CORPORATE PURPOSE AND CORPORATE COMPETITION

MARK J. ROE*

ABSTRACT

The large American corporation faces ever-rising pressure to pursue a purpose beyond shareholder profit. This rising pressure interacts with sharp changes in industrial organization in a way that has not been comprehensively analyzed and is generally ignored. It is not just purpose pressure that is rising: firms' capacity to accommodate that pressure for a wider purpose is rising as well.

Three possible changes in industrial organization are most relevant: the possibility of declining competition, the counter-possibility of increasing winner-take-all competition, and the possibility that the ownership of the big firms has concentrated (even if the firms themselves have not), thereby diluting competitive zeal. Consider competitive decline: In robustly competitive economies, firms cannot deviate much from profit maximization for expensive corporate purpose programs unless they bolster profitability (by branding the firm positively for consumers or by better motivating employees, for example). In economies with slack competition, in contrast, monopolistic and oligopolistic firms can accommodate purpose pressure from their excess profits, redirecting some or much excess profit from shareholders to stakeholders—to customers, employees, or the public good. By many accounts, competition has been declining in the United States. By some accounts, it has declined precipitously.

That decline suggests three possibilities: One—the central thesis of this Article—purpose pressure has greater potential to succeed if competition has declined or rents have otherwise grown; in competitive markets, the profit-oriented but purpose-pressured firm has no choice but to refuse the purpose pressure (or to give it only lip service), while in monopolistically-organized industries, the purpose-pressured firm has more room to maneuver. Two, the normative bases undergirding shareholder primacy, although still strong, are less powerful in monopolistic markets. Three, declining corporate competition and rising corporate profits create a lush field for social conflict inside the firm and the polity for shareholders and stakeholders each to seek a share of those profits. The result can infuse basic corporate governance with social conflict, contributing to or exacerbating our rising political and social instability. Expanding purpose pressure is one manifestation of this conflict.

TABLE OF CONTENTS

INTRODUCTION

The public corporation is today pressed more than ever to treat employees, customers, and the environment better, and to be a stronger corporate citizen overall. "A growing cohort—perhaps a majority—of citizens want corporations to be cuddlier, invest more at home, pay higher taxes and wages and employ more people," says a major business publication.[1] For proof of this pressure, one need go

* Professor, Harvard Law School. Thanks for comments and, in some cases, research assistance go to Maria Elisa Zavala Achurra, Robert Bartlett, Ilya Berlin, Thomas Brennan, Brian Cheffins, Mihir Desai, Einer Elhauge, Stavros Gadinis, Matteo Gatti, Victor Goldberg, Jeffrey Gordon, Oliver Hart, Rainer Haselmann, Jessica Ljustina, Louis Kaplow, Amelia Miazad, Aldo Musacchio,

no further than the 2019 corporate purpose statement from the Business Roundtable—the elite organization of CEOs of the 200 largest U.S. public firms. Those elite CEOs demoted shareholders from first to last on their list of whom the corporation serves.[2]

The growing strength of purpose pressure is readily understood. Government gridlock leads many to look elsewhere for action. Rising inequality and the threat of climate catastrophe turns activists' attention to corporations to mitigate them. Stock buybacks are seen by the media and social activists as enriching shareholders while employees and the economy suffer. Stories of corporate misbehavior light up internet-connected devices, confirming beliefs that large corporations are enthralled with the primacy of shareholder profit at the expense of the public good.

This controversy surrounding the proper goals for the corporation is thus far devoid of analysis, both in academe and the media, of how major shifts in industrial organization in the U.S. economy during recent decades affect the viability of purpose pressure and its normative character. These two literatures—industrial organization and proper purpose—sit side-by-side, unconnected. Concentration is rising and competition declining in much industrial organization thinking. The corporation must attend to some of society's ills, or at least stop contributing to them, in corporate purpose thinking. But the two streams of thought should not be left separate, as they interact. Powerful private firms attract purpose pressure, and high profits raise that pressure's chance of success. So, our first question is: how readily in the abstract should we expect purpose pressure to succeed or fail as marketplace competition rises and falls? Our second question is concrete: *has* industrial organization shifted in a relevant way? And, finally, do the two—purpose and competition—affect one another?

