency to defend their positions. *See* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1446–47 (1993); Blair & Stout, *supra* note 25, at 322; Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 538–39 (2006).

83. 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 may never happen and the gains may never be realized. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 92 (6th ed. 2012); POLINSKY, *supra* note 19, at 18. Mark Blaug observes that "most decisions of public policy . . . are expressly designed to aid a favoured group at the expense of every other . . . ." MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 608 (4th ed. 1985).

84. *See* BAUMOL, *supra* note 78, at 131 (observing that "even though everyone shares in them, the distribution of benefits may be unfair").

85. The antitrust laws themselves exhibit a willingness to sacrifice efficiency for redistributive ends. That is the content of the consumer welfare standard employed by antitrust law, which requires that antitrust maximize consumer surplus, even if doing so would reduce surplus overall. *See* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, 153 (4th ed. 2013). That standard may be

maximization of surplus is meaningless for managers, workers, or suppliers, CSR would argue, if these people can enjoy no part of the surplus.[86] By the same token, the Chicago School would argue, against irrefutable proof that shareholder primacy leads to inefficient operation of the firm, that shareholders still deserve to have it all, even if that reduces efficiency.[87] The investors who make production possible, they would argue, deserve the fruits as a matter of justice, if not as a requirement of efficiency. The battle over efficiency has always been a proxy battle the salience of which to the broader war over distribution is uncertain at best.

Some scholars seek to rationalize the appeal to efficiency using the logic of cooperative game theory, in which opposing parties agree to act in ways that expand the surplus generated by markets in exchange for a share of the gains.[88] The idea here is that by agreeing to split the gains from cooperation, the parties both end up better off, in absolute terms, than they would going it alone.[89] In the corporate mission context, that means that the Chicago School and CSR are right to argue over efficiency, because if they can identify and implement an efficient corporate governance structure, they can then divide the resulting increase in surplus between shareholders and groups favored by CSR, such as workers, leaving all groups better off.

The trouble with this bargaining theory of appeals to efficiency is that in practice neither side appeals to efficiency in order to offer a division of the additional surplus that efficiency may generate. Both sides appeal to efficiency in order to establish an iron tie between efficiency and a preferred division of

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 example of a 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).

86. This point is of the same general kind as the argument that perfect price discrimination renders consumption of no use to consumers. *See* Wassily Leontief, *The Pure Theory of the Guaranteed Annual Wage Contract*, 54 J. POL. ECON. 76, 79 (1946) (observing that a perfectly price discriminating firm, which extracts the entirety of the surplus from its counterparty, leaves its counterparty "clinging as closely as possible" to that party's "indifference line"). For more in this vein, see *infra* Section I.C.2.a.

87. Consider, for example, the peculiar argument made by David J. Teece and Mary Coleman, that Ricardian and Schumpeterian economic rents, which they acknowledge result from "price . . . being above cost," are nevertheless "necessary to induce investment." *See* Teece & Coleman, *supra* note 67, at 819–20, 822. Anything earned above cost, in the economic sense in which Teece and Coleman use the word, is by definition *not* required to cover costs, including those costs of research and development called "investments." *See infra* Section I.C. Behind this almost Freudian slippage between rents and costs one senses a belief that whatever a firm does earn the firm must somehow deserve.

88. *See* Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2180–86 (2013); Baker, *supra* note 85, at 485–93. Advocates of the use of tax and transfer, as opposed to the changing of legal rules, to redistribute wealth effectively take this approach. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 654–55 (2004). Tax and transfer advocates argue that legal rules should be chosen for efficiency, and that the tax system should be used to redistribute the gains associated with efficiency to ensure that all groups share in those gains. *See id.*

89. *See* Baker, *supra* note 85, at 485–93.

surplus.[90] Shareholder primacy advocates argue, for example, that giving the entirety of the surplus generated by firms to shareholders is necessary to maximize surplus.[91] There is no room in their argument for a sharing of gains from efficient organization of production.[92] By the same token, CSR argues that spreading surplus among workers and managers is the only way to maximize surplus.[93] Any gains that result must therefore be divided according to the same plan. The distribution of gains is predetermined and cannot be shared as an inducement to others to approve this particular proposed bargain. Indeed, the trouble with the bargain theory is that it assumes that surplus can be redistributed freely once it has been maximized, which means that the theory concedes from the start that the distributive question is independent of the efficiency problem.[94] That puts the parties to the corporate mission debate back where they started: haggling over who gets what. But the parties to the corporate mission debate appeal to efficiency instead for authority that their preferred distribution is *required* for efficiency.[95]

C. Cost Confusion

Even if the two sides of the corporate mission debate were willing to let efficiency decide the distributive question, the structure of any efficiency-based argument for a particular distribution of surplus must rest on a category mistake, making all such arguments incapable of deciding the distributive question.[96] All efficiency-based arguments must claim that giving surplus to one group or another is necessary to induce that group to take steps that maximize the size of the surplus.[97] But payments required to induce efficient production do not count as distributions of surplus at all, but rather as payments of the costs of production,

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90. *See* Blair & Stout, *supra* note 25, at 327–28; Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 ORG. SCI. 350, 354 (2004).

91. Examples may be found in Section I.C.2.a.

92. To be sure, shareholder primacy advocates sometimes argue by implication that the efficiency gains associated with shareholder primacy raise all boats. *See* Lee, *supra* note 82, at 538 n.7. But these advocates can mean only that other groups benefit marginally from the efficiency of shareholder primacy. Giving a substantial portion of the surplus to other groups would conflict with shareholder primacy advocates' basic argument, which is that giving substantially all of the surplus generated by a firm to shareholders alone leads to efficient operation of the firm.

93. *See* Blair & Stout, *supra* note 25, at 305. Like defenders of shareholder primacy, CSR sometimes argues that the efficiency gains associated with shareholder primacy raise all boats. *See id.* But here again the argument can only be that other groups (here shareholders) benefit marginally. *See supra* note 92.

94. *See* Baker, *supra* note 85, at 491 ("[T]he two diffuse interest groups can bargain to achieve a regulatory regime in which antitrust enforcement ensures competition among firms. The efficiency gains from competition would then be split between producers and consumers.").

95. *See supra* notes 92–93. Examples of these arguments may be found in Section I.C.2.

96. *See* Andrew Chin, *Ghost in the New Machine: How Alice Exposed Software Patenting's Category Mistake*, 16 N.C. J.L. & TECH. 623, 628 (2015) ("A category mistake occurs when an entity is placed in the wrong category or is given an attribute that only entities in another category can have.").

97. That is because efficient operation of the firm maximizes the surplus generated by the firm. *See* Jensen, *supra* note 10, at 11–12.

since they are necessary for efficient production to take place.[98] As a result, these arguments fail in the end to have any implications for the proper distribution of surplus. They say nothing about how to distribute the wealth left over after costs are covered.

1. In Antitrust Debates

a. Fixed Costs

Consider, for example, the basic argument of the Chicago School for reducing antitrust enforcement and allowing firms to maximize their profits.[99] The Chicago School argues that firms must be allowed to maximize profits in order to pay the fixed costs that are necessary to induce entrepreneurs, investors, and engineers, among others, to contribute to the firm in ways that are efficient.[100] Unlike, say, the cost of packaging materials, fixed costs are not associated with any particular unit of output.[101] They are usually incurred before production begins at all, and so they can easily be forgotten when summing up the total costs of a venture and determining the profitability of a firm.[102] When fixed costs are not included in the calculation of profits, the Chicago School argues, a firm may appear to be appropriating a large share of the surplus generated by production for itself, but in fact the firm's high prices, and the apparently large profits that result, are needed to cover the costs of entrepreneurship, investment, and innovation that make the venture possible.[103] It follows, argues the Chicago School, that antitrust enforcers should not strive to drive down prices and profits.

The story the Chicago School tells about fixed costs is largely true. But it does not add up to an argument that firms should be permitted to appropriate the entirety of the surplus they generate in the form of profits. Because whatever surplus a firm must appropriate to cover fixed costs does not really count as surplus at all, but rather as costs. Fixed costs are costs, not surplus. They are necessary to allow the firm to maximize surplus, which is to say, necessary for the efficient

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98. *See* WILLIAM J. BAUMOL, ECONOMIC THEORY AND OPERATIONS ANALYSIS 593 (4th ed. 1977).

99. *See* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. ECON. 153, 196–97 (2010); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

100. *See* Manne & Wright, *supra* note 99, at 196–97. 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 (3d ed. 1990).

101. SCHERER & ROSS, *supra* note 100, at 622–24.

102. *Id.*

103. *See* Manne & Wright, *supra* note 99, at 171–72; SCHERER & ROSS, *supra* note 100, 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).

operation of the firm, but they are not surplus themselves.[104] Surplus, properly defined, is the value that the firm generates for consumers after all costs of production have been paid. Profits are the share of that surplus that the firm appropriates for itself. Because profits are a share of surplus, but not of costs, profits are never necessary for the efficient operation of the firm.[105] As soon as they do become necessary, they stop being profits, stop being a part of surplus, and become costs.

In other words, once costs have been paid, there is no one else, whether an owner, entrepreneur, inventor, or god of production, who must be given some additional reward in order to be made willing to help the firm produce efficiently.[106] The covering of costs is enough to achieve efficient production. Investors, entrepreneurs, inventors, managers, suppliers, janitors, loving spouses keeping dinner warm on late nights, and the amazon jungle patiently oxygenating the atmosphere, all enable the firm to produce efficiently. The payments it takes, or, in the case of externalities, should take, to make them supply what the firm needs from them to do that all count as costs.[107] What is left over once those costs are paid alone constitutes the surplus and profits that are the subject of the corporate mission debate.[108] Arguments that profits are necessary to cover costs, such as the Chicago School's argument that profits are needed to cover fixed costs, are not arguments about the distribution of surplus at all. They miss the point of the corporate mission debate.

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104. *See* Greenwood, *supra* note 62, 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 (John Eatwell et al. eds., 1991). Whatever must be foregone is necessary. For a discussion of the relationship between necessity and cost, see Woodcock, *supra* note 12, at 127 n.56.

105. *See* MARSHALL, *supra* note 57, at 103, 668–69 n.1.

106. *See* BAUMOL, *supra* note 98, at 593 (defining "surplus" as "any payment in excess of the amount necessary to have the input in question supplied"); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 4 (4th ed. 2011) (defining "'economic' . . . profits" as "profits in excess of . . . the amount needed to maintain investment in the industry"). Because costs in the economic sense include any payments to shareholders required to reward them for investing in the firm, the redistribution of profits to non-shareholders, where profits are understood to be firm revenues in excess of costs, cannot, by definition, deprive firms of access to investors, lead to capital flight, or have any other effects on the firm that might reduce the efficiency or viability of the firm's operations. To suppose that shareholders must always be rewarded with the entirety of a firms' profits in order to be willing to invest is to deny the possibility that firms can ever generate profits, properly defined, at all. This point will be taken up in greater depth in the context of all fixed costs, not just the cost of capital, in just a few more paragraphs.

107. Externalities are harms inflicted by a firm on those who lack a legal right to compensation for the damage. The dollar value of externalities must be taken into account in calculating the magnitude of the surplus generated by a firm. *See infra* text accompanying note 156.

108. *See* BLAUG, *supra* note 83, at 458 ("[S]ticking to our definition of pure profit as being neither an opportunity cost nor a real cost, we can define it as a residual left over after all contractual costs have been met, including the transfer costs of management, insurable risks, depreciation and payments to shareholders sufficient to maintain investment at current levels.").

In the language of economics, the Chicago School fails to distinguish between profits and quasi-profits in its argument about fixed costs. Quasi-profit is the portion of a firm's revenues left over after the firm pays its variable costs, meaning costs associated with specific units or volumes of output.[109] The firm pays fixed costs out of quasi-profits and the residual is the firm's profits, its share of the surplus generated by its productive activities.[110] In arguing that firms need profits to pay fixed costs, the Chicago School is really arguing that firms need their quasi-profits to pay fixed costs. That is not an argument about how profits should be distributed, but rather an argument about how quasi-profits should be distributed. But only once that distribution has been carried out, and costs have been deducted from quasi-profits, does the distributive question what to do with the genuine, non-quasi-, profit that remains actually arise.

Even if it were sound, the argument that profits are necessary to cover fixed costs does not really support profit maximization, because the argument explains only why profits should be high enough to cover costs, but not why profits should always be so high as to appropriate from consumers every last penny of the surplus generated by firms. To get to full appropriation of the surplus, the argument must explain why fixed costs should always happen to be precisely equal to the surplus generated by the firm, necessitating the appropriation of the entire surplus by the firm in order to cover fixed costs. Otherwise, fixed costs may fall below the total amount of surplus generated by the firm, in which case the firm would not need to appropriate the entire surplus, and so the firm would not be compelled, on efficiency grounds, to maximize profits. Shareholders, entrepreneurs, and innovators must be paid. But why should their price always equal the surplus they help to create?

b. The Profit Motive

To make the case that firms should always be permitted to take the entire surplus, the Chicago School must argue that taking the entire surplus, and not just whatever share is needed to compensate shareholders, entrepreneurs, or innovators for their services, is efficient. The obvious move to make is to argue that in fact the entire surplus really is the reward that the firm requires to function efficiently. And that is exactly what the Chicago School does argue. The Chicago School claims that because firms are motivated by the pursuit of profit, firms will not be properly motivated to operate efficiently unless they can take the entire surplus that they create for themselves as profit. A firm will never act to maximize surplus, rather

109. An excellent early discussion of these concepts, in which "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 11, at 324–25. The distinction between profits and quasi-profits is sometimes referred to as the distinction between economic profits and accounting profits. *See* Raj Aggarwal, *Using Economic Profit to Assess Performance: A Metric for Modern Firms*, 44 BUS. HORIZONS 55, 55–56 (2001).

