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Martha T. McCluskey

University at Buffalo School of Law

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Defining the Economic Pie, Not Dividing or Maximizing It

Martha T. McCluskey

Abstract

This essay challenges the question that drives much of legal analysis: whether to maximize or divide the “economic pie.” Regardless of the answer, this question skews legal analysis and rests on dubious economics. This framing binary inherently presents economic maximizing as the presumptive norm, represented as superior to socioeconomic distribution in both spatial and temporal dimensions. By definition, economic “maximizing” stands larger in scope and first in order. The essay first critiques the idea that legal analysis can aim to make the economy bigger without engaging contested questions of value and politics, showing how this misleading separation of quantity from quality closes off rigorous thinking about legal institutions and processes vital to meaningful economic prosperity. Second, the essay challenges the binary’s sequential presentation of social justice as “redistribution” occurring after an imagined step of economic maximizing. That sequence sets up a narrative that distorts and narrows our vision of both the causes and solutions to problems of inequality and other social and environmental qualities. Instead, law and economic analysis should focus on how law should define the “economic pie,” recognizing that moral and political questions of justice are fundamentally inseparable from questions of economic gain.

What’s wrong with analyzing law in terms of two distinct economic functions: maximizing economic gain versus distributing it? That division sets up the question that drives much of legal analysis: whether to maximize or divide the “economic pie.” Regardless of the answer, the question itself undermines both sound legal economic analysis and social justice. Instead, we should ask: what values and powers should define the economic pie?

I. Dividing the Legal Economic Order

A. The Conventional Binary Frame

In their classic law and economics textbook, Robert Cooter and Thomas Ulen assert that economics has “spectacularly” succeeded as a guide to jurisprudence and policy

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* Professor of Law and William J. Magavern Scholar, University at Buffalo, State University of New York, mcclusk@buffalo.edu.

1 Chris William Sanchirico, Deconstructing the New Efficiency Rationale, 86 Cornell L. Rev. 1003, 1005 (2001) (stating that efficiency is the principal focus of law and economics, separate from distribution); Ted Hamilton, Why Law School’s Love Affair with Economics Is Terrible for the American Legal System, SALON (July 26, 2014) (reporting that efficiency, not justice, was the most common focus of his first year courses at Harvard Law School) (http://www.salon.com/2014/07/26/why_law_schools_love_affair_with_economics_needs_to_stop/).
because it scientifically predicts law’s effects. The sixth and latest edition does not temper its triumphant view in the wake of the 2008 global financial collapse, despite leading economists’ confident predictions that deregulated financial markets would ensure stability and growth. Presenting the orthodox frame without question or qualification, the textbook states that economic analysis evaluates law according to two overarching criteria: efficiency and distribution.

Efficiency, the textbook explains, represents maximum societal gain, taking into account all benefits and minimizing waste. Efficiency is always a relevant and rational criterion for law, because no one wants to waste money. Further, the authors report that “almost all” economists favor policies that increase efficiency. In contrast, the authors present distribution as an inherently debatable criterion for law: a question of which classes or interests should gain or lose. They note that economic analysis need not take sides in such distributive questions.

With some refinements and variations, this basic frame grounds much of contemporary analysis of law. Many scholars use the term “welfare” to represent the goal of maximum (or “optimal”) societal benefit distinct from values of fairness or distribution. Although many defend the contrasting goal of redistribution as a legitimate function of law, few question the frame that distinguishes this goal from economic maximizing.

B. The Divided Frame’s Ideological Tilt

Law and economics typically presents the choice of maximizing versus dividing as the central value choice for law. But the more fundamental judgment of value is embedded in the question itself. This foundational divide skews legal analysis even when

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3 See, e.g., David Colander et al., The Financial Crisis and the Systemic Failure of Academic Economics, Kiel Working Paper 1489 (Feb. 2009) (faulting economic models designed to disregard key elements of the real world).
4 Id. at 3-7.
5 Id. at 3-4.
6 Id. at 4.
7 Id.
8 Id.
9 See id. (stating that some do, while others do not).
11 Cooter & Ulen, supra note 2, at 4.
used without ideological intent, and even when deployed to resist right-wing policies.\textsuperscript{12} Though even-handed on the surface, this division inherently positions maximizing as the presumptive legal economic norm, with distribution as the exception or supplement needing special justification or limitation.

The frame tilts the field by contrasting these two goals in both spatial dimension and in time sequence. By binary definition, economic “maximizing” stands larger in scope and first in order. The colloquial “pie” metaphor highlights this spatial and temporal hierarchy. Before law can divide the pie, law needs the growth that produces the pie. And, with a bigger pie, law can distribute more or bigger slices to better satisfy particular distributive interests.

The more technical versions of the binary build on that basic skewed view. If we increase “efficiency” or “welfare,” that means we generate \textit{more} total resources or benefits (however defined) for subsequent distribution. “Redistribution,” in contrast, represents what we do with the resources already produced, so that it generally appears as a zero-sum transfer, or perhaps a net loss.

On this slanted field, distributive goals like social justice or fairness stand as secondary and expendable choices, inherently dependent on protecting or accommodating the goal of maximizing. In contrast, maximizing appears to be an essential function. While this frame leaves open the choice to “balance” maximizing with distributive policies, it implicitly places that choice as ancillary to the central goal of maximizing.

Beyond semantics, this definitional tilt reflects a dubious economics. The division between efficiency and equity emerged from a twentieth century effort to identify economics with the “harder” natural sciences like physics, rather than with social sciences and philosophy.\textsuperscript{13} This approach emphasizes markets as a mechanistic system of mutual gain produced through decentralized atomized voluntary exchange. That theory of economics is not only widely criticized, but is also particularly unsuited to legal analysis. Other approaches to economics analyze how markets operate as systems of power and governance interrelated with law and politics.\textsuperscript{14} Similarly, an extensive and esteemed economic literature goes well beyond decontextualized microeconomics to consider the impact of political economic institutions like colonialism, slavery, industrial policy, consumer demand, public education, antitrust law, infrastructure, corporate governance, taxation, or currency controls.


\textsuperscript{13} See Mark Blaug, Economic Theory in Retrospect 575 (5th ed. 1996) (explaining the failed historical quest for a positivist ground for this distinction central to neoclassical welfare economics).