Frank Partnoy, Roy Shapira, Steven Shavell, Zachary Singer, Roberto Tallarita, Michael Troege, Amy Zeng, Nancy Zhu, and participants in workshops at the Berkeley, Columbia, Harvard, and the University of Florida law schools, the Labex-NYU-SAFE/LawFin Conference, the Fourth Greater Boston Corporate Governance Workshop, and the Zürich Law & Finance Seminar Series.

1. *Businesses Can and Will Adapt to the Age of Populism*, ECONOMIST (Jan. 21, 2017), https://www.economist.com/business/2017/01/21/businesses-can-and-will-adapt-to-the-age-of-populism ("and are voting for politicians who say they will make all that happen.").

2. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans*,*'* BUS. ROUNDTABLE (Aug. 19, 2019), www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-topromote-an-economy-that-serves-all-americans [https://perma.cc/VS3S-6Y8Y].

Purpose, if the firm takes it seriously, can be costly. In a competitive market with thin profit margins, a firm pressed to, say, pay its employees noticeably more than their productivity warrants cannot prosper. It will be unable to raise capital well, its extra costs will chew away at profits, its sales will suffer, and it will shrink. At the limit it will disappear. Milton Friedman's famous assertion that the proper purpose of the corporation is to make profit for its shareholders fits tightly within a competitive market structure, such as that which the United States was widely thought to have had in the 1970s when Friedman rendered his famous and controversial analysis.

In contrast, a sharp downward shift in competitive zeal with more firms having more market power, means that purpose pressure, even if expensive, cuts into the monopolist's above-normal profits—its rents—not its thin competitive profit. Accommodating the pressure will not be as dire for that firm. It can pay and still prosper. Its monopoly profits will erode, but the firm itself need not lose access to new capital if its profits stay above the economy-wide expected return for capital. Thus reinterpreted, the new corporate purpose movement aims to reallocate supracompetitive profits of the large public firm.

Consider as well how weak competition affects shareholder primacy's normative fitness with the following simple observation: the shareholder primacy command to the board and chief executive officer of a monopoly firm commands them to raise their price and produce less. The higher price produces monopoly profit, and the monopolist typically cuts production so as to sell only to high-value (and therefore high-paying) users. The profit maximization command in an uncompetitive market does not implement the classic analysis of Adam Smith—that the butcher and baker will bring forth protein and bread not out of charitable sentiment but out of self-interest. In a monopoly market, the monopolist butcher and baker will produce less protein and bread than they could, and each will charge too much, leaving too many potential consumers with neither meat nor bread. A charitable purpose might produce more. Hence, weakened competition weakens one justification for limiting the impact of purpose on corporate governance.

The fit between corporate purpose and industrial structure is sound in theory and, we shall see in Parts II and III, corroborated by much, but not all, evidence.

* * *

While competitive zeal's interaction with purpose pressure is the most basic connection here, industrial organization thinkers are divided as to whether U.S. competition has sharply declined and, if it has, why. I examine the alternatives' interaction with purpose pressure as well. Understanding these channels and knowing which is more important is vital for proper antitrust policy. But, for the corporate project here, *each* of the new industrial reorganization understandings has rents rising and, hence, each has more corporate value becoming contestable.

Three rent-increasing channels are widely seen to have altered industrial organization in the United States in recent decades: The first is a sharp competitive decline. The second is that competition has changed, with more winner-take-all competition, steeper scale economies, and more widespread network industries now yielding one competitive winner (or just a few) in an industry. These winners enjoy high profits for the duration of their competitive victory. The third channel sees industry-level competitive structure as satisfactory but share ownership as having become much more concentrated—leading to a small group of large institutional investors owning stock across an industry in ways that slake competitive zeal.