110. *See* MARSHALL, *supra* note 109, at 434–37.

than profit, the Chicago School argues, so long as the firm's profit and the surplus created by the firm are not one and the same.[111] Absent that unity, a time will come when the firm could take an action that would increase the surplus the firm generates, but that action would not increase the firm's profits, and so the firm would fail to act. Only giving the entire surplus to the firm as profits ensures that the firm will always have an incentive to maximize surplus, and therefore to operate efficiently.[112] It follows immediately that paying the entire surplus over to the firm—which means allowing the firm fully to maximize its profits—is actually necessary for efficiency, and since any payment necessary for efficient production counts as a cost of production, it follows immediately as well that the entire surplus is actually a cost that legitimately must be turned over to the firm.[113]

This argument vanquished antitrust starting in the 1970s, causing enforcers to fear that in driving down prices they were in fact harming efficiency.[114] The argument's triumph corresponded with a resurgence of interest in the intellectual property laws and their rationale of promoting investment in innovation by increasing the share of the surplus that innovative firms can appropriate out of the total that they create through their innovative activities.[115] Appropriability gives

111. Joseph Schumpeter is the father of this view and its most explicit proponent. *See* SCHUMPETER, *supra* note 103, at 89–90 (arguing that in the "majority" of cases monopolies just cover costs). It is suggested by: WARD S. BOWMAN, PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL (1973); 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). Richard 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).

112. *See* Brunell, *supra* note 111, at 27–28.

113. For necessary payments as costs, see text and sources *supra* note 104. The Chicago School's argument here was a transposition, from the level of the firm to the level of the market, of the classic agency argument in corporate law that a manager will never completely maximize the profits of the firm unless the manager has a right to all of the firm's profits. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308, 312 (1976) ("[I]t is generally impossible for the principal or the agent at zero cost to ensure that the agent will make optimal decisions from the principal's viewpoint. . . . If a wholly owned firm is managed by the owner, [however,] he will make operating decisions which maximize his utility."). Now the argument was that the surplus created by production would not be maximized unless the firm, which controls the generation of the surplus by controlling production, has a right to all of the surplus the firm creates, and does not have to share it with consumers. For more on the agency problem in corporate law, and the fact that corporate law scholars generally acknowledge that the problem can be solved, at least approximately, see *infra* Section I.C.2.a.

114. *See* BORK, *supra* note 61, at 396 (arguing that price discrimination, in permitting a monopolist to extract a greater share of surplus from consumers, will induce "greater innovative effort"); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (extolling monopoly profits as incentives to firms to innovate); Easterbrook, *supra* note 67, at 15 (arguing that "in many cases the costs of monopoly wrongly permitted are small, while the costs of competition wrongly condemned are large").

115. William Nordhaus sparked a large literature on optimal patent life that took as foundation the notion that a firm's incentive to invest in innovation is determined by the share of the surplus the firm can extract from consumers. *See* WILLIAM D. NORDHAUS, INVENTION, GROWTH, AND

firms an incentive to maximize surplus, argued economists, because the larger the surplus that firms create, the larger the surplus that firms are able to appropriate as profits. And so more appropriability was therefore urged.[116] Congress created a specialized patent appeals court, the United States Court of Appeals for the Federal Circuit, which proceeded to bullet proof patent grants against challenge, and appropriability became a watchword too in antitrust, a kind of universal rejoinder to anyone arguing for more enforcement and lower prices.[117] Firms, it was everywhere said, would only invest in innovations that increase the value enjoyed by consumers or reduce production costs if firms could hope to capture as reward some of the expanded surplus created thereby. And the more surplus they could hope to capture, the harder innovative firms would work to increase product value and reduce costs.[118]

Of course, the argument that surplus should be distributed entirely to firms because that is necessary for efficient production fails to engage the question what to do with surplus, understood as value that is not actually necessary for efficient production, just as much as the argument about fixed costs fails to engage that question.[119] But the argument takes the confusion between costs and surplus to an extreme, by suggesting that there really is no surplus at all, no value that can be distributed or redistributed on moral grounds without upsetting the efficiency of the operations of the firm. The argument is a denial of the distributive problem par excellence.

But that is in a way the least of the argument's problems. For the argument leads to an absurdity that no one has quite seemed to appreciate. The trouble is that if all surplus should really be cost, then the motivation for maximizing surplus, and indeed for pursuing economic efficiency, is destroyed.[120] The entire value of an economy is exclusively the extent to which that economy generates surplus.[121] When there is no surplus, engaging in economic activity, whether buying or selling, offers

WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE (1969). For a survey of this literature, see SCHERER & ROSS, *supra* note 100, at 621–44.

116. *See* SCHERER & ROSS, *supra* note 100, at 622–24; BOWMAN, *supra* note 111; Vincenzo Denicolò, *Do Patents Over-Compensate Innovators?*, 22 ECON. POL'Y 680, 713 (2007) (arguing that appropriability is currently suboptimal).

117. For the effect of the Federal Circuit on patent litigation, see James Bessen & Michael J. Meurer, *The Patent Litigation Explosion*, 45 LOY. U. CHI. L.J. 401, 428–29 (2013) (sources cited therein). For appropriability in antitrust, see Brunell, *supra* note 111, at 2–3.

118. *See, e.g.*, Teece & Coleman, *supra* note 67, at 820–22.

119. *See supra* paragraph accompanying note 104.

120. Only the few economists who have sought to find the patent life that optimizes consumer, rather than total, surplus, have seemed to understand this problem. *See* Denicolò, *supra* note 116, at 721–22 (discussing the "gap between the social and private returns to R&D"). What use is the maximization of total surplus if consumers can enjoy no part of it?

121. This follows immediately from the definition of surplus as the excess of value over cost. If the value of economic activity, as measured by the consumers who enjoy the economy's fruits, does not exceed the value of the pain required to produce those fruits, which pain is commonly known as cost, then economic activity has no value and society would be better off doing nothing.

no real advantage to buyer or seller.[122] 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.[123] 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.[124] 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.[125] The Chicago School succeeds at establishing the efficiency of profit maximization only by taking the position that the economy is incapable of improving lives, which, if true, would eliminate the rationale for pursuing efficiency in the first place.[126]

An equally important flaw in the argument that firms must appropriate all surplus in order to operate efficiently arises from the argument's misunderstanding of the mathematics of incentives. To align the interests of the firm perfectly with the interests of society, the entire surplus need not be given to firms as profits, contrary to the Chicago School's argument. The intuition 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 is incorrect.[127] The size of the reward

122. *See* Ramsi A. Woodcock, *Personalized Pricing as Monopolization*, 51 CONN. L. REV. 311, 321–25 (2019) [hereinafter Woodcock, *Personalized Pricing as Monopolization*] (showing, in the context of personalized pricing, how allowing firms to appropriate all of the surplus they create harms consumers); Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371, 1390 (2017) [hereinafter Woodcock, *Big Data, Price Discrimination, and Antitrust*].

123. *See* VARIAN, *supra* note 60, at 4 ("[A] person's reservation price is the highest price at which he or she is just indifferent between purchasing or not purchasing the good.").

124. *See id.* at 410 ("[W]ith zero profits, all of the factors of production are being paid their market price—the same market price that these factors could earn elsewhere.").

125. *See* Woodcock, *Personalized Pricing as Monopolization*, *supra* note 122, at 321–25; Woodcock, *Big Data, Price Discrimination, and Antitrust*, *supra* note 122, at 1390.

126. It is no use arguing that the maximum that can be extracted from consumers is not the true extent of the value enjoyed by consumers, because competition from other firms gives consumers other options that reduce their willingness to pay for a firm's products. *See* Woodcock, *Personalized Pricing as Monopolization*, *supra* note 122, at 323–24. For the Chicago School's argument is that competition should be reduced to permit firms to extract the maximum possible value from consumers. *See* BOWMAN, *supra* note 111. The effect of reducing competition is not just to allow prices to rise, but also to increase consumers' willingness to pay, as the number of alternatives available to consumers falls. *See* Woodcock, *Personalized Pricing as Monopolization*, *supra* note 122, at 323–24. So the Chicago School argues precisely for the reductions in competition that ensure that consumer willingness to pay accurately measures the true extent of the value enjoyed by consumers from purchasing a given product. Which means that the extraction of all of that value really does leave consumers with nothing.

127. This view may have its origin in analyses 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). But if a regulator has information on a firm's costs, the regulator can reproduce the incentive structure created by allowing the firm to take the entirety of the surplus as profits by setting the firm's prices just high enough to cover its costs, plus a fixed and very tiny percentage of the surplus the firm generates, as discussed in detail in this and the following paragraphs.

needed to create an incentive to engage in productive activity is determined by the alternatives available to firms, not by the size of the surplus that firms create.[128] To maximize surplus, it is necessary only that the firm stand to earn more compensation maximizing surplus than by doing anything else.[129] The scale against which compensation must be measured is not the absolute size of the surplus created by the firm but the most money the firm could make doing something else.[130] Indeed, as will become clear in the next section, the scale is not even set by the best alternative of the firm as a whole but rather the best alternative of whoever controls the firm. To create the proper incentive for efficient operation of the firm, it is necessary only that whoever has control of production, whether financier, investor, entrepreneur, worker, or other contributor, stand to earn more compensation from inducing the firm to maximize surplus than from doing anything else.[131] But for now, continue to consider the firm, and not those controlling it, as the subject that must receive the proper incentive to maximize surplus.

Suppose, for example, that a firm produces a good worth $8.00 to consumers, and sells the good at a price of $8.00, but that a no-cost improvement can be made to the good that would drive the good's value for consumers up to $10.00, representing an increase in surplus of $2.00. The Chicago School's argument is that the only way to guarantee that the firm will adopt the improvement is to allow the firm to appropriate the entire $2.00 increase in surplus created by the improvement, by allowing the firm to charge a price of $10.00 for the improved good.[132] According to this view, allowing the antitrust laws to promote competition that prevents the firm from charging $10.00 will reduce the firm's incentive to make the improvement, by making the improvement less profitable for the firm.[133] The result of the Chicago School's approach is that the firm improves the product, but because

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128. *See* VARIAN, *supra* note 60, at 410–11 (discussing opportunity costs).

129. *See* text and sources cited *supra* note 104. This argument assumes that people are rational actors in the sense that they always choose their best alternative employment, even if that alternative is only preferable to other alternatives by a vanishingly small amount. This assumption is not as absurd as it might at first appear. Suppose, for example, that a worker can either work at Wendy's for $7.00 per hour or McDonald's for $7.50 per hour, but that the worker considers the two wages so similar as to be indifferent between them in practice. The argument here is not that the worker should be assumed anyway to choose the $7.50 wage simply because it is slightly higher than the $7.00 wage offered by Wendy's. The argument is that to induce the worker to choose a particular employment, the wage must be set just high enough to ensure that the worker is no longer indifferent between the two employments. So, for example, if the worker would cease to be indifferent between the two employments if the McDonald's wage were $8.50, then $8.50 would be the wage that is just high enough to induce the employee to work for McDonald's, even though that wage would be $1.50 greater than the worker's next-best alternative employment earning $7.00 at Wendy's.

130. *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 335 (7th ed. 2006) ("[I]f an individual works in his own firm, then his labor is an input and it should be counted as part of the costs. His wage rate is simply the market price of his labor—what he *would* be getting if he sold his labor on the open market."). Subject to the qualification discussed *supra* note 129.

131. *See infra* Section I.C.2.a.

132. *See, e.g.*, BOWMAN, *supra* note 111.

133. *See supra* text and sources in note 111.

consumers pay $10.00 for a good upon which they place a value of $10.00, the surplus consumers gain from the improvement is $0.00.

But the same result can be achieved by limiting the firm to appropriating cost plus 1% of the surplus the firm generates on the good, as opposed to allowing the firm to appropriate all of the surplus. For what matters in creating the proper incentive is only that the firm's fortunes rise as the firm generates more surplus, not that the firm be able to take all of the surplus the firm generates. So long as the firm's percentage share of the surplus remains constant, the firm's fortunes will move in sync with changes in surplus, and so the firm will have an incentive to make the surplus as large as possible. At cost plus 1% of surplus, the firm's profits will rise by two pennies if the firm implements the improvement, making the firm better off relative to the firm's next-best alternative of doing nothing. And better, regardless of magnitude, is all that the firm, or any rational profit-seeking entity, requires to act.[134]

Moreover, if greater improvements become available, the firm will pursue them as well. If the firm discovers a new technology that would increase the value of the product to $11.00, instead of $10.00, the firm will choose that technology over the one that only increases value to $10.00, because the firm's profit on the $11.00 technology is 1% of the $3.00 of surplus created by that technology, or $0.03, whereas the firm's profit on the $10.00 technology is 1% of the $2.00 surplus created by that technology, or only $0.02. The nice thing about limiting appropriability to 1%, from the perspective of consumers, is that the share of the surplus generated by the improvement jumps from $0.00, when the firm appropriates the entire surplus, to $1.98, when the firm implements the $10.00 technology, to $2.97 when the firm implements the $11.00 technology. Under this incentive-minimization approach, efficiency is preserved—the firm maximizes the surplus the firm generates on this good—and consumers take virtually all of that surplus.

Thus a rule requiring that firms charge prices just high enough to cover costs, inclusive of the cost of creating a small but genuine incentive for firms to improve their products, will not deter innovation and indeed will maintain every incentive for the firm to maximize the surplus the firm generates.[135] Indeed, in our example,

134. *See supra* note 129 and accompanying text.

135. In other words, suppose that the benefits to consumers of production effort e undertaken 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 $b - c$. Maximization 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 net benefit. If x is chosen to be very, very small, then the firm's profit will be vanishingly small, and consumers will enjoy the entire maximized net benefit of production.

the percentage of the surplus provided to the firm as compensation can be made arbitrarily small—reduced to 0.1% or 0.01% or 0.001%—while still preserving the incentive for the firm to maximize surplus. So long as the firm receives a price high enough to cover the costs of the improvement plus some incentive payment keyed to being at its greatest when surplus is greatest, the firm will have an incentive to maximize surplus.[136] The incentive payment, when minimized, is itself a cost of efficient production.[137] The entirety of the surplus, once that vanishing amount is deducted, can be left for consumers without any efficiency loss. Antitrust enforcers can therefore promote competition without worrying that in reducing firm profits competition will prevent firms from maximizing surplus, at least so long as firms refuse to compete prices below levels required to give them some small residual incentive to engage in that maximization project. More importantly, for purposes of this Article, adherence to a proper incentive rule is implicit in the duty imposed by antitrust's consumer welfare standard to minimize profits, as will be discussed in Part II.