\textsuperscript{14} For general discussion of this approach, see Warren J. Samuels, The Legal-Economic Nexus, 57 Geo. L. Rev. 1556 (1989).
By rejecting the simplistic efficiency-distribution frame, we can more accurately understand law’s potential for fostering and sustaining meaningful economic growth. Further, we can better advance social justice without imagining that goal as a problem of slicing a separately established economic pie. Instead, we should analyze concerns like equity, sustainability and fairness as first-order questions about the content and rules that constitute a legitimately productive and prosperous economy and society.\(^{15}\)

Toward that end, this essay explores how the maximizing-dividing binary limits and obscures our understanding of law and economy. I first examine the biases embedded in the framing division’s spatial contrast between “more economic pie” and “differently sliced economic pie.” Then, I examine the flawed assumptions of the temporal sequence that puts economic maximizing before “distribution.” This essay’s critique is part of a larger book project in which I explore how the binary frame operates through a variety of economic concepts in law to obscure sound legal economic analysis.

**II. Spatial Order: Measuring Gain by Reducing Substance**

The maximizing-dividing framework separates the size of the economy from substantive analysis of socioeconomic justice. In the familiar metaphor, legal economic analysis can and should reveal how to make the economic pie bigger without deciding how to divide the pie. Several flawed notions underlie the idea that law can analyze and increase economic gain free from contested judgments about who or what should gain.

**A. Essential Form versus Contingent Substance?**

On the surface, the goal of maximizing seems open to including more of everything that some people value, including equality, or clean water, or a living wage, or international human rights, or safer workplaces, or nontoxic food. But because the binary frame defines economic gain *apart* from particular social values and contexts, the size of the economic “pie” (overall societal gain) appears to constitute a form devoid of contestable substance. That means when law aims to address a specific substantive problem, such as contaminated public water supplies or poverty level wages, that law presumptively serves to advance one partial interest or value rather than the goal of maximizing the whole. From that ground, any particular policies aimed at substantive qualities appear likely to divide rather than expand societal resources.

In short, the binary frame poses a leading question: should legal rules risk a smaller economic pie by distributing slices that are more equal, nontoxic or fair? Instead, we could logically frame legal economic analysis with a different foundational question: should legal rules risk a smaller pie overall by maximizing unequal, destructive, or unfair gains to some? That alternative framing highlights an alternative implicit presumption:

that particular contested normative qualities are central to measuring the extent of economic gain.

The goal of efficiency or welfare maximizing essentially closes off analysis of contested substance by assuming economic gain takes shape as an impartial formal structure and process—a market order—that generally operates to expand societal resources without contested political and legal power. The maximizing ideal thereby renders suspect any legal support for restructuring the economy for a specific substantive goal other than more of what this unquestioned background process produces on its presumptively maximizing terms.

The binary frame, for example, initially appears open to the possibility that directing more resources toward environmental quality could increase socioeconomic gain overall. For example, if stricter pollution-control laws increase clean water by reducing petrochemical industry profits, those losses may be outweighed by gains in the fishing, farming, and tourism industries and by reduced illness among workers and their families. Nonetheless, that argument faces a high bar in a frame that assumes “maximum” economic gain generally need not depend on protecting clean water. Similarly, although the frame allows us to analyze specific failures in the maximizing order as grounds for legal re-ordering, that attempt at intervention will appear comparatively unreliable and debatable given the presumption that maximum productive gain is best generated without political direction.

Examined more closely, the founding premise of a maximizing order that stands apart from contested value masks a pervasive dependence on government protection. Law reforms mandating cleaner water are no more distributive—and no less productive—than the specific property, tort, corporate, trade, constitutional and criminal laws and enforcement regimes that allow industries to profit by poisoning a region’s water system and shortening the lives of workers and community members.16

B. Complete versus Partial?

The maximizing-dividing frame both mobilizes and evades an important precept drawn from legal realism and critical theories: the idea that normative ideals of justice—like equality, fairness or democracy—inevitably depend on partial, debatable interpretation, value, and perspective, not uncontestable deductive logic and objective fact. Against this recognition of law’s echoing epistemological and moral void, the idea of an impartial and comprehensive criterion for overall gain offers comforting assurance of clarity and consensus.17 In the

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16 See Rena Steinzor, Why Not Jail? Industrial Catastrophes, Corporate Malfeasance, and Government Inaction (2014) (giving examples of how existing legal rules and institutions failed to deter or punish efforts to profit from reckless disregard for injury, death, and property destruction).

framing binary, maximum gain—efficiency or welfare—by definition optimally accounts for and calibrates all perspectives and goals to produce as much as possible overall.\(^{18}\)

Despite its grandiosity, this standard can seem to build on contemporary skepticism about grand claims to truth and justice. Similar to critical legal theory, for example, the maximizing criterion for evaluating law encourages us to recognize that differences in interest, perspective and power complicate seemingly neutral or noble legal principles like equality, fairness, or democracy. For example, if law is used to advance gender equity and economic justice by requiring employers to give workers protected leave time for parenting responsibilities, that policy might instead induce employers to hire fewer mothers or potential mothers, leaving women and struggling families worse off. Or perhaps this policy will hurt women co-workers who will be disproportionately expected to sacrifice their own time to pick up the extra work of absent parenting employees. Or perhaps legitimate gender neutrality is better measured by a non-reproductive norm that does not assume women have parenting responsibilities.

The maximizing criterion appears to resolve the complexities and uncertainties of implementing social justice principles and policies, pushing analysis beyond good intentions and ideals. Like critical legal analysis or legal realism, the economic maximizing criteria highlights the limits of law, recognizing that private and informal power interacts with formal legal mandates and processes to produce a chain of consequences beyond the “law on the books.” For example, employers can have discretionary and discriminatory reactions to family leave mandates, so that these well-intentioned mandates make things worse. As critical theory cautions, those lacking the most power in a given system will be likely to be most at risk from systemic efforts to resist transformative change.