There is also a fourth relevant rents channel. Long-standing rents were once shared with labor decades ago, but in some analyses labor's capacity to obtain these rents has declined or disappeared. This possible channel leads to a similar but more complex analysis and conclusion.

* * *

In Part I, I contrast classical corporate purpose—shareholder primacy—with the wider purpose sought today. I then ask: in principle, is purpose pressure more likely to succeed in a competitive industry or a non-competitive one?

In Part II, I explore the extent to which the facts-on-the-ground match the concepts from Part I. I start with the evidence of decreasing competition. I then turn to the evidence that stakeholders do better in markets where competition is weak, that more profitable firms share profits with stakeholders, and that more profitable firms are more socially responsible than less profitable firms. The process can be likened to a capital-labor coalition in, say, the steel industry seeking tariffs. With the tariffs, a concentrated steel industry enjoys government-sanctioned market power and its concomitant capacity to raise prices to consumers. Capital and labor split the resultant monopoly profit.

In Part III, I examine alternative explanations for increasing industrial concentration and rising rents. These other explanations lie in increased economies of scale (which propels us to have larger firms), more network monopolies, and the dominance of superstar firms that emerge from winner-take-all contests of skill, foresight, and industry.

Each alternate avenue of industrial change *also* frees the benefiting firm from the intense competition that impedes firms from accommodating corporate purpose pressure. Skill, foresight, and industry monopolies are, in important analyses, the result of ferocious competition. But those end-result firms *also* no longer need to respond immediately and strongly to competitive pressures. There is good reason and data indicating that this avenue is more substantial than a competitive decline. But for this Article's thesis, I need not arbitrate the disagreement. Corporate purpose pressure to redivide the "good" monopolist's profits is as compatible with the Article's core thesis as pressure to redivide the "bad" monopolist's profits.

Then I show the consistency between the new horizontal shareholding analysis and the Article's thesis. In otherwise competitive industries, those seeking expanded but expensive purpose cannot readily succeed when they pressure a single firm but must bear down on the entire industry. For the pressure to succeed, it must resemble a tax, paid by all. Or the purpose pressure must be managed by a cartel, either agreed to by the firms themselves or organized by an outside ringmaster, such as institutional investors that own part of every firm in the industry. Recent antitrust scholarship has shown conceptually how, and brought forth evidence that, this new horizontal shareholding across an industry can affect prices and competition. This shareholding structure can in parallel fashion facilitate firms' decisions to broaden purpose and could do so even if its impact on raising prices turns out not to be as strong as originally thought. Cartelization allows the firms to escape the competitive forces that bar them from adopting wider purpose.

Each channel for industrial change—decreased competition or an altered nature of competition—can better accommodate the new purpose pressure than classic multi-firm competition. Thus I push forward a "supply-side" perspective for corporate purpose analysis; to fully understand the phenomenon, we need to understand not just the rising demand for wider purpose but the extent to which firms can now readily accommodate that rising demand.

In Part IV, I extend the analysis. First, I note normative implications. Shareholder primacy is more likely to bake the biggest economic pie in highly competitive industries than in noncompetitive ones. Declining competitive zeal does not reverse all rationales for shareholder primacy but it does weaken a key one.

Second, I consider the mechanisms through which purpose pressure can be greater for firms with high rents. Large firms attract political attention. Large firms with visible rents attract even more political attention. And firms with large rents have more reason to dodge political animosity because they want to retain those rents, which a motivated polity could confiscate or reallocate. The firm that does more corporate social responsibly and more strongly supports environmental, social, and governance efforts can reduce political animosity, giving up some rent to better ensure keeping the rest.