2. In the Corporate Mission Debates

a. In Shareholder Primacy Advocacy

The flaws in the Chicago School's case for profit maximization did not stop the Chicago School from winning the profit-maximization debate in antitrust for a time.[138] But winning on profit maximization only advanced the Chicago School's broader cause of shareholder primacy half of the way toward its goal of ensuring that shareholders get access to the entirety of the surplus generated by the firm.[139] For profit maximization means only that consumers should get nothing, not that shareholders, as opposed to workers, managers, suppliers, or anyone else who might plausibly be described as a firm insider, should get access to the surplus once it has been fully appropriated from consumers by the firm in the form of profits.

The natural answer to the question which kind of insider should get the surplus is: the insider who manages the firm, not shareholders as a group.[140] If the basis for giving the entire surplus to the firm is that the firm decides how to organize production and therefore requires the entire surplus in order to have an incentive to maximize it, then by extension it is the firm insider who actually controls the operations of the firm who should ultimately receive the entire surplus in order to have the proper incentive to induce the firm to maximize the surplus.[141] That poses a problem for advocates of shareholder value maximization, because shareholders

136. The size of the percentage is subject to the qualification discussed *supra* note 129.

137. Because that incentive payment is necessary for efficient production. *See* BAUMOL, *supra* note 98, at 593.

138. *See supra* paragraph accompanying note 114.

139. For the Chicago School's shareholder primacy goal, see *supra* Section I.A.

140. *See* Jensen & Meckling, *supra* note 113, at 308, 312.

141. *See id.*

rarely control the management of the firm.[142] They are passive, relying on professional managers to operate the business.[143] Which means that managers, and not shareholders, should take the surplus, at least if the appropriability argument is to be applied consistently.[144] And that in turn would seem to mean that efficiency does not support shareholder primacy after all.

The Chicago School managed to overcome this problem with the aid of a brilliant inconsistency. The Chicago School argued that within the firm surplus does not need to be allocated in its entirety to the party in control, because the incentives of managers can be brought tolerably into line with those of shareholders even if managers do not take the entire surplus. But at the same time the Chicago School took the position that outside of the firm, in the market as a whole, the incentives of the firm cannot be brought into line with the goal of maximizing surplus unless the entire surplus is paid over to the firm.[145] According to the Chicago School, managers could be made to work efficiently while shareholders, as "residual claimants," ate what those managers produced, but firms could not be made to operate efficiently while consumers ate what the firms produced.[146] The Chicago School could maintain this intellectual contradiction only because CSR never followed the Chicago School across disciplinary boundaries into antitrust law, and so there was no one with a foot in both corporate law and antitrust law with an interest in pointing out the inconsistency in the Chicago School's positions.[147]

The Chicago School executed this sleight of hand in the form of the now-famous "agency problem" of corporate governance, the problem of how to ensure that managers act as the agents of shareholders, maximizing the firm's profits on their behalf.[148] The Chicago School's solution to the agency problem was

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142. *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 24–34 (2001).

143. *See id.*

144. *See* Jensen & Meckling, *supra* note 113, at 312.

145. *See* STEPHEN MARTIN, ADVANCED INDUSTRIAL ECONOMICS 384–85 (2d ed. 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, 302–03 (1983) (assuming that the shareholders in a corporation have the right to "residual claims" defined as "net cash flows"). Thus the starting point for Michael 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 a full claim, in Jensen's view, over the profits of the corporation. *See* Jensen & Meckling, *supra* note 113, at 312. The other major inconsistency in Chicago School advocacy of shareholder primacy is the Chicago School's inconsistent treatment of profits and costs. *See supra* Section I.C.1.

146. *See* STOUT, *supra* note 5, 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 shareholders are residual claimants).

147. *See supra* Section I.A.

148. *See* Jensen & Meckling, *supra* note 113, at 308, 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). The shareholder rights literature in law and the principal-agent literature in economics are both devoted to this problem. For an example of the

to give management a fraction of the firm's profits in order to create an incentive for management to maximize profits, just as, in the example in Section I.C.1.b, the solution to the problem of giving a firm the incentive to maximize surplus without giving the firm the entire surplus was to give the firm a constant fraction—1% in the example—of the surplus.[149] In other words, in fashioning solutions to the agency problem, the Chicago School relied upon precisely the distinction between surplus and costs that the movement has denied in arguing for profit maximization as a goal.[150] Stuck in corporate law, CSR missed this sleight of hand entirely. The result is a bipolar shareholder primacy advocacy, in which in the corporate governance arena advocates seem aware of the distinction between distribution and efficiency, and understand that controllers do not require all of the surplus generated by the firm in order to act efficiently, but at the same time, in attacking the antitrust laws, advocates confuse costs and surplus and insist that controllers must have access to the entirety of the surplus in order to behave efficiently.

b. In CSR

CSR has not avoided the cost confusion that has plagued shareholder primacy advocacy.[151] For example, CSR has argued that giving profits to shareholders can deprive firms of the funds they need to invest in the long term, leading to lower long-term profits for firms.[152] The trouble with this argument is that any profits needed to maximize long-run profits actually are costs of production. Profit is an atemporal quantity, the total excess of the surplus that the firm appropriates from consumers, in the form of revenues, over the costs of production, summed up over the entire lifetime of the firm.[153] If long-term investments are required to maximize

principal-agent literature in economics, see Fama & Jensen, *supra* note 145, at 302–03. For an example of the shareholder rights literature, see Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 850 (2005) ("In publicly traded companies with dispersed ownership, the interests of management do not fully overlap with those of shareholders, and management thus cannot be automatically counted on to take actions that would serve shareholder interests. As a result, agency costs that reduce shareholder value might arise. . . . Adequate governance arrangements, however, can provide constraints and incentives that reduce deviations from shareholder-value maximization.").

149. *See supra* the paragraphs following note 127. 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 uncertain from the principal's perspective. *See* MARTIN, *supra* note 145, at 384–85. This does not alter the basic character of these arguments as attempts at minimizing the inducement required to make management maximize profits on behalf of shareholders, but it does make these arguments somewhat more complicated than the simple numerical example described *supra* in the text accompanying note 127.

150. See *supra* Section I.C.1.

151. For shareholder primacy advocates' confusion of cost with surplus, see *supra* Section I.C.1.

152. *See* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 691, 703 (2010).

153. 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 revenues at all current and future time periods net of opportunity costs. *See* RICHARD A. BREALEY ET AL., CORPORATE FINANCE 20–25 (8th ed. 2006). By long-run

that number, then those investments are costs of the firm, not profits.[154] The argument that firms are not investing enough 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 take the firm's long-run profits once they have been maximized.

A second example of CSR's miscategorization of costs is CSR's argument that firms should be free to spend their profits on compensation for victims of externalities.[155] Externalities are harms inflicted by a firm on those who lack a legal right to compensation for the damage.[156] Because the firm does not need to pay compensation for externalities, the firm does not try to avoid inflicting them.[157] That is a problem for the economy because the harms that a firm inflicts on others are costs of production.[158] Labor is a cost of production, for example, only because working harms workers, which is why workers demand a wage in exchange for working.[159] It follows that any payments, voluntary or otherwise, made to victims by firms to cover externalities are not distributions of profits at all, but rather the

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profit maximization I mean the maximization of net present value. *See also* SILBERBERG, *supra* note 22, at 416–17 (showing how to use present value to maximize value over multiple time periods).

154. *See* text and sources cited *supra* note 104.

155. *See, e.g.*, Elhauge, *supra* note 5, at 735–38 (arguing that corporate law would not prevent firms from sacrificing profits to prevent the externalities associated with clear-cutting a forest).

156. Economics texts typically define an externality as behavior of one agent that affects another agent. *See, e.g.*, VARIAN, *supra* note 130, at 600. But in an interconnected world, that definition is overbroad. When a buyer buys a product from a seller, the buyer's behavior affects the seller, but this is not an externality. What distinguishes externalities from other forms of interconnection between agents is that an externality has a harmful effect for which the victim cannot seek compensation. Buying creates no externality because the seller demands compensation from the buyer as a condition of allowing the buyer access to the product. And if the buyer takes without payment, the law provides the seller a remedy. By contrast, in the absence of nuisance laws, pollution from a factory may inflict harms on neighbors for which the neighbors have no legal remedy. That is a classic example of an externality. *See id.* at 632. This definition is immanent in many economics texts. *See, e.g.*, MAS-COLELL ET AL., *supra* note 9, at 356 (describing an agent who has a legal right to prevent activity by another that would inflict harm on the agent as "externality-free"). The foregoing describes negative externalities. Positive externalities arise when activity confers a benefit on a recipient for which the actor, as opposed to the target, has no legal right to compensation.

157. *See* VARIAN, *supra* note 60, at 636 ("[I]f the private costs and the social costs diverge, the market alone may not be sufficient to achieve Pareto efficiency.").

158. This follows from the fact that the concept of surplus is meant to capture the concept of net gain to society. COOTER & ULEN, *supra* note 83, at 42–43 (discussing cost-benefit analysis). It follows that surplus must be the benefits to society of economic activity less the harms to society of economic activity. And the surplus created by a particular firm must be the benefits the firm creates for society less the harms the firm inflicts on society, with those harms stretching from the harms the firm inflicts on its own workers on down to the pollution the firm dumps on pollution victims as part of the firm's activities. For a firm to maximize the surplus that the firm creates, the firm must therefore consider all of the harms associated with the firm's activities, not just those for which the firm is required by law to pay compensation, and balance them against the benefits of the firm's activities.

159. *See* VARIAN, *supra* note 130, at 174 (observing that the wage compensates for the loss of enjoyment associated with leisure).

payment of costs.[160] When CSR urges that firms allocate profits to pay victims who otherwise would go without compensation, CSR is not redistributing profits but rather ensuring that the firm pays all of the costs that the firm creates, including those for which the firm is not legally obligated to pay compensation.[161] The surplus that the firm spends on these externalities is not really surplus but cost, so here, too, a putatively distributive argument turns out really to be an argument about costs.

A third example of CSR's miscategorization of costs is CSR's argument that management must have the authority to allocate profits to team members on an ad hoc basis, instead of paying profits to shareholders, in order to give team members the proper incentive to work hard for the firm.[162] It is rarely clear precisely how much of the value of a team effort is due to any particular team member.[163] If the team decides compensation in advance, argues CSR, then team members may free-ride on the work of others. But if the team decides compensation after the fact, argues CSR, then team members may worry about losing out to other members who want to increase their share of the profits.[164] According to CSR, vesting power in management to decide allocation of the surplus on an ad hoc basis, rather than fixing compensation before or after the fact, creates a neutral arbiter that can monitor shirking and reward hard work.[165] But management can only exercise this power, argues CSR, if shareholder primacy does not require that managers reserve all of their firms' profits for shareholders.

The trouble with CSR's team production argument against shareholder primacy is that it is not really an argument for redistribution of profits. Instead, team production is an argument for realizing managerial and labor efficiencies by incurring additional costs. The argument is in effect that the performance of the team, and presumably therefore the profits the team creates, will increase if management can allocate profits to different team members on an ad hoc basis.[166] All profits allocated to team members to improve performance are then not really profits but only costs, because the allocations are necessary to induce team members to operate the firm efficiently.[167] The real distributive question faced by management is what to do with any profits left over once the teamwork problem

160. These payments are not costs in the sense that the firm must pay them to be able to produce, because the fact that these payments are not compelled by law makes them unnecessary to induce production by the firm. *See* BAUMOL, *supra* note 98, at 593. But they are costs in the sense that they are necessary for the firm to produce efficiently. If the firm does not make these payments, then the firm will not take all harms inflicted by production into account, and therefore will fail to act in ways that maximize surplus rather than profits. *See* VARIAN, *supra* note 60, at 636. To the extent that corporate law is concerned with inducing firms to operate efficiently, corporate law must understand these payments to count as costs.

161. *See* VARIAN, *supra* note 60, at 636.

162. *See* Blair & Stout, *supra* note 25, at 271–76.

163. *See id.* at 249–50.

164. *See id.*

165. *See id.* at 250–51.

166. *See id.* at 270–71.

167. *See* text and sources cited *supra* note 104.

has been solved and all ad hoc payments have been made to the team. The question of how to allocate compensation among team members to solve teamwork problems is a matter of efficiency, not distribution.[168]

II. ANTITRUST AS CORPORATE GOVERNANCE

A. The Distributive Powers of the Board Under Corporate Law

In the absence of an economic reason for which any particular group should get the surplus, the question how the wealth generated by firms should be distributed can be resolved only by interminable debate regarding what distributive justice requires.[169] While that debate festers, however, the distributive question is resolved in the meantime by the law, to which I now turn. It will become clear that, when corporate law and antitrust law are read together, the law opposes shareholder primacy and indeed mandates that firms *minimize* profits. It will also become clear that the Chicago School itself has inadvertently brought about this result.

The state of corporate law today is the product of two opposing forces. The first is a shareholder-primacy-based interpretation of corporate boards' fiduciary duty of care that holds that boards must maximize profits and pay those profits to shareholders. This interpretation operates as a default interpretation of the law, which is then modified by the second force. That second force consists of a multitude of doctrinal attacks levied upon the shareholder primacy interpretation by CSR.[170] Many of these attacks fail to displace the shareholder primacy interpretation, either as a matter of doctrine or effect, but not all.

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168. *See* STOUT, *supra* note 5, at 80–81 (arguing that shareholders benefit when the board can allocate surplus to facilitate team production).