But unlike legal realism and critical analysis, the binary frame directs legal analysis to evade the vexing but engaging moral, political, and empirical questions of the public interest. Instead, it relieves responsibility for close analysis of the values and context of policies (like family leave requirements) by presenting a disengaged and simplistic formalism as the more reliable alternative to the imperfections of legal idealism.\(^{19}\) Much of the slippery ideological slope of the framing division rests on its assumption that overall societal gain is most reliably analyzed as a total quantity divorced from particular quality.

**C. Quantity versus Quality?**

The separation of economic size from scrutiny of substance sets up a legal epistemology that makes analysis of particular moral and social qualities appear less

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\(^{18}\) For a discussion and critique of the orthodox economic idea of the “market” as omniscient, see Philip Mirowski & Edward Nik-Khah, The Knowledge We Have Lost in Information: The History of Information in Modern Economics 7 (2017).

\(^{19}\) See generally Douglas A. Kysar, Regulating from Nowhere: Environmental Law and the Search for Objectivity (2010) (analyzing how economic cost-benefit analysis absolves legal decision makers of individual responsibility or commitment).
rational and legitimate than formal quantification.\(^{20}\) For example, legal economic scholars Eric Posner and Cass Sunstein defend quantified cost-benefit maximizing as the legal standard that should guide regulation.\(^{21}\) In response to criticisms of that method, they argue that regulators can and should include moral commitments to health, life and environment in this measurement of overall net benefit.\(^{22}\) To do so, they present individuals’ willingness to pay for those moral qualities in the existing market as the most reasonable legal proxy for the amount of those qualities that maximizes societal well-being.\(^{23}\)

Consider how this reasoning applies to residents of impoverished communities who seek to clean up local water sources poisoned from chemical industry pollution. Posner and Sunstein would direct regulators to evaluate whether those residents are willing and able to pay for remediating this harm with increased taxes or private donations—or if not, whether those residents can enlist wealthier or better organized allies to do so, or perhaps to at least fund and promote the costly quantitative empirical studies that will persuade regulators and judges of this willingness to pay. If those impoverished residents facing toxic water have not mobilized significant resources in support of cleaning up their water,\(^{24}\) then (in this logic) regulators can comfortably and rationally assume that the residents are willing to bear any increased risks of cancer or falling home values as part of a tradeoff that maximizes the total public good from naturally scarce resources.

As this example shows, the problem with a quantitative approach to maximum societal well-being is not simply that some social values seem difficult to quantify, like the goals of preserving clean water, wilderness areas, or human lives, or the goal of cultivating trust in the political economic system. More fundamentally, the problem is that any claim to quantify a discrete and tangible gain to enlarge the societal “whole” necessarily rests on partial and contestable judgments of fact and value. Should a rural community’s lack of targeted charitable or electoral donations count as evidence that non-toxic water has less societal benefit than chemistry industry profits supported by well-funded industry lobbyists and lawyers? Or should that lack of individual investment in political support for non-toxic water count as evidence of societal loss due to that community’s unequal, distorted, or unfair political economic power? Perhaps families in polluted Louisiana bayous, for example, have already lost substantial home equity, health, jobs and other

\(^{20}\) See Mirowski & Nik-Khah, supra note 18, at 23-26 (tracing how orthodox microeconomic ideas of market rationality discredit and invert knowledge).


\(^{22}\) Id. at 1811-14.

\(^{23}\) Id. at 1839.

\(^{24}\) See Arlie Hochschild, Strangers in Their Own Land: Anger and Mourning on the American Right (2016) (exploring numerous reasons why Louisiana residents aware of personal harm from industry environmental damage nonetheless fail to support stronger environmental regulations).
assets due to deteriorating environmental conditions, so that they have few resources to invest in protecting their values, while, in contrast, the polluting industries can devote their ample gains from that harm to lobby for further political and legal protection against environmental controls.

The crucial question is not merely how to count non-commodified “social” goals, but how we “count to one” on the legal economic scale, even for the most routinely quantified market commodities.25 What qualifies as the value that gets us from zero economic pie to any positive quantity of pie? Consider, for example, if private banks report an increase in net worth over the prior year. Does that gain count as more economic growth? Or does this quantity represent more asset bubbles ready to burst, more dubious accounting strategies, more monopolizing bank mergers, or more bank fees collected from falsified bank accounts or from fraudulent and discriminatory subprime loans? More fundamentally, is the current public and private structure of the banking industry a beneficial means of generating capital for real economic production, compared to other alternative systems?26 The regulatory process should explicitly engage and evaluate rather than assume and cover up these foundational questions about what qualitative standards best define and guide quantifiable gains.

D. Private versus Public?

By detaching the size of the overall economic “pie” from particular substantive qualities, the foundational binary frame does the further ideological work of reducing public gain to private interests.27 On the surface, the maximizing-dividing frame offers an appealing alternative to the idea of public interest, which is inevitably contested and subject to imperfect politics and factual judgments. The maximizing criterion instead establishes the public welfare—maximum societal gain—as the seemingly more straightforward aggregation of private gain: a quantity of component parts that add up to a total sum conceptualized as a change in size without a change in kind or quality.

Defined as the total of individualized gain, the idea of a maximum overall gain—or welfare—can appear to be a more practical, realistic and tangible guide to law than the public interest. At the individual level, we can reasonably imagine that private businesses and other economic agents often operate to maximize their private economic self-interest. From this ground, it can seem logical to further imagine an economic “whole” consisting


of multiple individual independent economic maximizers whose combined interactions maximize the size of the societal “pie.” In this view, any concerns of the public good left out of this aggregation can be addressed by separately tapping into this maximum pie to provide relief to those persons or values losing out in the process of private gain-seeking.

This bifurcation of public and private overlooks the more accurate economic understanding that collective institutions and ideologies ground any decentralized system of individualized private self-interest maximizing. Economic orthodoxy recognizes that a private “market” must be driven not only by atomized maximizers, but also by a public legal system. At a minimum, that system must define and secure property and contract rights, with political and legal institutions producing and regulating currency and credit; and civil and criminal justice systems capable of upholding and mediating those rights. But that orthodoxy generally neglects to consider how those basic legal rights and institutions raise fundamental and complex questions that have long generated conflict and social transformation.