Third, I inquire further into the ways environmental, social, and governance (ESG) thinking and corporate social responsibility (CSR) can affect the firm with market power. Executives, boards, and even institutional shareholders can be less relentlessly profit oriented with rents than with competitive profits. Begin with managerial agency costs—the classic debility of the large, diffusely-owned public firm for profit-oriented shareholders—which are higher for stockholders of a firm with market power. Weak competition allows more managerial independence from profit-oriented shareholders. Executives can more readily follow their consciences and their personal interests (in, say, having a less stressful work life and a happier workforce). If the other institutions of corporate governance were airtight, then, yes, they would keep executives loyal to shareholders even in firms with market power. But if competition is part of the package of forces constraining executives, then an economy of firms with more market power will make it easier for ESG and CSR to be effective. A second way ESR and CSG enter the firm comes from shareholders not being fully united. Some shareholders, like many hedge fund activists, unremittingly pursue profit, while others, like some large pension funds, nowadays seek more ESG and CSR. The latter can do so more easily for firms with above-normal profits or when they can, in effect, themselves monopolize a relevant market in one dimension, that of doing ESG and CSR.

A third way ESG and CSR pressure becomes important is not recognized in the analytic literature, as far as I can tell. Many analysts indicate that most ESG/CSR is ultimately just cheap talk; executives and boards will only do CSR if it is profitable. I agree that much purpose pressure in the end must be profitable to succeed widely. But that determination is dynamic, not static. Effective purpose pressure *changes* the profit calculation of the firm, its executives, and its shareholders. I show how this process can work and why it works more strongly for monopoly firms: by affecting the public's opinion of the firm, altering the morale and motivation of the employees, striking at executives' consciences, and upping the chance of congressional action that redistributes rents away from executives and shareholders.

The fourth extension links purpose to rising contemporary political tension: if corporate profit becomes a major distributional battlefield inside the corporation, that conflict would contribute to the increasing instability and tension in the polity. Corporate governance institutions—like board elections, capital structure, and shareholder activism—have long tied executives and boards more tightly to shareholder-profit goals. Some thought tightening was needed for managerial accountability; some thought it was already too tight and managers needed more autonomy. But now the contest is shifting to include these social purpose values. Institutions that once were solely or primarily thought of as means to mitigate managerial slack are becoming suffused with social considerations.

* * *

Ideas—like corporate purpose that is wider than raw shareholder primacy—may succeed because they are persuasive and fair. They can succeed when they fit the interests of those with votes and power.

And—the thesis of this paper—they can succeed more easily when market structure makes them easier to implement. The new corporate purpose pressures' origins lie primarily outside industrial organization—mostly in frustration with weak government responses to big problems that many believe are only getting bigger. But purpose pressure has more potential to disturb the profit-focused public corporation today than it could have had decades ago. This difference in susceptibility is due to markets and industrial change yielding higher rents. The new industrial organization makes more firms able to respond positively to stakeholder pressure without cutting into their competitive profits.

Rising social pressure on the corporation should be seen as not just a set of changing mores but as a new struggle to divide up the large firm's supracompetitive profits. A rise in supracompetitive profits fits with a rise of pressure on the firm to distribute those extra profits to more than just shareholders. The pressure both reflects and fosters the increasing polarization and instability of the polity.

I. CORPORATE PURPOSE AS EXTRACTING MONOPOLY RENT: THE CONCEPT

Corporate purpose pressures—the idea that corporate decisionmakers should consider not just shareholder profitability but also stakeholders and society more broadly[3]—are more likely to fail in highly competitive industries than in weakly competitive ones. Some of these new social pressures on the corporation seek that the corporation have a purpose beyond profits—say, to chiefly orient the pharmaceutical company to curing disease over making money. And some pressures are oriented to stakeholders—say, to respect employees more, and to serve customers beyond what is profitable. For some analyses, purpose and stakeholder respect differ. But here we join them, as both aim to orient the firm away from shareholder primacy.[4]

In principle, a firm in a highly competitive market that accedes to expensive new socially conscious corporate purpose pressures will

3. *See* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?* __ TEX. L. REV. (forthcoming); Colin Mayer, *The Future of the Corporation and the Economics of Purpose*, 58 J. MGMT. STUD. 887, 888–89 (2021).