169. *See supra* Section I.B.

170. For the shareholder primacy interpretation, see Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 604 (2006) ("To be sure, shareholders own the residual claim on the corporation's assets and earnings."); Bainbridge, *supra* note 55, at 697; Hansmann & Kraakman, *supra* note 4, at 468; RICHARD A. POSNER & KENNETH E. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION 90 (1980). The shareholder primacy interpretation is reflected in Delaware caselaw. *See* N. Am. Catholic Educ. Programming Found., Inc. 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. Ch. 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) (Am. Bar Ass'n, 2016); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 285 n.30 (1998) (citing that language); Elhauge, *supra* note 5, at 769 n.89 (same); Greenwood, *supra* note 62, at 124 n.66 (same). Gordon Smith notes 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).

For the myriad attempts to undermine the orthodoxy, see STOUT, *supra* note 5, at 32, 39 (any fiduciary duty to maximize profits and pay them to shareholders applies only in the long run, and shareholders have a right to payment by the firm only when the firm declares bankruptcy); Elhauge, Perhaps the highest profile of CSR's attacks is CSR's argument that any fiduciary duty of a corporate board to maximize profits and pay them to shareholders applies only in the long run.[171] But this argument is ultimately of little aid to consumers seeking to escape shareholder primacy's profit-maximizing scythe, however, because even if the argument is correct as a matter of law, the power of the argument to turn back shareholder primacy is predicated on the cost confusion described in Section I.C.[172] Tension between short- and long-term profit maximization arises only when short-run profits are better spent on long-run investments than on payments to shareholders.[173] But when that is the case, the short-run profits that ought to be invested are really costs of production, required to maximize the overall profits of the firm once the proceeds of the long-run investments are taken into account.[174] So in establishing that firms may sacrifice short-run profits for long-run gain, CSR has merely given boards leeway to more fully maximize profits. But CSR has not through this change undermined the basic rule of shareholder primacy that firms must always strive to maximize profits and give them to shareholders.

At the same time that CSR has advanced the long-run profit-maximization argument, CSR has seemed to acknowledge the argument's limitations by suggesting that the real utility of establishing the board's right to engage in long-run profit maximization is actually rhetorical and strategic.[175] CSR has argued that long-run profit maximization enables boards in practice to allocate profits however they wish, even when the allocation does not actually maximize long-run profits, because boards can use claims that they are engaging in long-run profit maximization to insulate their allocation decisions behind the business judgment rule.[176] That rule requires that judges defer to business decisions, including decisions regarding how to spend profits, that are made by the board in good faith.[177] CSR argues in effect that because any profit allocation decision may plausibly be characterized as

supra note 5, at 763–69, 848–52 (fiduciary duties in fact permit both charitable donations and board actions intended to comply with ethical rules that either reduce profits or reduce the amount of profits distributed to shareholders, an interpretation strengthened by state corporate constituency and charitable giving statutes, and any duty to maximize shareholder profits and pay those profits to shareholders exists only when the board is considering an offer to buy out the shareholders); Greenwood, *supra* note 62, at 121 (the power of the board to refuse to pay dividends to shareholders reflects the absence of a shareholder right to profits); Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 297–303 (1994) (the business judgment rule allows boards, at least in practice, to do whatever they want, so long as they do not engage in self-dealing or fail entirely to prepare for important decisions).

171. *See* STOUT, *supra* note 5, at 32.

172. *See id.*

173. Otherwise, maximizing short-run profits will not reduce the net present value of the firm, which includes both short- and long-run profits. *See* BREALEY ET AL., *supra* note 153, at 20–25.

174. *See* text and sources cited *supra* note 104.

175. *See* Smith, *supra* note 170, at 286; Elhauge, *supra* note 5, at 770–71; STOUT, *supra* note 5, at 29–31.

176. *See* Elhauge, *supra* note 5, at 770–71.

177. *See id.*

advancing the profitability of the firm in the very long run, long-run profit maximization permits boards to make bad faith decisions to allocate profits to non-shareholders in a way that cannot be detected and stopped by the courts.[178] While CSR is almost certainly right to argue that in practice long-run profit maximization and the business judgment rule interact to enable boards to allocate profits freely without threat of legal sanction, the argument does not resolve the legal question what the law actually requires of boards. The corporate mission question must be answered by examination of the content of the board's fiduciary duty of care, not by appeal to the inability of courts effectively to enforce that duty.[179]

CSR has also attacked the shareholder primacy interpretation of the duty of care on the ground that the undeniable discretion of the board to decide whether to pay out profits to shareholders in the form of dividends or share buybacks implies that the board has no duty to preserve profits for the benefit of shareholders, and that the board may pay profits out to non-shareholders instead.[180] The trouble with this argument is that it does not actually follow from the discretion of the board to decide whether to pay profits to shareholders that the board may pay profits out to non-shareholders. The board might still have a duty to *preserve* profits for shareholders by not paying profits to others, even if the board has no duty ever actually to pay the profits so preserved out to shareholders.

Such a duty to preserve profits without necessarily paying them out is actually consistent with shareholder primacy. Draining cash from the firm can be costly at times when the firm requires cash to respond to emergencies or to invest. It follows that a board can only faithfully carry out its duty to maximize profits under the shareholder primacy interpretation of the duty of care if the board has discretion to decide when paying profits to shareholders would be least costly to the firm.[181] And

178. *See id.*

179. 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 62, at 135. If that were true, then boards would be free to decide for themselves whether to depart from any shareholder primacy rules that may otherwise be part of the duty of care. But unlike in the case of post-*Lochner* deference, the business judgment rule requires that firms construe their powers in good faith. *See* Gevurtz, *supra* note 170, at 296–303 (identifying good faith as a requirement in each of three interpretations of the business judgment rule); Smith, *supra* note 170, at 285–86 (discussing the shareholder primacy fiduciary duty). As a result, the rule does not permit boards to use long-run profit-maximization arguments in bad faith to mask departures from shareholder primacy, if in fact shareholder primacy is part of the duty of care.

180. *See* REVISED MODEL BUSINESS CORPORATION ACT, *supra* note 170, § 6.40 (providing for distribution of dividends); STOUT, *supra* note 5, at 40; Greenwood, *supra* note 62, at 121.

181. Joseph Schumpeter makes this point well in the antitrust context when he argues that what may look like short-run profits may actually be monies that a firm must keep on hand as insurance against risks to future cash flows. He writes:

> If for instance a war risk is insurable, nobody objects to a firm's collecting the cost of this insurance from the buyers of its products. But that risk is no less an element in long-run costs, if there are no facilities for insuring against it, in which case a price strategy aiming at

discretion regarding when to pay of course implies discretion regarding whether to pay at all.[182] But this discretion is no more than a cost-saving measure designed to ensure that boards turn profits over to shareholders in the least costly way.[183] The discretion does not signal repudiation of the duty to maximize profits and turn them over to shareholders that constitutes the shareholder primacy interpretation of the duty of care.

A similar shortcoming exists in CSR's alternative arguments that the right of shareholders to the firm's profits in bankruptcy, and the right of shareholders to demand that the board obtain the best possible bid to buy out shareholders during takeover attempts, constitute exceptions that prove the rule that in general the board has no duty to maximize profits and preserve them for shareholders.[184] In both bankruptcy and takeover, the lifetime of existing shares in the corporation comes to an end.[185] It follows that in these cases the business decision whether it is more costly to pay out cash to shareholders now or later no longer exists, and board discretion to postpone the payment of profits to shareholders no longer helps to reduce costs and maximize profits. So in these circumstances the payment of profits to shareholders is required, as the shareholder primacy interpretation of the duty of care demands. The fact that in these contexts the law recognizes the right of shareholders to insist upon payment of firm profits therefore supports the shareholder primacy position, instead of undermining it.[186]

CSR has also failed to show how the ethics exemption to the duty of care undermines shareholder primacy.[187] CSR has tried to argue that the exemption's authorization of "responsible" or "reasonable" deviations from the duty of care permits boards to deviate from any duty to maximize profits and turn them over to

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> the same end will seem to involve unnecessary restriction and to be productive of excess profits.

SCHUMPETER, *supra* note 103, at 88. Schumpeter's argument is directed against arguments that firms should charge lower prices and earn lower profits. But the argument works equally well in explaining why firms might want to retain any profits they do generate in the short run and not pay them out to shareholders. For the duty to maximize profits in shareholder primacy, which is mentioned elsewhere in the cited sentence, see Roe, *supra* note 52, at 2066–67.

182. Because a corporation can live forever. *See* Carlos L. Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778, 778 (1952) (observing that "corporate existence is permitted to be perpetual").

183. *See* SCHUMPETER, *supra* note 103, at 88.

184. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986) (stating that when a company is for sale "the directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company"); 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); Elhauge, *supra* note 5, at 848–52; STOUT, *supra* note 5, at 30–31, 39; Greenwood, *supra* note 62, at 124 n.60.

185. *See* STOUT, *supra* note 5, at 30–31, 39.

186. *See id.*; Elhauge, *supra* note 5, at 848–52; Greenwood, *supra* note 62, at 124 n.60.

187. *See* Elhauge, *supra* note 5, at 763–66.

shareholders.[188] But this ethics exemption does not empower boards to stop maximizing profits or to stop allocating them to shareholders. Instead, the exemption does no more than to allow boards to internalize externalities by paying compensation to victims or by spending on precautions to avoid the harms entirely.[189] That means that the ethical exemption allows boards to manage the firm to maximize surplus, rather than profits, by taking all of the costs of production into account in making management decisions, rather than just those costs that the law happens to charge to firms.[190] But the ethical exemption does not establish that, once surplus has been maximized in this way, the firm need not seek to appropriate the largest possible share of the surplus for itself as profits or that the firm need not preserve profits for shareholders.[191]

So much is clear from the examples of ethical conduct provided by the American Law Institute (ALI), each of which involves an expenditure by a firm on a precaution designed to help the firm avoid inflicting an externality on others.[192] Spending on product safety, which is the first example, is spending to reduce externalities if it is to serve as an example of conduct exempt from the requirement that conduct be profitable. Otherwise, the spending would be profitable, which would imply that the precaution averts damages that victims could legally charge to the firm.[193] The same is true for the ALI's second example, steps taken by a firm to honor promises upon which employees have reasonably relied.[194] If keeping promises is not needed to maximize profits, then workers lack the legal right to enforce the promises or the ability to factor noncompliance with promises into the wage rate, which implies that steps taken to honor promises amount to precautions designed to avoid uncompensated harm to workers.[195] Adherence to moral standards of journalism by a newspaper, which is the ALI's final example, also represents the taking of a precaution designed to minimize external harms.[196] If moral journalism is not profit maximizing, and therefore needs an ethics exemption, then taking steps to introduce morality into journalism must avoid harms of misinformation that readers would not otherwise be able to charge to

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188. This language comes from the American Law Institute's Principles of Corporate Governance. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, §§ 2.01(b)(3), 2.01 cmt. f; Elhauge, *supra* note 5, at 763–66. The Principles are not of course binding on the states, but reflect contemporary views on the duty of care. *See id.* at 738 (describing the ALI's Principles as "influential").

189. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, § 2.01 cmt. h. For more on externalities, see *supra* note 156 and accompanying text.

190. *See* VARIAN, *supra* note 60, at 636.

191. Both of which shareholder primacy requires. *See* Roe, *supra* note 52, at 2066–67.

192. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, § 2.01 cmt. h.

193. *See id.*; SHAVELL, *supra* note 88, at 214–15 (discussing precautions and product safety). This follows from the definition of an externality as an uncompensated harm. *See supra* text and sources in note 156.

194. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, § 2.01 cmt. h.

195. *See* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 928 (1985).

196. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, § 2.01 cmt. h.

newspapers.[197] Thus, in each of these examples, the firm internalizes an externality and in none does the firm refuse to maximize profits net of externalities or refuse to preserve those profits for eventual payment to consumers.

But to prevail in the legal struggle against the shareholder primacy interpretation of the duty of care, CSR only needs one successful argument. Fortunately for CSR, one of its arguments against shareholder primacy does stick, undermining almost all of the shareholder primacy interpretation of corporate law and establishing not only that boards may pay profits to non-shareholders, but even that boards have no duty to maximize profits and can choose to charge lower prices in order to leave more surplus to consumers.[198] The argument is that the charitable exemption to the board's duty of care, which gives the board authority to give profits as charity to any group consistent with the public welfare, allows the board to allocate profits in any amount to virtually any group of non-shareholders.[199] The ALI does suggest that the charitable exemption is subject to a reasonableness requirement. But that requirement can most plausibly be read not to prevent the board from paying the firm's entire profit out to non-shareholders, but only to prevent the board from going beyond profits in the economic sense to pay additional value out of the firm to non-shareholders.[200] That is, an unreasonable payment can only be one that pays funds that the firm actually needs to cover costs, such as the costs of providing shareholders with the minimum reward necessary to induce them to invest in the firm, out to non-shareholders. All other payment amounts are reasonable, because reasonableness has no content when applied to distinguish between magnitudes of profit in the economic sense. All profits are the same: every penny represents funds that are not needed for the firm to operate efficiently and which can therefore reasonably be allocated in any amount to anyone, shareholder or non-shareholder alike.[201] Only when a payment exceeds the amount of a firm's profits and starts to cut into funds required to cover costs can a line be coherently drawn between a reasonable and an unreasonable amount of charitable giving.

At first glance, the charitable giving exemption appears not to go so far as to undermine the rule that boards must maximize profits, but rather only to go as far as authorizing boards to pay profits, once maximized at the expense of consumers, to any non-shareholder group the board may wish to favor.[202] CSR, preoccupied

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197. The adherence of newspapers to ethical standards is an example of how social norms induce 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).

198. For the requirement of shareholder primacy that firms maximize profits and pay profits to shareholders, see Roe, *supra* note 52, at 2066–67.

199. *See* Elhauge, *supra* note 5, at 763–69; PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, § 2.01(b)(3).

200. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, § 2.01(b)(3).