In short, the framing concept of the larger whole as an “aggregation” of private components begs the fundamental question of the process of aggregating: the governing rules and institutions through which these private components are combined into an economic totality. Whether the particular gains of a given legal economic entity interacting with any other reflect a process of mutual self-interest maximizing or one-sided force, plunder, extortion, or fraud, is the omnipresent, inherently value-laden, question of law. Regardless of elaborate mathematical or econometric models of the quantified aggregate whole, without judging the actual social and political quality of the process, we get no closer to rigorous or meaningful predictions or proof that any individualized gain will end up expanding or destroying societal “pie.”

Private market gains may appear to be a pragmatic starting point for determining maximum societal gain, at least in a market economic system that to some degree consists of competitive voluntary exchange. But even in established neoclassical theory, mainstream economics leaves plenty of room for doubt about whether private market maximizing normally or naturally operates as to maximize rather than minimize the economic whole, absent substantial, ongoing public oversight.

For example, Robert J. Shiller and George Akerlof (both winners of the Nobel Prize in Economics) develop established neoclassical economic theory to show that, without extensive public regulation for qualities of fairness, private markets are likely to induce private firms to “win” by concentrating on one-sided gains that in the aggregate reduce overall well-being. Fraudulent transactions exploiting the most vulnerable persons—what they term “phishing for phools”—constitute the “low hanging fruit” that

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28 See Ugo Mattei & Laura Nader, Plunder: When the Rule of Law Is Illegal (2008) (showing how a technocratic vision of international financial regulation serves to rationalize violent and unequal extraction of resources).

enable firms to maximize profits. As particularly “innovative,” aggressive, or unscrupulous firms pursue such irrational and unfair gains, these firms are likely to secure market (and political) power that they can use to increase others’ vulnerability and irrationality. That market power by the least scrupulous “winners” creates market pressures for other firms to follow suit, creating what legal economic scholars William Black and June Carbone describe as an increasingly criminogenic economic order where wrongdoing by powerful business organizations becomes normal and necessary.30 Shiller and Akerlof similarly describe how maximizing private gain without careful control for public-regarding values like equality and fairness leads to an economic “phishing equilibrium”31 that maximizes societal outcomes that are neither rational nor preferable from virtually any private person’s perspective.

As these analyses show, the political economic “whole” may be substantially less (or more than) than the sum of its private gain-seeking “parts.” Rather than imagining the public welfare as a bigger and better pie, a more plausible metaphor for determining overall economic well-being may be an ecosystem or organism where well-being does not correlate with growth in component parts. In that alternative model of the whole, the value of an increase in any quantifiable part of such a system (e.g., increased belly fat, air temperatures, or particular private firm’s profits) will likely be thoroughly dependent on how the other parts are distributed, supported and regulated.

E. Precision versus Generality?

By constructing the maximum societal gain as an aggregate of atomized microeconomic pieces, the foundational binary elevates decontextualized, fragmented, and trivial evidence of gain over broader and deeper understandings of economic well-being. For example, to include moral commitments in cost-benefit analysis of maximum societal gain, Eric Posner and Cass Sunstein advocate calculating private individuals’ willingness to pay for moral commitments to reducing harms like prison rape, climate change, or dolphin deaths from tuna fishing practices, measured (for example) by private donations to organizations protecting dolphins.32 Nonetheless, they exclude highly generalized moral values from this proposed calculation of optimal aggregate gain. Using the example of moral opposition to government regulation, they imagine that such general ideological preferences can be safely and soundly ignored by regulators because those preferences represent subjective ideals with trivial impact or could be evenly balanced by opposing views.33

31 Akerlof & Shiller, supra note 29, at 5-6.
32 Posner & Sunstein, supra note 21, at 1813-17, 1827-30.
33 Id. at 1835.
To the contrary, their example shows that, at this generalized ideological level, private power is most likely to have the most unequal and powerful influence on how regulators and other legal authorities evaluate competing economic, moral, and political positions. In recent decades in the U.S., wealthy business owners and allies have invested billions of dollars in creating a wide variety of institutions willing and able to pay politicians, lobbyists, media, scholars, judges, and regulators to help weaken government regulations protecting environmental and human health, fairness, and other social justice qualities.\textsuperscript{34} They have done so in part by funding, promoting, and litigating the idea that cost-benefit analysis deserves to be the measure of public well-being in federal regulation of industry.\textsuperscript{35}

By excluding from the maximum “whole” the overarching question of the general moral qualities of the legal economic system, Posner and Sunstein implicitly affirm an ideology promoting unequal and unaccountable private gain regardless of resulting societal losses. Their regulatory standard denies that the well-being of workers, consumers, families, children, prisoners, elderly persons, and the environment can be independent criteria for overall societal well-being. By reducing these values to fungible consumer expenditures, their cost-benefit analysis does not meaningfully include these values but instead discounts them as expendable and abstract parts equivalent to market spending (on fossil fuel investments for example) likely to destroy those qualities of well-being.

This superficial precision ironically closes off analysis and imagination of the possibilities for meaningfully enhancing societal well-being. By constructing the maximum political economic “pie” as a sum of discrete monetized pieces divorced from holistic value, the size of the pie necessarily becomes limited by the rule of existing market power. In this view, law cannot aim to directly alleviate or transform the harms that plausibly erode human and environmental well-being (like prison violence or environmental destruction), it can only improve how precisely it reflects and reinforces others’ willingness to tolerate or resist those harms under existing legal and political conditions.