4. I similarly use CSR and ESG interchangeably, although they operate at differing levels of generality.

eventually disappear. While realistic market constraints are rarely that severe—and corporate purpose pressures rarely so costly—such a firm in a competitive market will still be compromised. If the corporate purpose costs are large,[5] a firm must raise its price or cut its services. If it cannot do either because of competition, it will shrink. It will have trouble raising new capital. In contrast, firms with market power in weakly competitive markets do not face the same barrier to incorporating costly CSR and ESG measures into their operations.

A. Shareholder Primacy: The Classical Theory, from Milton Friedman back to Adam Smith

Modern shareholder primacy—the idea that the corporation should be organized for shareholders' profit and not for a wider social purpose beyond complying with the law, the regulatory framework, and prevailing social norms—traces back to the iconic 1970 *New York Times* magazine article by Milton Friedman, the conservative, Chicago-school economist.[6] Friedman extolled the virtues of capitalism, competition, and free markets,[7] with shareholder profitability as one means to foster them.[8] "[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . . ."[9]

Four main rationales motivate shareholder primacy: (1) property; (2) clarity of purpose for management; (3) clarity for risk-bearing; and (4) social specialization.

5. By costs, I mean the net costs that detract from the firm's bottom line. If customers like the branding implicit in a company with a good purpose reputation, and those customers pay for purpose's cost, or if employees are more motivated when working for a purpose-driven firm, then the purpose costs are offset by the benefits. If the benefits exceed the costs, then corporate purpose pressure has helped the firm, which was too unimaginative to see the opportunity.

6. While Friedman is widely given credit for the concepts, or their modern formulation, the shareholders-as-owners idea was widespread at the time. But Friedman was then, and is still, famous. *See* Brian R. Cheffins, *Stop Blaming Milton Friedman!* 6–36 (Cambridge Legal Stud. Res. Paper Series, Paper No. 523, 2020).

7. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 3–4, 12–16 (1962).

8. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/UH4Q-D7NC/].

9. *Id.* Friedman was quoting from CAPITALISM AND FREEDOM, *supra* note 7.

The formalistic property idea is that the corporation belongs to its shareholders. Managers are obliged to work for their employers.[10] For business clarity and efficiency, say primacy advocates, directors and executives *should* think of themselves as employees of their company's owners, because a single overarching profit goal leads them to run their companies more effectively. Multiple goals distract executives, disrupting their focus on running the business.[11] And, besides, there is no obvious metric to trade off a societal good against shareholder profit or other societal benefits.[12] Since shareholders lose value first if the firm suffers, their primacy leads to the firm being run better than otherwise.[13] And as long as executives are paid from profits and elected by shareholders, their incentives will be to favor shareholders whatever the announced purpose of the corporation is.[14]

The last rationale is social specialization. Expansive purpose diverts directors and executives from running their firms well when they take on the political tasks of the legislature.[15] But the executive is not qualified to do so, and she is not selected by a political process.[16] Friedman's deepest fear was that strong social responsibility would curb the market. "The doctrine of 'social

10. Friedman, *supra* note 8; *cf.* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 186–87 (2018); A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) [hereinafter Berle, *Corporate Powers*] ("[A]ll powers granted to a [corporate board] . . . are . . . exercisable only for the ratable benefit of all the shareholders as their interests appears."); ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 241 (2d ed. 1968) (1932) (conceptualizing the corporation as private property, owned by its shareholders).

11. *See, e.g.*, Andrew Keay, *Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?*, 7 EUR. CO. & FIN. L. REV. 369, 383 (2010).

12. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 660 (2006); *see also* Michael C. Jensen, *Value Maximization, Shareholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 11 (2001); Am. Bar Ass'n Comm. on Corp. L., *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2269 (1990) (arguing that requiring directors to consider non-shareholder interests would lead to poor corporate managerial decision-making overall).

13. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36–39 (1991).

14. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020); Matteo Gatti & Chrystin Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1 (2020); Keay, *supra* note 11, at 400 (shareholders elect directors). The counterview is that shareholders' control of boards and executives is weak. Boards and executives, for example, have considerable influence over the corporate election and can devote corporate resources to promote themselves in the corporate election. *See infra* Part IV.

15. Friedman, *supra* note 8.

16. *Id.*

responsibility' . . . does not differ in philosophy from the most explicitly collectivist doctrine."[17]

* * *

Modern shareholder primacy is a corporate-scaled version of Adam Smith's classic account: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[18] In this vision, the self-interested corporation run by self-interested shareholders produces the greatest good for society.

B. Modern Purpose: More than Just for Shareholders

Opposing thought holds that (1) the property argument is poor logic—the State defines what property is; (2) corporate social responsibility increases profits—corporations can do well by doing good; (3) ESG/CSR values are what shareholders want; and (4) the utilitarian greatest-good-for-the-greatest-number maxim should prevail.

The property argument is effectively circular, the proponents of expansive purpose show. Because the State defines property, it can change property's parameters for the corporation—in the same way that it regulates access to, emissions from, and usage of physical property.[19] If corporate structure today gives shareholders a prime place in the corporation,[20] corporate law and structure could change that if needed to make wide purpose work.[21] And besides, CSR is

17. *Id.*; *see also* A. A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932).

18. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 20 (P.F. Collier 1909) (1776).

19. GREENFIELD, *supra* note 10, at 187–88; Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L. J. 339, 370–71 (2012); Fisch, *supra* note 12, at 649.

20. Bebchuk & Tallarita, *supra* note 14, at 139 (directors' incentives are not to favor stakeholders).

21. Primacy proponents could reply that this would entail a revolutionary restructuring of the corporation that is not in the political cards and that, by giving too many possible directions to the corporation, would undermine its effectiveness.

profitable, say the critics,[22] bringing forward evidence linking more CSR to higher profit.[23]

The third major modern purpose argument is that shareholders are not disembodied Wall Street moneymakers, but people with pensions and savings who have concerns and lives that benefit not just from shareholder profits but from fresh air, a stable polity, and a wholesome society. Economists Oliver Hart and Luigi Zingales have advanced that view, as have legal scholars Einer Elhauge and Lynn Stout.[24]

The last objection to shareholder primacy is basic: it fails to maximize utilitarian social value. Primacy degrades the environment because the firm offloads environmental costs onto a public that must then live with polluted air, devastated parks, and degraded nature. Primacy is said to lead to financial crises,[25] mistreated employees,[26] and corporate disasters—from British Petroleum's Deepwater Horizon oil catastrophe, to United Airline's dragging a doctor off

22. The view appeared early in the classic law review debate on purpose: E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–56 (1932); Berle, *Corporate Powers, supra* note 10, at 1049. *See generally* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99 (2008).

23. Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 82 (2010); Claudine M. Gartenberg, Andrew Prat & George Serafeim, *Corporate Purpose and Financial Performance*, 30 ORG. SCI. 1 (2016); Mozaffar Khan, George Serafeim & Aaron Yoon, *Corporate Sustainability: First Evidence on Materiality*, 91 ACCT. REV. 1697 (2016); Marc Orlitzky, Frank L. Schmidt & Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403 (2003). But if these pro-social actions benefit shareholders, primacy advocates tellingly point out, there is no conflict between expanded purpose and shareholder primacy. Bebchuk & Tallarita, *supra* note 14, at 110. However, see *infra* Part IV on how persistent purpose pressure alters the calculus of profitability.

24. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 784 (2005); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. & ACCT. 247, 248 (2017); LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 96–99 (2012); *cf.* Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020). A difficulty is that social visions could differ, or even clash. Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577–93 (2006). Not all of the authors mentioned in the text reject shareholder primacy. As an example, *see* Elhauge, *supra*, at 745. Rather, their point is that because shareholders prefer not just profit, calculating their interests is subtle.