201. *See supra* text and sources in notes 104, 105.

202. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, § 2.01(b)(3).

with the division of profits between firm insiders and largely oblivious to the consumer interest, has certainly not attempted to push the charitable giving exemption beyond this boundary.[203] But the exemption in fact extends far beyond it, to authorize boards to choose not to maximize profits and instead to leave surplus entirely to consumers through the charging of lower prices. A board interested in allocating surplus to consumers can do so by first charging consumers the highest possible prices to satisfy the board's duty to maximize profits, and then using the charitable giving exemption to pay the profits back to consumers in the form of cash rebates.[204] Indeed, because there is nothing in the law that would prevent the board from reducing the time between the payment and the rebate to the smallest time possible, the board could simply refund a customer's money as soon as payment takes place at the point of sale. Or the board could stipulate that as a condition of undertaking any purchase the customer must agree that the purchase price represents a net price that reflects a higher profit-maximizing price offset by a rebate. That would allow the board plausibly to claim to be simultaneously carrying out its duty to maximize profits and exercising its right to engage in charitable giving to consumers. Thus for all intents and purposes the charitable exemption swallows the requirement that boards maximize profits.

Reading the charitable giving exemption to swallow the duty to maximize profits threatens to violate the old canon of statutory interpretation that requires that two rules be read to give effect to both.[205] But while it is true that the rule requiring the board to maximize profits, and hence to minimize the share of surplus available to consumers, would seem to be rendered ineffective by a rule permitting the board to reallocate profits to consumers, the threat is illusory. The profit-maximization requirement remains meaningful, even when the board redirects profits to consumers through lower prices, because the profit-maximization requirement still forces the firm to continue to engage in two activities associated with profit maximization that do not involve charging consumers the highest possible prices: the acts of minimizing costs and maximizing product value.[206] Without the profit-maximization rule, a firm could choose to allow costs to rise or product quality to fall, thereby reducing profits, even if the firm intended to

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203. *See supra* Sections I.A, I.B.

204. Consumers are legitimate recipients of corporate charity. The ALI contemplates charitably giving for the "public welfare, [as well as] humanitarian, educational, and philanthropic purposes." *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 62, §§ 2.01(b)(3), 2.01(b)(3) cmt. h. Consumers are the public.

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

206. Reducing costs and increasing the value of products to consumers are examples of "dynamic efficiencies" that 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 (1995).

redistribute any profits the firm would still be able to earn back to consumers after earning them.[207] Although the charitable giving exemption allows boards to charge low prices and forego extracting surplus from consumers as profits, the exemption does not absolve boards of the responsibility embodied in the profit-maximization rule to create the largest possible surplus, the largest possible potential profits. The profit-maximization rule ensures, in other words, that firms wishing to direct their profits to consumers nevertheless continue to operate efficiently, as they would be required to do were they to keep all profits for shareholders. That hardly amounts to reading all content out of the profit-maximization requirement in the duty of care.

Thus what CSR has accomplished is to so batter the shareholder primacy interpretation of the duty of care that today the board has neither a duty to preserve profits for shareholders nor even a duty to maximize profits, though the board does still have a duty to operate the firm efficiently. But what CSR has not achieved, and indeed has not sought, is to read the duty of care to impose an affirmative duty on boards to *minimize* profits for the benefit of consumers. Antitrust law, however, does that.

B. The Antitrust Duty to Minimize Profits

In the middle of the 20th century, courts and enforcers understood the goal of antitrust law to be the promotion of competition, regardless of the consequences for distribution or efficiency.[208] 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 law today.[209] This new mission, known as the consumer welfare standard, implies that antitrust law must both maximize surplus and minimize prices, to ensure that consumers receive the largest surplus possible.[210] In practice, however, courts and enforcers have implemented the new

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207. That is, profit maximization forbids firms from engaging in waste, even when firms turn all of their profits over to consumers. *See* W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 88–89 (4th ed. 2005) (discussing waste of this kind in the monopoly context).

208. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 386 (2014).

209. *See* Salop, *supra* note 29, at 338–47; Vaheesan, *supra* note 208, at 395–99.

210. It is more commonly said that the goal of antitrust is to protect consumer surplus against attempts to reduce it below the competitive level. *See, e.g.*, Salop, *supra* note 29, at 336. But there is no principled way to carry out that goal other than by striving to maximize consumer surplus. The consumer welfare standard must be understood to require consumer surplus maximization and profit minimization, not just maintenance of consumer surplus at the competitive level, because the size of the surplus enjoyed by consumers under competitive pricing is an arbitrary function of a firm's marginal costs. *See* FRIED, *supra* note 42, at 134 (observing that the "actual incidence of rents" depends on the "shape of the cost curve"). If marginal 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 profits. (To see why consumer surplus can be very low at the competitive price, consider the following example. Suppose that the cost of producing a first unit of output is $1.00, the cost of producing a second unit is $10.00, and the cost of producing a third unit is $12.00. Suppose further that consumers uniformly place a value of $10.02 per unit on the output. Then at the competitive price of $10.01 per

mission only by reducing the vigor with which they condemn anticompetitive practices, to ensure that excessive competition does not prevent firms from covering the fixed costs, including costs of innovation, required for firms to maximize surplus by producing the best possible products.[211] But courts and enforcers have done nothing to prevent this enervation of antitrust law from allowing firms to raise prices above costs and thereby to deny consumers the largest possible share of the enlarged surplus that the weakening of antitrust enforcement has been allowing firms to generate.[212]

For example, to ensure that firms can pay the costs of being the best, antitrust law today does not prohibit the sale of superior products under any circumstances, a policy that allows some firms to appropriate the surplus generated by those products for themselves.[213] Sellers of superior products have the power to charge high prices for them because competitors, lacking equally appealing offerings, cannot lure consumers away from the superior products, even by charging lower prices.[214] High prices for superior products are no problem from the perspective of consumer welfare so long as sellers need the high prices to cover costs, particularly the costs of research and development required to create superior products.[215] But if the prices sellers charge are higher than necessary to cover costs—and there is no reason to suppose that the power created by the sale of a superior product magically ends as soon as prices rise above costs—sellers deny consumers access to a portion of the surplus generated by superior products.[216] A superior-product seller's ability to extract surplus from consumers through above-cost pricing conflicts with

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unit, the firm will produce and sell two units and generate $9.02 of profit. Consumer surplus, by contrast, will be a vanishingly-small $0.02.) In such a circumstance competition itself offers little protection for consumers. A standard that puts consumer welfare first must do better than competitive pricing, at least when firms are constrained to charge uniform prices. (When firms are not constrained to charge uniform prices, as is increasingly the case in the information age, competition should drive prices down to costs, and thereby maximize consumer surplus, eliminating the distinction between protecting the competitive level of consumer surplus and maximizing consumer surplus. *See infra* Section II.D. The fact that the two interpretations of the consumer welfare standard are converging for technological reasons on consumer surplus maximization is itself an independent reason to understand consumer surplus maximization as the true goal of the consumer welfare standard.) The focus on the distribution that prevails at the competitive price is a relic of the days when antitrust's goal was the promotion of competition, rather than consumer welfare. *See supra* note 208 and accompanying text. The interpretation of the consumer welfare standard as requiring the maximization of consumer surplus has been endorsed by other scholars. *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, COLUM. L. REV. 975–76 (2016) (suggesting that the alternative would lead to absurd results); Aaron Edlin et al., *The* Actavis *Inference: Theory and Practice*, 67 RUTGERS L. REV. 585, 609 (2015) (assuming a maximization standard in evaluating reverse payment patent settlements). On an unrelated note, there is sometimes a trade-off between price minimization and surplus maximization, the consequences of which for an antitrust duty to minimize profits are discussed in Section II.D.

211. *See* Woodcock, *supra* note 14, at 1758–60.

212. *See id.* at 1759–60.

213. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

214. *See* Demsetz, *supra* note 80, at 2.

215. *See supra* Section I.C.1.

216. *See* Woodcock, *supra* note 14, at 1759–60; Woodcock, *supra* note 12, at 126–36.

antitrust's goal of maximizing consumer surplus, but today antitrust refuses to do anything about the conflict.[217]

The same is true when competitors collaborate to produce superior products through research and development joint ventures, or when a firm imposes restrictions on retailers or suppliers designed to improve the end product delivered down through the supply chain to consumers.[218] Antitrust today permits these activities, when in mid-century it would not, on the theory that these activities improve product quality and therefore the size of the surplus that firms can generate for consumers.[219] But antitrust does not step in when firms abuse the power that the resulting product improvements confer on them to raise prices and keep the extra surplus they generate through product improvements for themselves.[220]

Antitrust must do more to remain faithful to its mission of maximizing consumer surplus, by imposing a duty on businesses to choose prices to minimize profits.[221] That is, antitrust must 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 the surplus that the firm generates.[222] Only in that way will firms both operate efficiently in the sense of maximizing surplus and ensure that consumers enjoy all of the surplus generated by

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217. *See* Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2311–12 (2018). For antitrust's goal of maximizing consumer surplus, see sources cited *supra* note 210.

218. *See* HOVENKAMP, *supra* note 106, at 222–31, 412–20, 478–84, 498–505.

219. Under the prevailing "rule of reason" standard of review, these practices all escape condemnation so long as they are essential to the creation of efficiencies, such as product improvements. *See* Hemphill, *supra* note 210, at 937–39 (discussing least restrictive alternatives analysis and the rule of reason). Courts almost never condemn vertical mergers, for example, particularly when they lead to efficiencies. *See* HOVENKAMP, *supra* note 106, at 430. Courts treat exclusive dealing, a soft form of vertical integration, with less severity than they did in the 1970s, particularly when efficiencies can be shown. *See id.* at 484–86. And the courts have done away with bans on restrictions imposed by manufacturers on their distributors, approving of such restrictions when efficiencies can be shown. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 900–03, 906–08 (2007). Courts also allow research and development joint ventures when efficiencies can be shown. *See* HOVENKAMP, *supra* note 106, at 222–28.

220. Under the prevailing least-restrictive-alternatives interpretation of the rule of reason, a practice that both increases surplus and leads to above-cost pricing that appropriates part of the surplus for firms violates the law only if there is a way to achieve the same increase in surplus without conferring on firms so much market power as to permit firms to charge above-cost prices. *See* Hemphill, *supra* note 210, at 937–39. But short of forcing firms to share their superior products with competitors, which can lead to cost increases due to a loss of economies of scale, or excessive competition and below-cost pricing that ultimately reduce surplus, there is rarely a way to limit the power of firms that undertake vertical or horizontal restrictions for purposes of producing superior products. *See* Woodcock, *supra* note 12, at 161–62 (discussing the impossible lengths to which antitrust would need to go to restructure industries in order to ensure that competition leads to at-cost prices); HOVENKAMP, *supra* note 106, at 321–22. The only solution to this problem, and the one advocated in this Section, is to read the consumer welfare standard to ask firms not to exercise their market power, by choosing to charge at-cost prices and thereby to minimize their profits.

221. *See* Woodcock, *supra* note 14, at 1770–71.

222. *See id.*

firms. To avoid putting the courts in the position of setting prices, this duty would be enforceable with nominal damages alone, and would influence behavior primarily by drawing the attention of the public to high prices and by prevailing on the sense of duty of firms to follow the law.[223] 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 surplus but would avoid driving prices below costs, 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.[224]

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223. *See id.* at 1770–74. By pegging the price a firm may charge to the firm's actual costs, a duty to minimize profits avoids all of the problems faced by rate regulators in choosing regulated rates. *See* VISCUSI ET AL., *supra* note 59, at 539–54 (discussing the shortcomings of rate of return regulation, among many other forms of price regulation). A duty to minimize profits can do that, however, only because it relies upon the good faith of firms in identifying their own costs and charging prices equal to them. For the Legalism of administrative rate regulation, an antitrust duty to minimize profits therefore substitutes the Confucianism of a duty that is not meaningfully punishable at law. *See* NEEDHAM, *supra* note 37, at 312 ("The Legalists laid all their emphasis on positive law . . . . As against this the Confucians [thought that] right behavior [should] be taught, rather than enforced, by paternalistic magistrates.").

224. *See* Woodcock, *supra* note 14, at 1774–77. Imposing restrictions on prices, without requiring that firms strive to maximize product value, might be thought to create an incentive for firms to reduce costs by degrading product quality in order to recapture profits lost due to the pricing restrictions. *See* David E. M. Sappington, *Regulating Service Quality: A Survey*, 27 J. REG. ECON. 123, 130–31 (2005). Firms are unlikely to degrade quality in response to a profit-minimization duty, however, because the duty requires that firms price at cost, so any cost reductions created by degrading quality would force the firm to reduce price further, preventing the firm from capturing any profits. More importantly, the weakness of the sanction for violating the duty to minimize profits, which sanction would be the payment of nominal damages, means that firms wishing to avoid the duty to minimize profits would not need to resort to quality degradation, but could simply ignore the duty and continue to charge above-cost prices. *See* Woodcock, *supra* note 14, at 1770–74.

The social obloquy associated with a firm's insistence on charging higher prices in the teeth of a federal judgment indicating that the prices are too high might itself be treated as a cost of the firm, one that might induce the firm to acquiesce in the charging of lower prices even when the court has made a mistake and lower prices are inefficient. Reputational damage is best treated not as a cost, however, but as a reduction in demand for a firm's products. To the extent that a firm's defiance of a court's decision that prices are too high harms the firm, it is because the court's decision induces some consumers to reduce demand for the product. Such reductions might in fact cause the firm to acquiesce in the charging of low prices, but the fact that this acquiescence would be caused by a change in demand makes it difficult to view the low prices as really inefficient after all. For the efficiency of charging higher prices lies in the higher prices' ability to stimulate investment that increases product quality and consumer demand. If consumer demand instead falls when higher prices are charged—even if only as a result of the information provided to consumers by the judicial decision—one must conclude that consumer assessments of the product offered to them have changed and any improvements to the product arising from the higher prices are no longer as attractive to consumers, given the higher prices, as they initially appeared to be.