Closer analysis shows that the goal of enlarging the political economic “whole” depends most fundamentally and clearly on the general qualities that Posner and Sunstein’s welfare maximizing standard dismisses. Indeed, these generalized qualities are likely to be among the most highly valued and most popular ideals. Consider, as examples, the general preference for a legal system not rigged to favor the wealthiest or the most

\textsuperscript{34} In 1999, a report calculated over a billion dollars in spending in the 1990s by the top twenty conservative think tanks in the U.S., and that this spending aimed to promote ideological opposition to industry regulation as one of its major goals. David Callahan, $1 Billion for Ideas: Conservative Think Tanks in the 1990s, Center for Responsive Philanthropy 5-6, 15-16 (March 1999).

immoral;\textsuperscript{36} or the value of health and environmental regulation that is governed more by independent science and broad public participation than by the public relations firms of the highest private bidders;\textsuperscript{37} or a preference for public policy focused on improving people's economic options, rather than on codifying and solidifying existing constraints on those preferences;\textsuperscript{38} or a preference for a society that does not primarily reward and reinforce the value of maximizing short-term individualized self-interest in a ruthless societal competition to extract gain from increasingly devastated others.\textsuperscript{39}

\section*{III. Temporal Order: Maximizing Gain Before Justice}

\textit{A. First Maximizing, Then Redistributing?}

The foundational frame further skews analysis by analyzing maximizing and dividing as a sequence of distinct functions. In the familiar law and economics story, making more pie logically comes first, so that an undefined “we” can then more easily move to the next step of slicing it differently to address concerns about quality and equality. The term “re-distribution,” commonly used to distinguish social justice goals from economic maximizing, explicitly inscribes this sequence. It positions some legal rules as the baseline impartial maximizing distribution, so that other legal rules identified with qualities like ethics, equality, or a healthy, stable environment stand apart as contested, subsequent re-distribution. That temporal storyline again obscures our vision of what qualities define the substance and process of economic winning.

Moreover, this standard law and economics framing sequence relies on a fuzzy and fictional idea of the second step of re-distribution. When law makes “more pie” we do not naturally get an economy full of self-interested pie-winners eager to stop winning and start sharing. Instead, those winners in the pie-maximizing game will plausibly prefer to use their gains to secure an even larger share of the future pie, without particular regard for the “losers.”\textsuperscript{40} That result is especially likely in a legal and economic order geared

\textsuperscript{36} See Tamar Frankel, Trust and Honesty: America’s Business Culture at a Crossroad (2008) (discussing trust in law and economics as a valuable public asset).


\textsuperscript{38} See Martha T. McCluskey, Constitutional Economic Justice: Structural Power for “We the People,” 35 Yale L. & Pol’y Rev. 271 (2016) (developing a constitutional theory of economic freedom and well-being based on democratic collective power to reduce scarcity).

\textsuperscript{39} See S.M. Amadae, Prisoners of Reason: Game Theory and Neoliberal Political Economy (2015) (explaining how neoliberal law and economic logic generates and rationalizes a system and subjectivity of pervasive predatory destruction).

\textsuperscript{40} See Frank Pasquale, Capital’s Offense: Law’s Entrenchment of Inequality (reviewing Thomas Piketty, Capital in the Twenty-First Century (2014)), b02, Oct. 1, 2014 (analyzing how capital concentration creates legal and political power to resist “redistribution”) (https://www.boundary2.org/2014/10/capitals-offense-laws-entrenchment-of-inequality/).
toward legitimating and rewarding private pie-winning where there is minimal regard for public qualities like fairness, cooperation, and equality.\(^{41}\)

Conventional law and economics often further allocates the two-step sequence of maximizing, then dividing, into different legal processes. As Cooter and Ulen explain in their textbook, after legal rules and regulations focus first and foremost on maximizing, questions of distribution can be addressed through a separate, subsequent process of government taxation and spending to avoid distorting law’s presumed baseline maximizing system.\(^{42}\)

The political process governing taxing and spending, however, is not insulated from the power of self-interest maximizing winners, and indeed has become less so in part thanks to pie-winners willing to pay lavishly to change taxing and spending rules and ideologies to their advantage.\(^{43}\) In recent decades, these law reforms efforts have included loosening restrictions on political contributions and corruption; restricting Congressional deficit spending; changing constitutional law to limit federal spending powers, opposing tax increases on the wealthy by financing politicians, academics, media, academics and policy staff critical of “redistribution”; and reducing government resources for tax collection and enforcement.\(^{44}\) For example, organizations supported by the Koch family’s oil industry winnings recently announced plans to spend $400 million in the 2018 U.S. elections to promote political candidates favoring tax cuts for the wealthy and opposing government spending on Medicaid and other “redistributive” programs for the non-wealthy.\(^{45}\)

Similarly, the framing division’s fictional sequence obscures how winning self-interest-maximizers will also be likely to invest in changing the private law rules that constitute the supposed baseline maximizing process. For example, organizations like the U.S. Chamber of Commerce and the American Legislative Exchange Council coordinate the biggest global economic “winners” to invest their resources in redistributing basic private market rights. This includes weakening collective bargaining rights; restricting state

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\(^{42}\) Cooter & Ulen, supra note 2, at 106-08 (arguing that social justice goals like alleviating poverty should be achieved through progressive taxation and spending, not property rights).

\(^{43}\) See Richard A. McAdams & Lee Anne Fennell, The Distributive Deficit in Law and Economics, 100 Minn. L. Rev. 1051 (2016) (discussing political barriers to taxing and spending as a method for “redistribution”).


tort damages; insulating business executives from criminal responsibility for reckless death and injury; expanding intellectual property rights; changing antitrust law to increase industry concentration, reducing professional workers’ power to organize, and extending non-compete contracts penalizing low-wage workers from quitting bad jobs; promoting international trade laws that remove investors’ property rights from democratic sovereign control; or restricting consumers’ and workers’ access to public independent courts to enforce their property and contract rights.

The baseline legal economic “maximizing” order always defines and mobilizes a particular distribution of pie, with significant yet debatable effects on societal well-being. Sound legal analysis cannot coherently bracket the effects of that distribution by focusing first on a fixed fictional state of distributive neutrality.

B. Upward Growth, Then Downward “Re-distribution”?

Indeed, the framing division does not ignore distributive concerns in defining baseline maximizing, but instead implies that inequality and injustice are the norm within the legal economic order—that is, both typical and typically beneficial. The second “dividing the pie” step presents equality and fairness as redistributive adjustments to accommodate those persons or values left out of a presumed preceding maximizing order. This implies that the step of “dividing the pie” involves moving resources downward from those who have more to those who have less, or from readily monetized values (like industry profit) to less marketable values like stability, safety, and integrity. As the Cooter and Ulen textbook explains, “Some people think that government should redistribute wealth from rich to poor for the sake of social justice, whereas other people think that government should avoid redistributing wealth, allowing individuals to receive all the rewards of their hard work, inventiveness, risk-taking, and astute choice of parents.”