25. Roger C. Altman, *The Great Crash, 2008,* FOREIGN AFFS., Jan.–Feb. 2009; THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR, AND FINANCE CAPITALISM 477 (Cynthia A. Williams & Peer Zumbansen eds., 2011) ("shareholder primacy has . . . increase[d] . . . inequality, systemic fragility and financial risk. . . .").

26. Steve Denning, *The Unanticipated Risks of Maximizing Shareholder Value,* FORBES (Oct. 14, 2014, 11:15 AM), https://www.forbes.com/sites/stevedenning/2014/10/14/the-unanticipated-risks-of-maximizing-shareholder-value/?sh=199c192f7094 [https://perma.cc/3CZB-23EE].

their overbooked plane, to Boeing's slipshod introduction of the crashworthy 737 Max.[27]

The view that purpose should be broad is increasingly popular. The Business Roundtable's famous 2019 restatement of corporate purpose—demoting shareholders to fifth on the list[28]—was explained by *Fortune*, the business publication, as fitting with and perhaps caused by public opinion: "as many Americans (64%) say that a company's 'primary purpose' should include 'making the world better' as say it should include 'making money for shareholders.'"[29]

C. Competition Confines Corporate Purpose: The Concept

Those arguing for or against shareholder primacy have sidestepped an important consideration: the competitive landscape of the underlying companies and industries. We know the demand for expanded purpose is rising. Is there also an increased capacity to supply it?

To explicate: firms compete on costs, services, and quality. In highly competitive markets, firms make profits, but competition drives their profit level down to the minimum that capital providers insist on for providing the capital. The raw material for steel might cost $600 per ton and the labor to transform it might cost $300, and if capital costs are $100 for each sale, then the firm must charge $1,000 for each ton of steel.

If purpose pressure raises the costs of production by, say, $50, then the firm must obtain $1,050 for each unit of steel—but it cannot if its customers will switch to competitors charging only $1,000. Yet if

---

27. Katie Allen, *Everyone Loses Out When Corporate Governance Falls by the Wayside*, GUARDIAN (Sept. 11, 2016), https://www.theguardian.com/business/2016/sep/11/corporate-governance-deepwater-horizon-shareholders [https://perma.cc/D7MG-86GB]; Peter Georgescu, *Boeing and Business Governance*, FORBES (Apr. 17, 2019, 12:37 PM), https://www.forbes.com/sites/peter georgescu/2019/04/17/boeing-and-business-governance/?sh=f7022927d982 [https://perma.cc/HE9D-75PS] (attributing the Boeing 737 catastrophe to a profit-seeking, shareholder primacy culture); STOUT, *supra* note 24, at 1–5 (concluding that the BP oil spill and the 2008 financial crisis stemmed from shareholder primacy). An alternative view that I would advance is that organizations fail, with shareholder influence a secondary aspect of the failure. The Challenger spacecraft failure, the Chernobyl accident, and the escape of the COVID-19 virus from Wuhan are organizational failures at least as substantial as Boeing's, BP's, and United's, but did not entail shareholder-induced distortions.

28. *Business Roundtable*, *supra* note 2.

29. Alan Murray, *America's CEOs Seek a New Purpose for the Corporation*, FORTUNE (Aug. 19, 2019, 3:30 AM), https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/ [https://perma.cc/MZC4-3RM2]. How much of the Roundtable's statement was public relations and how much was a real reorientation of purpose could be debated. But even if only the former, it indicates that the popularity of public purpose thinking persuaded the Roundtable to say something.

buyers will not pay $1,050, the company will go out of business. Why? If it charges only the original $1,000, then it loses $50 with each sale. To stay in business at $1,000 per unit, it must then pay only $550 for the raw steel, or only $250 for the needed labor, or pay its capital providers half of the $100 that they expect. But if it offers $550 for the raw steel, then the steel provider will sell elsewhere for $600. If it offers only $250 for labor, the employees will work elsewhere. If it offers only $50 to capital-providers, not the $100 market rate, it will fail to raise enough new capital.[30] The adjustment period may be slow—perhaps for as long as it takes current capital equipment to wear out—or fast, but on these numbers, the firm will inevitably shrink and go out of business.