That is, in order for a judge's incorrect decision to prevent a firm from continuing to charge high prices, consumers must accept the judge's incorrect decision as correct. But in a free enterprise system built on the worship of consumer sovereignty, the decision of consumers to accept the judge's decision as correct, particularly given the opportunity of the firm to make its own case directly to consumers regarding the fairness of the prices that the firm charges, must be considered authoritative. *See* Woodcock, *supra* note 217, at 2334–36 (discussing the consumer sovereignty foundations of the free market system). The only exception would be if the court's incorrect decision has not merely informational, but manipulative, effects upon consumer decision-making processes, something that is

Were antitrust to recognize such a duty to choose a consumer-surplus-maximizing, profit-minimizing price, the consequences for the debate over corporate mission would be profound. Antitrust law 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 prices and redistribute surplus to itself in the form of higher profits.[225] Under my proposed duty to minimize profits, antitrust law would now also require that firms choose prices equal to their costs, to the end of maximizing consumer surplus and therefore minimizing profit.[226] That is, if antitrust law's consumer welfare mission is taken seriously and a duty to price at cost is imposed, then profit *maximization* would become illegal, and punishable by nominal damages under the law and general opprobrium in the court of public opinion.[227]

In this way, antitrust would resolve the long-running debate over corporate mission. Because, if firms do not generate profits, there is no question which constituent of the firm is entitled to a firm's profits.[228] The answer is: none. Because there should be no profits. All of the surplus generated by the firm's productive activities should go to consumers, not shareholders, managers, or workers. This does not mean, however, that non-consumer contributors to the firm would abandon their posts or work less hard. The firm could still pay these other contributors their costs, defined as the minimum that would be required to make them contribute with alacrity.[229] There would also still be shareholders and a possibility of dividends. To the extent that dividends would be necessary to encourage equity investment, the dividends would count as costs, not profits, and so the firm could still pay them out.[230] The firm would also be allowed to continue

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difficult to credit given the decidedly unseductive way in which courts publicize their decisions. *See id.* at 2314 (discussing the inefficiency of manipulative advertising).

In other words: given that the remedy is nominal damages, the decision of the court that a price is too high serves no purpose other than to help consumers reach their own independent judgment regarding whether that price is too high. As such, any effect of an erroneous decision by the court upon the firm must run through consumers, but because in the free market system consumers are the ultimate authority regarding what is and is not a fair price, a judge's error can never adversely affect a firm. *See id.* at 2334–36. In a system that recognizes consumer sovereignty, the buck stops with consumers, and their decisions, unless the result of manipulation, must always be treated as correct and indeed efficient. *See id.* at 2314.

225. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 596–97, 607–10 (2003) (discussing antitrust supremacy); HOVENKAMP, *supra* note 106, at 158–59 (discussing price fixing).

226. *See* Woodcock, *supra* note 14, at 1770–71.

227. *See id.*

228. For a discussion of why the corporate mission debate amounts to a debate about which group should get the firm's profit, see *supra* Section I.A.

229. For the distinction between cost and profit, see *supra* Section I.C.1.

230. *See supra* text accompanying notes 100, 107. The continuing ability of corporations to pay shareholders the dividends required to induce investment ensures that under my proposed duty to minimize profits the distinction between for-profit and non-profit corporations would remain. For-profit corporations would continue to be authorized to pay dividends or make other cash distributions to shareholders, so long as the distributions would be necessary to attract investment.

to pay any costs that the firm might need to incur on an ad hoc basis in order to reward teamwork by managers or workers, because those are costs that must be incurred for the firm to produce efficiently, and therefore do not count as profits. The teamwork concerns of CSR could therefore still be taken into account.[231] The firm would also still be able to spend the firm's quasi-profits in whatever ways necessary to maximize surplus, because such expenditures count as costs.[232] The only difference is that now the firm would also need to charge low prices to ensure that consumers take all of what is left over after costs are covered.

My proposed antitrust rule, that boards have a duty to minimize profits and by extension to maximize consumer surplus, would not displace current antitrust limits on anticompetitive conduct, such as the rule against price fixing, but would add to the law's kit for maximizing consumer surplus a new, complementary, tool.[233] That tool would permit the law to discourage firms from charging above-cost prices in situations in which traditional antitrust rules are toothless, such as in the case of sale of a superior product. As already described, in that case traditional antitrust prohibitions on anticompetitive conduct are inappropriate because the anticompetitive conduct—the act of fielding a competitive product—is actually good for consumers.[234] When firms achieve power to raise prices by means prohibited by traditional antitrust prohibitions on anticompetitive conduct, enforcers could still bring cases based upon those prohibitions, and could still seek associated remedies directed at bringing prices down through increased competition.[235]

Whereas non-profit corporations would continue to be prohibited from declaring dividends or otherwise distributing to investors any funds remaining after creditors are paid. *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 § 14.05(d) (AM. BAR ASS'N, 2008) (barring any member or affiliate of a charitable corporation from receiving a distribution upon dissolution other than as payment for services rendered).

231. *See supra* text accompanying note 162.

232. *See supra* text accompanying note 109.

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

234. *See* Woodcock, *supra* note 217, at 2309–14 (discussing "innovation primacy" in antitrust law). Fielding a superior product is anticompetitive because doing so drives sellers of inferior products from the market. *See id.* at 2309. But fielding a superior product is nevertheless good for consumers relative to the alternative of having a competitive market of inferior products and no superior product at all. *See id.* at 2312. Traditional antitrust remedies seek to restore competition to the market, but in the case of competition harmed by the fielding of a superior product, that can be done only by suppressing the product, with attendant harm to consumers, or forcing the seller to share the product with competitors, which can lead either to higher costs due to the loss of economies of scale, or to excessive competition that drives prices below the levels required by the seller to recoup innovation costs, chilling innovation in the long run. *See* HOVENKAMP, *supra* note 106, at 321–22, 339–40; *cf.* Woodcock, *supra* note 12, at 154–55, 158–59. A duty to minimize profits avoids the dangers of competition-based remedies in this context.

235. *See* POSNER, *supra* note 233, at 33–48 (providing an overview of traditional antitrust rules and remedies).

My proposed duty to minimize profits would greatly advance the cause of efficiency, even in these more traditional cases. That is because competition is a wasteful enterprise, requiring markets to support duplicative operations, many of which will ultimately fail.[236] Competition can lead to innovation, and when that occurs the gains often more than justify the costs. But in cases in which the primary purpose of promoting competition is to keep prices low, and many traditional antitrust cases have this character, imposing a rule of profit minimization, if the rule is in fact honored in practice, would generally be less wasteful than encouraging new firms to organize and enter the market in the hope that competition between them will eventually lead to lower prices.[237] My proposed profit-minimization rule would be available to enforcers in such cases as an alternative to the pursuit of traditional antitrust remedies aimed at promoting competition.

None other than the great case of *Dodge v. Ford*, over which shareholder primacy advocates and CSR have done battle for decades because of the Michigan Supreme Court's explicit endorsement of shareholder primacy therein, actually serves to illustrate by omission the advantages of my proposed profit-minimization duty over policies focused solely on the promotion of competition.[238] *Dodge v. Ford* was a crypto-antitrust case. The Dodge brothers, shareholders in Ford, wanted to use their Ford dividends to cover the costs of creating a new car company to rival Ford.[239] The great inventor of the Model T responded by cutting prices right down to costs and using the corresponding drop in profits to reduce the dividend to the bare minimum required to pay the cost of capital, starving the Dodges of financing.[240] But if Ford had been successful, he could not possibly have harmed consumers, because Ford did exactly what an antirust duty to minimize profits would require: he charged prices no higher than necessary to cover costs, minimizing the firm's profits and maximizing consumer surplus.[241]

236. *See* SCHERER & ROSS, *supra* note 100, at 97–102.

237. For the gains of innovation usually exceeding the costs, see Woodcock, *supra* note 217, at 2313 nn.200–01.

238. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 683–84 (Mich. 1919); STOUT, *supra* note 5, at 24–27; Smith, *supra* note 170, at 315, 315 n.186.

239. *See* Rock, *supra* note 15, at 520–22.

240. *See id.* To be precise, Ford cut the price of the Model T by enough to reduce annual accounting profits by two thirds, and planned to plough the company's existing cash hoard of nearly $60 million into constructing new production plants needed to serve the increased demand created by the lower prices. *See Dodge*, 170 N.W. at 671–72. If the remaining annual one third of accounting profits may be supposed to have been needed to cover research and development costs, to insure Ford against business uncertainty, and the like, then Ford cut prices down to costs in the economic sense. *See supra* Section I.C.1. The one third of accounting profits would also no doubt have been used in part to pay the "regular" annual dividend of 5%, which Ford retained, but that dividend must be understood to constitute the cost of capital: the bare minimum Ford would need to pay to satisfy the expectations of investors and ensure that Ford would be able to tap equity markets in the future if need be. *See Dodge*, 170 N.W. at 671; *cf.* Greenwood, *supra* note 62, at 123 (arguing that there is no cost of equity capital because corporations have no legal duty to use dividends to compensate shareholders for the money they invest in corporations).

241. *See supra* text accompanying note 222.

The only way Ford's choice to harm competition by starving the Dodges could have harmed consumers is if Ford had prevented the Dodges from bringing additional innovation to the market, because innovative products increase consumer surplus. In the event, Dodge and the many other brands that followed Ford into the car market did not bring innovation, and a case can be made that Ford, which built more reliable cars and sold them at reasonable prices, actually went on to become a victim of a style of marketing-based competition involving flashy but shoddily-crafted vehicles that ultimately reduced the level of innovation in the car market, leaving the market vulnerable, decades later, to better-quality imports from Europe and Asia.[242] If the court's goal in ordering Ford to pay the dividend was to induce competition that would do no more than keep prices low, the court should have ruled for Ford, which was already charging low prices, to the great benefit of consumers, and spared the waste involved in assembling a whole new car company in order to achieve the same result.[243] If the court had taken that approach, the court would have had no need to recognize a shareholder right to dividends or deliver the endorsement of shareholder primacy for which the case is known today.

An entire generation of economists and corporate law scholars have spent their careers trying to shore up shareholder primacy by finding ways to ensure that managers maximize profits, despite the obvious conflict of interest associated with managers' duty under shareholder primacy to turn those profits over to shareholders.[244] Were the courts to recognize an antitrust duty to minimize profits, this agency problem would remain, but now it would be consumers, rather than shareholders, for whom managers would need to be made to work effectively. The challenges policymakers face in resolving both agency problems are similar. Consumers, like shareholders, are often numerous and their ability to organize to monitor managers is limited.[245] Consumers, like shareholders, often also have only a short-term relationship with the firm, or one that involves only a small financial interest, making consumers unwilling individually to invest the resources necessary to supervise managers.[246] Consumers, like shareholders, often influence the firm

242. *See* F.M. SCHERER, INDUSTRY STRUCTURE, STRATEGY AND PUBLIC POLICY 283–85, 291–95, 322 (1996) (discussing the use of annual model changes as a marketing method in the car industry, as well as the quality-based success of Japanese imports). The Dodges in fact initially argued that Ford had violated the antitrust laws, but a lower court rejected the claim. *See* Rock, *supra* note 15, at 522.

243. *Dodge*, 170 N.W. at 685.

244. *See generally* David E. M. Sappington, *Incentives in Principal-Agent Relationships*, J. ECON. PERSP. 45 (1991) (discussing work by economists on the principal-agent problem and noting connections to corporate governance); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 8–10 (1998) (discussing legal arrangements that reduce agency costs). For more on the agency problem, see *supra* Section I.C.2.a.

245. *See* Bainbridge, *supra* note 170, at 613 (observing that shareholders have a "collective action" problem).

246. *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 boards); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1414 (1993).

only by making purchase and sale decisions.[247] 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, corporate law gives consumers no direct authority at all over management.[248] Consumers would have a compensating advantage under my proposed duty to minimize profits, however, one that shareholders lack in their own efforts to control managers: two enforcement agencies that would be able to sue to vindicate consumers' right to low prices.[249]

One striking result of a duty to minimize profits would be the prohibition, as a general matter, of the extraction of rent in the traditional economic sense.[250] Rent is the profit generated by a seller who rations access to a good that is in limited supply by raising prices.[251] Consider the classic example of land.[252] The supply of land is fixed, and the cost of land is zero, since no one produces land, it is just there.[253] 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.[254] By charging high prices for their land, landowners can drive some buyers from the market and thereby ration access to their land to those having the highest willingness to pay for it.[255] But because the ration prices charged by landowners are necessarily above the landowners' costs, they generate profits at those market-clearing prices.[256] Those profits are rents.[257] An antitrust duty to minimize profits would require landowners to use any other equally efficient means available to them to identify the buyer who places the highest value on the land and then to charge that buyer

247. *See* Hansmann, *supra* note 246, at 283 (expressing skepticism that the market for corporate control allows shareholders to discipline managers); Green, *supra* note 246, at 1414 (noting that shareholders can sell their shares at any time).

248. *See* REVISED MODEL BUSINESS CORPORATION ACT, *supra* note 170, § 8.08 (describing the default right of shareholders to vote to remove directors); Strine, Jr., *supra* note 5, at 766 (emphasizing that the voting rights of shareholders give them the power to compel managers to maximize shareholder wealth).

249. *See* HOVENKAMP, *supra* note 106, 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.

250. *See* VARIAN, *supra* note 60, at 412–13 (defining economic rent).

251. *See id.*

252. *See id.*

253. *See id.*

254. *See id.* at 7 (considering what happens when price is so low that demand exceeds supply).

255. *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 42, 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 60, at 413. By assumption, that cost is zero.

256. *See* VARIAN, *supra* note 60, at 412–13.

257. *See id.*

the zero price that equals the landowner's cost of producing the land.[258] Only in that way would a landowner, if a corporation, comply with its duty to maximize surplus by selling to the buyer who places the greatest value on the land, but at the same time minimize profits by charging the buyer the lowest possible price.