This ahistorical view of redistribution directs scrutiny and controversy toward policies promoting equality (or other social justice goals), while implicitly affirming policies promoting inequality as a presumptively objectively beneficial maximizing distribution. In this picture, resources normally and naturally flow upward toward the rich in the process of benefiting all. Inequality appears to be not only natural, but essential to the well-being of others, given the framing assumption of maximizing as a process of expanding overall “pie,” distinct from demands for particular slices. In that view, those at the top appear to deserve their gains from “hard work and inventiveness” regardless of losses to the rest or to fundamentals like integrity and planetary survival.

As the previous section of this essay explains, political processes aimed at adjusting legal rules to redistribute market gains are at least as likely to involve moving resources upward to existing private winners, reinforcing their success in disregarding the particular well-being of losing persons and values. Indeed, distrust of the politics and

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46 Cooter & Ulen, supra note 2, at 106.

47 Id.
“special interests” resulting from downward redistribution is a major theme of the conventional law and economics narrative, developed especially in public choice theory. Building on the maximizing-dividing frame, that orthodox view presents the political and legal process itself as a distorted market that operates to maximize private self-interest without the advantage of (assumed) market discipline from open competition and voluntary transactions. For example, the Liberty Encyclopedia of Law and Economics asserts that “redistribution” normally benefits the most politically organized interests at the expense of the most unorganized, rather than the poorest at the expense of the rich.48

That seemingly critical attention to economic power in law relies uncritically on imagining a baseline market insulated from access to coercive, contested law and politics. The problem that redistribution sparks powerful resistance shows that law reforms must strategically aim to restructure the conditions that generate existing unequal or destructive market power, rather than trying to supplement or redistribute that power after first maximizing it.

By stepping outside the ideological framing division between beneficial economic maximizing and suspect political dividing, we can turn analysis more honestly and rigorously to the central question of what rules should define the political economic game in the first place.49 In contrast to “distribution” or “re-distribution,” terms like “equality” or “fairness” can better direct scrutiny to the baseline rules for winning, opening up the possibilities for an economy that operates with less loss and scarcity.

C. Accept Scarcity First, Then Mitigate Tragedy?

Confined by the framing division, law’s potential for overall good will be limited by a skewed diagnosis of economic problems. The frame’s sequential story implies socioeconomic justice problems arise either as side effects of the process of maximizing overall gain or as inevitable external constraints of natural scarcity limiting that maximum. To solve distributional problems, in this view, lawmakers must decide how much to correct or compensate those persons or interests losing out from this presumed benign initial process producing overall gain. The binary sequence therefore presents problems like poverty, inequality, corruption, financial market instability, or environmental destruction primarily as accidental or unfortunate tragedies, rather than injustices.

Though this sequential frame seems open to the possibility of subsequently mitigating these harms, it sets up the problem so that any such “redistributive” solution will reasonably require careful scrutiny and constraint. As second-order “redistribution,” any legal effort to correct or compensate particular harms will seem to move slices of the


economic pie from one interest to another, confronting us with tricky, controversial, and technical questions of tradeoffs between competing interests. And by starting with the assumption of a generally benign economic order, then any subsequent legal effort to deliberately single out some harms but not others for “redistribution” may seem more unjust than the original targeted loss. Further, this framing sequence suggests that particular losses are likely to be temporary blips or lags in the inexorable forward motion toward maximum total gain. From that view, the “losers” may seem better served by government action advancing and smoothing the pie-expanding progress rather than by redressing specific losses.

Finally, by framing the problems of socioeconomic quality and inequality as bad luck rather than bad law, or bad economics, the solutions appear largely beyond reasonable human legal economic knowledge and control.\(^50\) This prevailing frame encourages us to see the causes of “distributive” problems like global poverty, climate change, or financial crisis largely as the result of impartial aggregate maximizing under scarcity, or inevitable failures of human losers or regulators, rather than as the result of particular structures of legal and political power reflecting particular interests and ideologies.

By making scarcity the naturalized ground limiting subsequent solutions, demands for substantial “redistribution” to redress substantial or even catastrophic harms will appear to be naïve or risky social re-engineering. The smarter and more morally legitimate solutions, given this frame, must instead focus on limiting law’s redistributive compensation to narrowly tailored, meticulously calculated transfers to only the most deserving or demanding “losers.” That leaves those who remain unsatisfied or insecure to queue up for a piece of the presumably scarce but ever-expanding pie—or be locked up or otherwise punished and monitored for getting out of that line.

**D. First Making, Then Taking?**

1. **Defining Productivity**

By attributing economic losses to an initial process of beneficial maximizing under scarcity, the founding division further tilts the field so that law’s seemingly valid distributive function slides into fundamentally illegitimate “redistribution.” If we imagine that law first and foremost maximizes productive gain, then if law subsequently changes that existing resource distribution it will seem to force some to give up their legitimate rewards. That means redistribution can look like stealing from productive “makers” to reward unproductive “takers.”\(^51\)

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\(^50\) See Mirowski, supra note 18.

This slippery logic starts by imagining that legal analysis confronts the economy as an external sum of material resources that can either move forward toward maximum net gain or sideways in zero-sum transfers. According to this view, each legal move away from net gain is likely to take away from progress toward a bigger metaphorical pie, leaving us with tougher competition for scarce resources and more tragic losers. In his influential book, *Efficiency versus Equity: The Big Tradeoff*, Arthur Okun cautioned, “[W]e can’t have our cake of market efficiency and share it equally.” That paradigmatic tradeoff between a bigger and more equal pie represented a shift in prevailing theory away from the Keynesian macroeconomic theory that economic growth can be generated by egalitarian government social spending and industry regulation.

The scarce dessert metaphor stands more firmly against social justice in N. Gregory Mankiw’s leading introductory economics textbook, which asserts that “when the government tries to cut the economic pie into more equal slices, the pie gets smaller.” Mankiw’s narrative presents an initially optimal “economic pie,” abstracted from legal rights and macroeconomic institutions, that is then distorted by egalitarian policy. If government intervenes to require employers to pay a living wage, for example, Mankiw argues that workers will have less income because employers faced with increased labor costs will restore their original gains by reducing employment.