C. Antitrust Preemption of Corporate Law

My proposed antitrust duty to minimize profits would be grounded in section 2 of the Sherman Act, which prohibits monopolization.[259] As federal antitrust law, the duty would preempt any duty of the board under state corporate law to maximize profits for the benefit of shareholders, because the Supremacy Clause of the U.S. Constitution preempts state law that conflicts with federal law.[260] The courts have applied preemption sparingly in the antitrust context, preempting state law only when the conduct authorized by the particular state law in question always violates federal antitrust law.[261] But any state corporate law grant of authority to boards to maximize profits or pay profits to anyone other than consumers would meet that preemption standard were courts to read a duty to minimize profits into antitrust law, because profit maximization necessarily always violates a rule requiring profit minimization.

The fact that an antitrust duty to minimize profits would preempt state corporate law rules regarding the duty of care does not actually settle the question whether an antitrust profit-minimization duty could be enforced in contravention of state laws, because the courts have read the antitrust laws to confer immunity

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258. *See* Ramsi A. Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, 105 IOWA L. REV. 1759, 1784–93 (2020) (arguing that in the information age many efficient alternatives to rationing with price now exist). True, landowners would at first be able to recoup the prices they paid in purchasing their land, which prices would count as fixed costs and therefore be chargeable to buyers under a duty to minimize profits. *See supra* Section I.C.1. But because a duty to minimize profits would only permit landowners to add to that amount the slightest sliver of additional profit as an incentive to transfer their land to the buyer who places the greatest value upon it, landowners would not be able to capture most of the appreciation in value associated with their land, and over time that would cause the passed-along cost—the dead hand of the world that existed before the arrival of the profit minimization duty—to decline into insignificance and eventually vanish entirely. *See id.*

259. 15 U.S.C. § 2 (2018); Woodcock, *supra* note 14, at 1770–71.

260. U.S. Const. art. VI, § 2. The courts recognize three kinds of exercise of Supremacy Clause power: (1) express invalidation of state law, as when a federal statute declares a particular state law void; (2) 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 precludes state regulators from imposing their own design standards; and (3) 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. R.R. Friction Prods. Corp., 565 U.S. 625, 630–31 (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*, 59 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 law and state law are considered to be in conflict, permitting antitrust law to displace state law.

261. *See* HOVENKAMP, *supra* note 106, at 794–95 (sources cited therein).

from preemption on state rules that are part of an industrial policy that is actively being implemented by the state.[262] The key factor that determines whether a state rule benefits from this "state-action" immunity is whether the state's bureaucracy actively supervises implementation of the rule at issue.[263] If not, and if in particular the rule appears intended to do no more than give a state imprimatur of legality to essentially private anticompetitive conduct, then immunity does not apply and the rule is preempted.[264] 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 cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.[265]

By allowing firms to choose their own above-cost prices and profit levels, state corporate law regimes today authorize precisely this kind of unsupervised private conduct, conduct that would necessarily violate an antitrust duty to minimize profits. 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.[266] Although the courts do sometimes regulate board compliance with the duty of care, board pricing decisions are subject to the business judgment rule, pursuant to which courts allow firms almost unlimited discretion in their decision-making.[267] 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, or the profits they

262. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102–05 (1980); HOVENKAMP, *supra* note 106, at 794. This is known as "state action" immunity from the federal antitrust laws. *See id.* at 797.

263. *See* Parker v. Brown, 317 U.S. 341, 351–52 (1943); HOVENKAMP, *supra* note 106, at 800, 805–10.

264. 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 106, at 800. This clear-authorization requirement mandates that the authorization be rooted in statute, rather than in regulations issued by state administrative agencies, in order for the authorization to qualify for immunity. *See id.* at 801–02. For purposes of argument, I assume that state corporate law statutes create the requisite clear authorization for boards to charge above-cost prices in violation of an antitrust duty to minimize profits. The failure of that assumption would provide additional grounds for implementing federal preemption of state corporate law with respect to the distribution of the surplus by firms.

265. *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 105–06.

266. *See* 1A FLETCHER, *supra* note 230, § 159 (discussing the inability of the Secretary of State in "many jurisdictions" to reject the filing of a corporate charter).

267. *See* Gevurtz, *supra* note 170, 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).

generate, to the state, making supervision impossible.[268] State action immunity does not apply, and my proposed antitrust duty to minimize profits would therefore preempt state corporate law rules regarding the maximization and distribution of profits.

D. Efficiency Concerns

For a duty to minimize profits to be efficient, the rule must require that firms maximize surplus as part of the process of turning surplus over to consumers, because lower surplus reflects less efficient operations. This presents a problem for the use of antitrust law's consumer welfare standard as the basis for imposing a profit minimization duty on firms, because antitrust law's consumer welfare standard does not take efficiency into account. The standard requires that firms pursue maximization of consumer surplus even when doing so would reduce overall surplus and therefore efficiency.[269] Thus unlike both shareholder primacy advocates and CSR advocates, who argue that their favored distributions of wealth are efficient, the antitrust laws themselves throw efficiency to the winds and favor consumers no matter what the consequences for efficiency, albeit with the understanding that what maximizes consumer surplus usually maximizes total surplus too.[270] By contrast, an efficient duty to minimize profits can insist upon profit minimization only when profit minimization does not reduce surplus, because efficiency means the maximization surplus.[271] In general, the two standards, antitrust law's consumer welfare standard, which puts maximization of consumer surplus first, and the true profit-minimization standard that puts efficiency first, will dictate the same firm behaviors.[272] But in two important cases they do not, and in those cases literal application of the consumer welfare standard would sacrifice efficiency for distribution.

The first case in which application of antitrust law's consumer welfare standard can be inefficient arises when a firm inflicts externalities: harms for which the firm does not pay compensation.[273] Boards that elect to pay compensation to victims, including victims who have no legal right to compensation, will operate their firms efficiently, because they will take all of the costs associated with production into account in making decisions, and so when they act to maximize

268. *See Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 99.

269. For the efficiency of profit minimization, see *supra* Sections I.C.1, I.C.2.a, II.B. For the consumer welfare standard, see Salop, *supra* note 29, at 336.

270. *See id.* For the appeals of advocates of shareholder primacy and CSR to efficiency, see *supra* Section I.B.

271. Part I established that the distribution of surplus and surplus maximization are analytically separate problems. That remains true. But as will become clear in this Section, law or technology may limit a firm's ability to achieve a particular desired distribution of the surplus created by the firm. When that is the case, the solution is not to effectuate redistribution anyway by sacrificing surplus, but to alter the law or improve the technology.

272. *See* Baker, *supra* note 85, at 516.

273. For more on uncompensated harms, see text accompanying note 155.

profits they will maximize surplus as well.[274] Consistent with this efficiency rationale, corporate law permits—though does not require—boards to pay compensation for harms that the firm is not legally required to compensate, even if doing so reduces profits.[275] Antitrust law, however, has traditionally had little tolerance for the charging of higher prices in order to provide compensation for externalities. A firm cannot, for example, defend against the claim that it has engaged in price fixing in violation of section 1 of the Sherman Act by arguing that the firm needed to fix higher prices in order to generate revenues with which to compensate victims of the firm who would not be able to obtain redress in court.[276] By enabling the firm more fully to take the costs of its productive activities into account, such price fixing might actually result in more efficient production by the firm, but the consumer welfare standard requires that enforcers put the interests of consumers before efficiency.[277]

If the courts were to impose an antitrust duty on boards to minimize profits, that duty, too, would ignore the problem of externalities, and require firms to reduce prices even when higher prices would be required to provide compensation for externalities.[278] Firms would effectively be prohibited from internalizing externalities, and so their production decisions would tend not to maximize surplus, an inefficient result.[279] Consider, for example, a firm that must choose between creating a good worth $10.00 to consumers at a cost of $3.00 in harm to others and creating a good worth $10.00 to consumers at a cost of $2.00 in harm to others. The profit-minimizing firm should create the $2.00 good and sell it at a price of $2.00, because that maximizes surplus at $8.00 and turns all of that surplus over to consumers through the charging of an at-cost price. But if the $3.00 in harm is not compensable at law, while the $2.00 is compensable, the consumer welfare standard would require that the firm create the $3.00 good, because the absence of a duty to compensate for the harm would allow the firm to give the good away for free, conferring a full $10.00 of value on consumers, $2.00 more than if the firm were to create the $2.00 good. The result is a reduction in surplus from $8.00 to $7.00, because externalities are genuine harms, and therefore reduce surplus, even if neither firms nor consumers are required to pay compensation for them. While existing antitrust practice supports this result, there is no reason for which the courts could not change the consumer welfare standard to require that consumer surplus be calculated net of all costs, including reasonably calculable and identifiable

274. *See* VARIAN, *supra* note 60, at 632–37.

275. *See supra* Section II.A.

276. 15 U.S.C. § 1 (2018). That is, I am aware of no court that has recognized a "covering the cost of externalities" antitrust defense. *See* Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 879–82 (2000) (calling for recognition of such a "market failure" defense).

277. *See* Kirkwood & Lande, *supra* note 68, at 240–41.

278. *Cf.* Hammer, *supra* note 276, at 879–82.

279. *See* VARIAN, *supra* note 60, at 632–37. For the importance of taking all harms of production into account in determining surplus, see *supra* note 158 and accompanying text.

externalities.[280] That would permit defendants to escape liability for charging higher prices by showing that since the higher prices were needed to provide compensation for externalities, the defendants did not actually reduce consumer surplus, properly calculated net of all harms, both those for which the law requires compensation and those for which the law does not require compensation.[281]

Using antitrust law's consumer welfare standard as the basis for a duty to minimize profits would also lead to inefficiency when firms lack the technical capacity properly to charge at-cost prices. Recall that for a firm to have an incentive to maximize surplus while still minimizing profits, the firm must charge prices that extract from consumers a constant, but small, percentage of the surplus generated by the firm.[282] That ensures that the firm's own welfare is tied to the size of the surplus the firm generates.[283] But charging a price that extracts a constant percentage of the surplus generated by each unit the firm sells requires knowledge of the value that each consumer places on each unit that the consumer buys, because surplus is the difference between the value a consumer places on a product and the product's costs of production.[284] Firms do not have perfect information about consumers' product valuations, however, and so they may be unable to identify the low prices they would need to charge to minimize profits without sacrificing efficiency. In that case, an efficient profit-minimization rule would require that firms default to charging the lowest prices that firms know will not harm efficiency. But the consumer welfare standard does not put efficiency first in this way. Instead, the consumer welfare standard would require that firms charge prices that maximize the value enjoyed by consumers, even if doing so would reduce overall surplus and therefore be inefficient.

Consider, for example, the firm that knows so little about the value each of its customers places on the firm's products that the firm has no basis for charging different prices to its customers and must therefore charge the same price to each of them. In this case, the only price that the firm can charge that is consistent with

280. *See* Kirkwood & Lande, *supra* note 68, at 240–41; Hammer, *supra* note 276, at 879–82.

281. *See* Hammer, *supra* note 276, at 879–82.

282. *See supra* Section I.C.1.

283. *See id.*

284. For more on surplus, see *supra* notes 59, 158. The fact that firms may never be able to obtain perfect information about consumers' product valuations does not make profit minimization unworkable as a general matter, any more than imperfect information makes the project of profit maximization that firms pursue today unworkable. *See* Woodcock, *Personalized Pricing as Monopolization*, *supra* note 122, at 319–20. In order to maximize profits, firms must know the value that each consumer places on each unit that the consumer buys, in order to charge the highest possible prices to each consumer for each unit. *See id.* at 331–32. In both the case of profit maximization and the case of profit minimization, the difficulty of determining consumer valuations means only that firms must work continually to improve the information they have on consumers and to adjust prices accordingly. *See* Woodcock, *Big Data, Price Discrimination, and Antitrust*, *supra* note 122, at 1408 ("The same big data revolution that is making it easier to know the characteristics of consumers is also making it easier to know the costs faced by firms. Thus, eventually regulators will be able to go beyond preserving the current level of consumer welfare to set prices that maximize consumer welfare, which is only possible when costs are known, if regulators wish to do so.").

surplus maximization is the price that equilibrates supply and demand for the firm's products, because at that price every buyer willing to pay the costs of production will make a purchase, and each purchase by a person who values a product at a level above the cost of making the product generates additional surplus.[285] At this market-clearing price, profits are not minimized, however, unless every unit sold happens to have the same production cost.[286] To ensure that all units are sold and surplus maximized, this market-clearing price must be at or above the cost of every unit, which means that so long as costs are not uniform over all units the price must be above cost for all except the most expensive units.[287] Indeed, if production costs vary enough over the units produced, then the share of surplus taken by the firm as profits will be different for each unit sold and very far from a minimum.[288]

Profit minimization is clearly not possible in this example, because the firm is constrained by its lack of information to the charging of a uniform price. But the existence of such an example is no argument against adoption of a profit-minimization duty. As a firm's information on consumers improves, the firm would be required by a profit-minimization duty to start charging lower, and different, prices for each unit the firm sells, to ensure that each consumer pays a price no higher than the cost of producing the particular unit that the consumer purchases, inclusive of the constant percentage of surplus required to create the proper incentive for the firm to maximize surplus.[289]

The trouble created by the imperfection of firms' information about consumers comes not from the resulting limits on the ability of firms actually to minimize profits, but rather from the consumer welfare standard, which will not permit the information-poor firm to charge the efficient uniform price while waiting for the firm's information to improve. The problem is that there may exist

Under an efficient profit-minimization rule, the firm would be required to charge the uniform market-clearing price, because that price maximizes surplus, and as the firm's information improves, the firm would be required to start lowering prices, on an individual unit basis, until profits are minimized without reducing the size of the surplus. But the consumer welfare standard would not permit a firm to take this approach. For there exists an alternative uniform price that could confer more value on consumers than does the market-clearing price, so long as the firm's information remains so poor that the firm cannot charge different prices to

285. *See* VARIAN, *supra* note 130, at 306–08.

286. *See* FRIED, *supra* note 42, at 134; VARIAN, *supra* note 130, at 259–60.

287. *See* FRIED, *supra* note 42, at 134.

288. *See id.*

289. *Cf.* Woodcock, *Big Data, Price Discrimination, and Antitrust*, *supra* note 122, at 1408. Under this regime, firms would have no financial incentive to improve the quality of their information on consumers, because they would be required to use that information to reduce prices and profits. But firms have no financial incentive to follow any part of a profit minimization duty, unless reputational harms associated with violating the duty turn out to be significant. *See supra* Section II.B. Firms would be expected to abide by the duty in the first instance because it is the law, not because firms have a financial interest in compliance.

different consumers.[290] By reducing the uniform price that the firm charges below the market-clearing price, the firm could actually increase consumer surplus, but at the expense of efficiency.[291] Because the firm cannot charge different prices for different units that the firm sells, the firm would stop producing the most costly units once the firm reduces its uniform price below the market-clearing level, and so the surplus generated by selling those costly units would be lost.[292] But the lower uniform price charged for all other units would increase the surplus enjoyed by all other consumers in an amount that might more than offset the losses.[293] If the losses would be offset, then the consumer welfare standard, in privileging distribution over efficiency, would require that the firm charge this inefficient below-market price.[294]

The seriousness of this problem should not, however, be overstated. For one thing, the consumer welfare standard is the law, and the law must be followed whether it chooses distribution or efficiency.[295] For another, there is no guarantee that a lower price would attract the purchases of consumers who place the highest value on the good. Those who place such a low value on the good that they are only barely priced into the market by the lower price might snap up the good, in which case the lower price would reduce consumer surplus relative to the market-clearing price. This uncertainty regarding the effect on consumers of below-equilibrium prices alone might be enough to prevent the consumer welfare standard from compelling them. For yet another thing, this is a short-run problem. The information age is fast improving the ability of firms to guess the values consumers place on their products and to know their own marginal costs, and as firms become better at doing that, they will, if subject to my profit-minimization rule, become better and better at charging consumers prices that are both at-cost and efficient.[296] Moreover, the surplus available for consumers to take through profit minimization is largest only when, unsurprisingly, the firm acts to maximize surplus. So once information increases and firms become able efficiently to reduce prices on a unit basis, consumer surplus will come to exceed whatever value firms would be able to offer consumers at alternative, inefficient prices. And so the consumer welfare standard, preoccupied as it is with maximizing consumer surplus, would no longer mandate inefficient pricing, but instead would require that firms price efficiently.[297] Finally, in many markets, fixed costs are sufficiently large that firms constrained to

290. *See* Kirkwood & Lande, *supra* note 68, at 240–41.

291. The situation is identical to that of monopsony, or buyer power. *See* HOVENKAMP, *supra* note 106, at 14–15. The powerful buyer generates profits by dictating inefficiently low prices to sellers for the same reason that the surplus enjoyed by consumers, who after all are buyers, are maximized when sellers charge inefficiently low prices.

292. *See id.*

293. *See id.*

294. *See* Kirkwood & Lande, *supra* note 68, at 240–41.

295. *See* Salop, *supra* note 29, at 336.

296. *See* Woodcock, *Personalized Pricing as Monopolization*, *supra* note 122, at 314–15.

297. *See* Kirkwood & Lande, *supra* note 68, at 240–41.

charge uniform prices are not able to reduce their prices below efficient levels, because that would prevent them from covering costs.[298]

Regardless, the courts can fix this problem, as in the case of externalities. Here, the way to do so would be for courts to amend the consumer welfare standard to require that firms maximize consumer welfare only when doing so would be efficient.[299]

E. The Social Justice of Consumer Welfare

CSR has sought to transform the national political conversation regarding how wealth should be distributed into a question for the corporate board to answer in the first instance.[300] Hence CSR's insistence that the board has the power to distribute wealth based on the board's sense of social justice.[301] By contrast, shareholder primacy advocates want to absolve boards of distributive responsibility.

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298. *See* VARIAN, *supra* note 130, at 435–37. A price insufficient to cover fixed costs ultimately eliminates the product entirely, and therefore all surplus, including consumer surplus, that the product generates, in violation of the consumer welfare standard. *See supra* Section I.C.1. Indeed, recognition of the importance of not driving prices to marginal costs when fixed costs are large distinguishes contemporary antitrust from mid-century antitrust, which focused on competing prices down to marginal costs, regardless of the consequences for consumers. *See supra* note 70 and accompanying text. Antitrust today continues to define monopoly power in relation to marginal costs, rather than average costs, which latter take fixed costs into account. But the rule of reason and the consumer welfare standard nevertheless ensure that power needed to cover fixed costs is not punished today. *See* John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. REV. 1169, 1188–89 (2018) (discussing average cost as a baseline for the measurement of monopoly power); *supra* note 220 and accompanying text (discussing the rule of reason).

299. Debates over whether antitrust has a consumer welfare standard or a total welfare standard have tended to assume that a consumer welfare standard must put distribution in favor of consumers before efficiency and that a total welfare standard can have no distributive component at all, allowing the distributive chips to fall where they may. *See* Salop, *supra* note 29, at 336–37. In fact, a total welfare standard, understood to mean a requirement that antitrust act to maximize surplus, can have a distributive component. For, as argued extensively in this Article, once surplus is maximized, the question remains to whom to pay it. *See supra* Section I.C. Acknowledging the analytic distinction between efficiency (maximizing surplus) and distribution (deciding to whom to pay the surplus) opens up new options for antitrust. In particular, it makes it possible to resolve the debate over antitrust's mission by accepting the total welfare standard's admonishment that antitrust must always act in the first instance to maximize surplus, while at the same time insisting, in the spirit of the consumer welfare standard, that once surplus is maximized firms must turn over as much of it to consumers as is technologically feasible to do through the charging of low prices. *Cf.* Baker, *supra* note 85, at 518 (recognizing that the distributive and efficiency questions are analytically separate and arguing that antitrust should require efficiency, but refusing to endorse "any particular split of the efficiency gains, so long as consumers on average do at least as well as they would absent a competition regime").

300. That, at least, is what the Chicago School has long feared that CSR is trying to do. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 (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 10, at 21 (suggesting that CSR is an attempt to implement socialism through the firm).

301. *See supra* Section II.A.

Hence shareholder primacy advocates' insistence upon identifying shareholders as the only legitimate beneficiaries of the surplus created by firms, and referring critics seeking distributive justice for other groups to other legal regimes, such as labor law for those interested in aiding workers.[302]

Despite shifting the identity of the rightful beneficiaries of firm wealth from shareholders to consumers, my proposed antitrust duty to minimize profits would 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.[303] For example, because paying workers more than the absolute minimum they are willing to accept amounts to giving workers a share of the surplus generated by the firm, and a profit-minimization duty requires that boards give the entire surplus to consumers, a profit-minimization duty would oblige boards to pay workers the lowest possible wages.[304] And the lowest possible wages could be very low indeed if labor supply were plentiful, tax and transfer were to provide little in the way of a safety net, the minimum wage were low, and unions were weak, as they are today. To the extent that society would condemn such low wages, society could not, under my proposed antitrust duty to minimize profits, seek relief by insisting that boards drive a soft bargain with workers, as CSR would want.[305]

By contrast, under current law, a firm may avoid taking advantage of the weak bargaining power of a particular group by paying the group more than the firm would need to pay to secure the group's services, effectively transferring a share of the firm's profits to the group.[306] What CSR has done in defending the board's authority to allocate wealth is to save the board from a sharp distinction between profits and costs, which would otherwise force the board to leverage bargaining power to extract concessions from all groups save the one to which the board is required to distribute profits, whether that favored group be shareholders or consumers.[307] Under current law, the board can mix profits and costs, by giving a needy group more than the group could get away with in bare-knuckle negotiations with the board.

An antitrust duty to minimize profits, like any legal rule that would pick a distributive favorite (here, consumers), does not permit boards to mix profits and costs. But a duty to minimize profits does have some distributive justice advantages

302. *See* Hansmann & Kraakman, *supra* note 4, 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"); Friedman, *supra* note 300 (arguing that a manager acting according to CSR principles is assuming the roles of "legislator, executive and jurist").

303. *See supra* Section II.B.

304. *See supra* text and sources in note 104. Consistent with this approach, Amazon has in fact explicitly invoked the consumer interest in refusing to negotiate better employment terms with workers. *See* 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).

305. *See* Vaheesan, *supra* note 64, at 664–65, 684 (attacking antitrust's consumer welfare standard for failing to take the interests of other groups, including workers, into account).

306. For the CSR-influenced state of current corporate law, see *supra* Section II.A.

307. *See supra* Section I.C.2.b.

relative to a shareholder primacy rule or even to the current rule of board discretion.[308] A duty to minimize profits likely would spread wealth more evenly across society than would shareholder primacy, because consumers are likely on average poorer than shareholders.[309] And a duty to minimize profits likely would spread wealth more evenly than would 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 pollution victims. Moreover, in picking consumers as a favorite, a duty to minimize profits would have the virtue of ensuring that groups that society may not want to enrich further, such as shareholders or managers, have less access to the corporate pie than they do under either shareholder primacy or board discretion.[310] By contrast, board discretion has been justly criticized for imposing no affirmative duty on boards to take distributive justice of any kind into account, but instead merely giving boards the option to do so, allowing them to choose to enrich management or other favored constituencies if they wish.[311]

If firms were actually to obey a duty to minimize profits, the duty would create a world in which people would expect to get rich not from their participation in production in any capacity, because they would be unable to enjoy profits from such participation, but from their role as consumers of valuable products sold at low prices.[312] In this sense, a pricing duty is fundamentally more democratic than any rule that would maximize profits and turn them over to a group that participates in production, such as shareholders, managers, or workers.[313] 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 businesses over that time.[314] As a result, when surplus is concentrated

308. For the current rule of board discretion, see *supra* Section II.A.

309. *See* Woodcock, *Big Data, Price Discrimination, and Antitrust*, *supra* note 122, at 1391 n. 111 (discussing the consequences for wealth distribution of shifting wealth from consumers to "producers," meaning shareholders in this context); Ireland, *supra* note 54, at 57–62 (discussing evidence that shareholders in the United States tend to be wealthy).

310. *See* supra Section II.A.

311. *See* Bainbridge, *supra* note 82, 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."). While noncompliance with my profit-minimization duty will surely limit the amount of justice actually done by the rule, it is reasonable to suppose that there will be more compliance, and therefore more social justice, done with a weakly-enforced requirement than with a rule that imposes no requirement to do any amount of social justice at all. *See* Woodcock, *supra* note 14, at 1772–73.

312. *See supra* Section II.B.

313. *See supra* Section II.A.

314. 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 televisions, whereas only a fraction of the population invests, either actively or through a retirement fund. *See* Ireland, *supra* note 54, at 57–62 (discussing share ownership); U.S. BUREAU OF LABOR STATISTICS, REPORT 1066, CONSUMER EXPENDITURES IN 2015, at 15–16 (2017) (showing that the average consumer making less than $5,000 per year spends on everything from cereals to entertainment).

in firms, the individual faces a riskier wealth lottery.[315] By forcing firms to pay surplus to consumers through lower prices, instead of distributing surplus to groups that contribute to production, whether shareholders, managers, or workers, a duty to minimize profits reduces the risk that any one person faces of being left behind by success.[316] The average person is more likely to buy from a successful firm than to work for, or own shares in, a successful firm, and under a profit-minimization rule every buyer of a successful firm's products shares in the surplus that the firm creates. That is the world in which the duty of business is to maximize the wealth of consumers.

CONCLUSION

The problem of corporate mission is fundamentally a problem of how the wealth generated by firms should be distributed once all the costs of production, including externalities, have been taken into account.[317] Both advocates of shareholder primacy and CSR have attempted to transform the fundamentally moral question how to distribute that wealth into a technical problem of how to maximize the wealth created by firms, by arguing that their preferred distributions are necessary for firms to operate efficiently.[318] There is, however, no necessary relationship between economic performance and how the wealth generated by that performance is allocated, because the wealth created by a firm—the total surplus the firm generates—is by definition 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.[319] While firms, and managers, do require a financial stake in the wealth they generate in order to have an incentive to maximize it, that stake need not extend to all or even most of the wealth they create but can be vanishingly small without losing its incentive effects.[320]

CSR has succeeded at undermining shareholder primacy orthodoxy in the interpretation of corporate law and establishing the existence of discretion in boards of directors not only to allocate profits as boards see fit, but also to forego profits in favor of maximizing consumer welfare.[321] But that is not the same thing as establishing that boards have a duty to minimize profits through the charging of at-cost prices. The antitrust laws, however, do accomplish that, by imposing upon firms, as a matter of federal law supreme over all state corporate law regimes, a duty to maximize the welfare of consumers, which implies a duty to minimize profits.[322]

315. *See* VARIAN, *supra* note 130, at 238.
316. *See id.*
317. *See supra* Sections I.A & I.C.
318. *See supra* Sections I.B.
319. *See supra* Section I.C.
320. *See supra* Section I.C.1, I.C.2.a.
321. *See supra* Section II.A.
322. *See supra* Section II.B, II.C.

The antitrust laws therefore resolve the great debate over corporate mission in favor neither of shareholders nor of other corporate insiders, but in favor of consumers.

While the doctrinal vehicle through which the antitrust laws accomplish this feat, the consumer welfare standard, is an imperfect means of achieving profit minimization, because that standard requires that firms sacrifice efficiency when doing so would increase consumer welfare, the problem can be avoided by judicial reinterpretation of the standard to require that firms favor consumers only when doing so would be efficient.[323] The resulting regime, in which firms maximize the wealth they create and then turn as much of it as possible over to consumers, would do social justice, by ensuring that the gains created by economic activity are distributed to the one interest group in the corporate mission debates to which all people belong.[324]

323. *See supra* Section II.D.
324. *See supra* Section II.E.