Empirical data not only casts doubt on this prediction, but also shows that low wages can reduce employment and productivity by making work too costly. The contemporary low-waged United States economy stands out for the high portion of middle-aged workers who have dropped out of the labor market not to devote their energy to family, volunteering, education, or travel, but rather to cope with poverty, drug addiction, despair and depression. Countering Mankiw, economist Nancy Folbre analyzes how cognitive bias helps sustain the conventional economic assumption that the current system of highly unequal private market gains from work—such as skyrocketing executive compensation—reflect “just deserts” for superior productivity rather than unequal legal economic protections that often reward socioeconomic extraction rather than contribution.

54 See N. Gregory Mankiw, *The Cost of a Living Wage*, Boston Globe, June 24, 2001 (arguing that government law can’t repeal the economic law of supply and demand that rewards productivity).
2. Defining Waste

Framed against an initial presumed maximum pie, “redistributive” laws appear to threaten the pie not only by taking resources back from productive ends, but also by adding a costly separate process. Cooter and Ulen’s textbook invokes another scarce desert story to illustrate what it presents as the inevitable “transaction costs” of the transfer. They imagine a law requiring one desert oasis to share its bowl of ice cream with a separate and distant oasis that lacks ice cream. The act of transferring resources from the original distribution to the second oasis means some resources are wasted: as someone runs with the bowl across the desert, some of the ice cream melts, leaving less for everyone to eat.

This story implicitly distinguishes redistribution from normal legal rules protecting the first oasis’s presumed property right to the ice cream, so that any transfer depends on private bargaining. In theory, in a productive mutual maximizing exchange, the second oasis would have to curtail its demand for equal ice cream to account for the costs of any transfer. In contrast, with the hypothetical “redistributive” law, the second oasis relies on government enforcement without considering whether the sharing will result in a net loss overall.

But this story works by abstracting the two transfers from any context to assume a central distinction between productive exchange and wasteful redistribution. Any real context would raise the question of how to account for the indirect costs and government force involved in any seemingly productive exchange from the start. If the first oasis gets a property right to keep an unequal share of ice cream despite others’ competing demands, for example, will it be held to account for the full costs of the government policing and civil courts, environmental protection, and financial, social and political stability that enable it to enjoy its dessert despite hungry outsiders? Do the residents of the first oasis pay for government force used to secure jurisdiction over the productive land, or to secure the labor that tends the cows at low cost, or to enforce any patent on the ice cream making technology precluding the second oasis from making its own?

By framing social justice not as redistribution but instead as defining and organizing the basic terms of the productive process, we can more readily imagine how legal rules encouraging more equal sharing could lead to more resources by reducing what logically could be construed as wasteful “transaction costs.” Considering the ice cream story, perhaps egalitarian laws requiring sharing might lead the people from both oases to more cheaply access information, labor and manufacturing strategies that generate more productivity overall. Or perhaps by cooperating in a joint private enterprise or shared

57 Cooter & Ulen, supra note 2, at 105-06.
58 Id.
government they could better and more cheaply and sustainably secure the labor and supplies and financing that enables long term investments in better technologies and infrastructure for storage and transport.

E. First Autonomy, Then Dependency?

By imagining social justice policies as transfers of scarce resources from productive winners to unfortunate losers, the binary frame constructs the beneficiaries of “distribution” as passive recipients who depend on government power to take away from autonomous others. Without questioning this sequence, even defenders of “redistribution” will end up treating that goal as a threat to individual freedom. For example, law scholar Daniel Markovits constructs “redistribution” as a tricky moral tradeoff between protecting economic “agents” and economic “patients.” He argues that economic winners do not necessarily deserve to keep their unequal gains because their success results from individual luck and subjective arbitrary tastes rather than hard work and inherent moral or economic superiority. Nonetheless, he assumes these winnings arise from an established first-order economic process of individualized choice largely free from questionable political and legal power. As a result, he advocates carefully limiting subsequent “redistributive” aid for hapless economic “patients” to minimize interfering with the choices of economic “agents” more fortunate in their talents and tastes.

Consider how this logic applies to those who have a talent with relatively modest value in the existing market—perhaps elementary school teachers, journalists, plumbers, police officers, or attorneys providing legal services for people in poverty. These “unlucky” individuals may deserve some redistribution to compensate for their less valued talents. But framed as redistribution, this compensation appears to require excluding any especially costly “tastes”—like the ability to raise children, or access to life-saving cancer treatment, nontoxic air and water, higher education, or public judicial enforcement (rather than private arbitration) of individual contract and property rights. In this strained nonjudgmental moral balancing act, such expensive legal economic protections would likely interfere with the choices of others to use their more highly valued talents (perhaps as fast food industry executives, casino developers, or financial market speculators) to support their own expensive tastes in (for instance) fancy cars, or electoral campaigns, tax avoidance, mass incarceration, unrestricted carbon emissions, or access to exclusive

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62 Id. at 2318-19 (arguing that redistribution will be too costly if it supports expensive tastes).

63 See Martha Fineman, Having a Child Is Nothing Like Deciding to Buy a Porsche, The Guardian, Dec. 1, 2013 (responding to Mankiw’s arguments that health insurance companies should have a right to charge women more for covering the costs of childbirth, just like they charge drivers more to cover expensive car choices).
schools, housing, or citizenship insulated from less fortunate people (except as low-waged service workers).

To be fair, Markovits rejects what he calls the “somewhat hyperbolic” libertarian argument that redistributive taxation from rich to poor represents “enslaving the talented”: a property right in other (wealthier) persons. Instead, he proposes that law can sufficiently respect the freedom of those lucky to have higher-priced talents or lower-cost tastes by limiting redistribution to the amount of insurance against bad market luck rationally purchased by a hypothetical disembodied consumer before knowing the actual price of their talents and tastes in a not-yet-defined market. This formal model allows relatively constrained appropriation of winners’ property (taxes on wages, for instance) but protects against substantial interference with winners’ freedom to choose how they express their talents and tastes. In short, Markovits leaves open the accusation that redistribution is “theft” from wealthy owners, by instead proposing to limit redistribution to avoid “enslaving” them.

Markovits assumes the established political economic order substantially advances individual choice, even if it does not reflect individual merit. His analysis does not grapple with the problem that unequal market gains arise in the first place not just from variations in talent and taste but also (for example) from specific and changing bundles of property rights that operate with government force to restrict others’ choices. Stepping outside the frame that assumes an initial uncontroversial system of voluntary maximizing, we can instead scrutinize how law pervasively structures the choices offered by any real political economy. By leaving unquestioned those initial legal limits and privileges inherent in any particular “market” system, Markovits’s ungrounded reasoning can only provide a weak defense of changing that initial order to alleviate inequality.

F. First Market Power, Then Powerless Democracy?

The concept of “redistribution” subtly diminishes our vision of equality and social justice by constructing those goals as compensation for failed market power, rather than as the affirmative power of democratic citizenship. For example, Markovits imagines a rational consumer purchasing inequality insurance from behind a Rawlsian veil of ignorance about the market value of her tastes and talents. In his analysis, that model consumer would buy only minimum support to avoid paying high insurance costs likely to interfere with other future choices. His example erases consideration of that ideal rational actor’s power to define or

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64 Markovits, supra note 61, at 2325.
66 See McCluskey, supra note 38, at 279-83, 286-91 (discussing, as examples, the dormant commerce clause and access to judicial enforcement of contract and property rights).
67 See Markovits, supra note 61, at 2305-19, 2325-26 (developing an insurance model as the basis for appropriate levels of equality).
68 See id. at 2318.
direct the market as a democratic citizen. That model consumer appears, for example, to have no power to decide how legal rules and institutions should organize the labor market that will price her individual talents, or how the legislative and regulatory systems should govern the insurance and health care markets, or what interests and ideals will structure the criminal justice system, monetary policy, the family, or other basic legal and political arrangements for providing security and productivity.69

Instead, imagine how a more truly free and powerful individual might confront the risk that the political economic order will make health care, retirement, clean water, and well-educated children too costly for talented but modestly paid teachers, police officers, legal services attorneys, home health workers, small business owners, or plumbers, given the competing demands of individuals with extraordinary talents for rationalizing and gaining from privatized, volatile and fragmented health insurance, water utilities, retirement savings, and education systems. Or consider how that ideal free agent might respond to the risk that those “winners” will want to spend their gains to satisfy their tastes for designing these provisioning systems to extract high fees, high executive salaries and investor profits, or their taste for maximizing their freedom to exploit or cheat confused and vulnerable consumers struggling with limited options, or their taste for fostering a culture of distrust, despair, and political disillusionment to minimize resistance from the “losers” in these systems.

Faced with a consumer choice about whether to purchase limited, stigmatized, and costly relief for losing out in such a system, our ideally free individual might rationally reject that choice as fundamentally irrational, immoral, and coercive. Instead, a truly free and powerful agent might seek to organize an economy around different values and interests, rejecting the premise that the initial order must maximize gain unqualified by judgments of societal well-being, fairness and merit. By stepping outside the assumption of a market order normally and naturally established free of destructive or unjust power, we can have a more robust view of freedom modeled on a citizen who refuses to surrender to a system that offers them bad choices between saving money and saving their health, between saving jobs or saving the planet, between saving for their children’s education or for their retirement.70

As political theorist Corey Robin argues, the metaphor of distribution stands in the way of showing that egalitarian government protection against private economic power is fundamentally about enhancing liberty, not about trading freedom for security.71 Developing that view of freedom, an ideally rational agent might wisely and morally govern the economy with legal principles like democracy, equal protection, environmental stewardship, human

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69 For a more robust vision of collective action as a source of personal freedom and power, see Martha A. Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 Yale J.L. & Feminism 1 (2008).

70 See Leff, supra note 17, at 481-82 (noting that law and economics’ idea of free choice relies on assumptions about who deserves the power to force bad choices on others with violence).

rights, and due process. That ground allows us to celebrate, rather than agonize over, the fact that this system will constrain some people’s freedom to gain by undermining these values.

IV. Reclaiming Legal Power to Define the Pie

Legal economic analysis should not assume law’s role is first and foremost to act as an unseeing, unjudging, and passive facilitator of private self-defined gain. That view diminishes the power and value of law.

The maximizing-dividing framework subtly undermines traditional liberal political theory, which generally affirms some degree and form of public power as the ground of freedom and productivity. Liberalism (across both right and left leaning versions) assumes at least minimal public limits on private willingness to pay (restricting force or fraud, for example) and instead grounds political economy in some distinctly public qualities, such as due process, democratic legislation, principled adjudication in independent courts, or regulation subject to professional expertise and participatory public process.

In contrast, neoliberal theory draws on the maximizing-dividing frame to assert existing private gains as the ultimate measure of legitimate legal authority and economic prosperity, so that law should normally operate to maximize these gains. By assuming an economic optimum apart from public value, the binary frame positions democratic power to redirect or restrict that unqualified gain as a potential disruption and detriment to more legitimate and beneficial private authority, except as a limited supplement. In effect, the maximizing-dividing frame revives the infamous *Lochner* era theory that law should generally protect and enhance existing unequal market bargaining power as a fundamental right limiting democratic economic policy, with limited exceptions for those deemed incapable of market autonomy.

To better advance social justice goals, law and economics must affirm the public democratic authority to define and control the quality and equality of economic power. Instead of asking whether to maximize or divide scarce resources, legal economics should focus on the possibilities for lifting the political and legal barriers that make human flourishing seem scarce and costly. Substantive social conditions like good jobs, healthy and stable environments, good education, safe housing, trustworthy businesses, and well-functioning democratic governments should be essential measures of overall socioeconomic well-being, not peripheral and secondary adjustments to an economic order presumed superior apart from those qualities.

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72 See Markovits, supra note 61, at 2323 (focusing on the “dilemma” that redistribution will restrict some economic choices).

73 See Martha T. McCluskey, Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State, 78 Ind. L.J. 783, 787-93 (2003) (explaining how neoliberal uses the problematic rhetorical distinction between redistribution and efficiency to revive *Lochner’s* naturalization of economic inequality); see also Nancy MacLean, Democracy in Chains: The Deep History of the Radical Right’s Stealth Plan for America (2017) (tracing how influential law and economics ideas have advanced political and legal efforts to undermine democracy).