Bottom line: if the ESG or CSR does not reward the firm—in either greater productivity, better branding, or otherwise—the firm will face pricing pressure or friction with its suppliers. In the short run, some firms can do major ESG even if it reduces profit. But doing so in the long run will be difficult or impossible. Even if the corporate jurisdiction did not require shareholder primacy, hypercompetition drives firms toward that result.

* * *

Consider next the monopoly or oligopoly before and after it faces major corporate purpose and ESG pressures of the kind in the prior paragraphs.

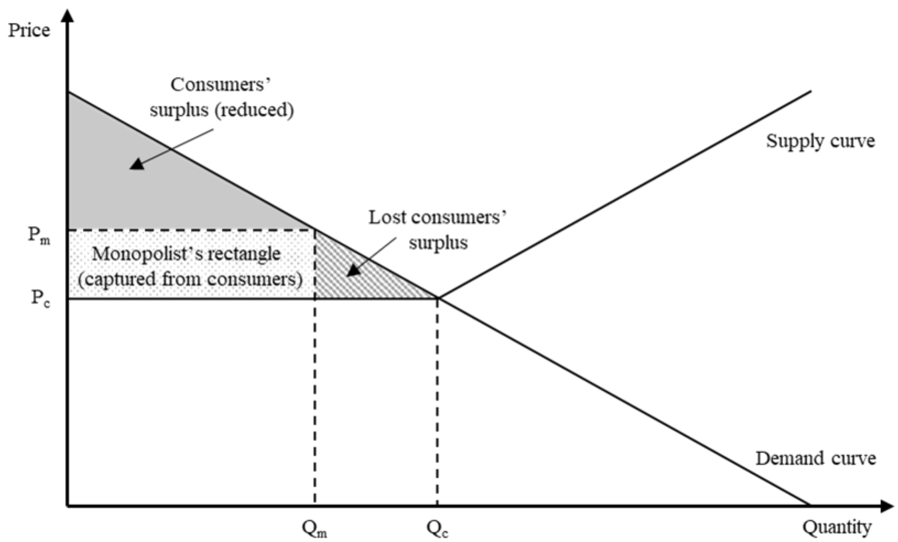
The monopolist steel mill faces the same cost structure, but because it faces no competition, it charges $1,120 for each ton of steel. Capital costs are still $100 for each ton of steel, but because the firm faces no competition, it raises its price per ton to make $120 in extra, monopoly profit.

In the classic analysis, it profits most by charging a higher price to customers who value steel highly and does so by cutting production

30. I.e., if the expected return is only $50 and capital providers everywhere else in the market insist on a 10% return, the firm could only raise $500, not the $1,000 it needs. The $100 for $1,000 of capital is capital's cost—the cost of renting capital for the factory from financial markets. The concept of capital having a cost is easy to visualize if the capital comes via a rental—i.e., via a loan. But it is embedded in all forms of capital, including the stock market. Financiers expect a return, or they will put their money elsewhere. (Pro-social capital providers might accept a lower return on capital.)

and not selling to customers who value steel less.[31] Figure 1 illustrates.[32]

Figure 1. The Monopolist's Profit, Before Purpose Pressure Campaign



The firm could not raise its price without limit, because at too high a price many customers would stop buying. Every price increase loses it a few customers. In the classic analysis, the firm raises price until the extra profit from the higher price just offsets the profit lost from the next lost customer.

Now posit new, major, and costly ESG pressure on the monopoly steelmaker. Yes, some costs might be mitigated or even recovered via enhanced employee productivity and motivation or by superior branding with consumers. But posit that the costs are greater than the benefits by $50 per ton of steel.

31. If the firm could discriminate and sell at a high price to high-valuing customers and sell at a profitable but lower price to lower-valuing customers, it would. But this is hard to do—lower-valuing customers, for example, might buy more steel and then resell it at a slight markup to the higher-valuing steel user.

32. Figure 1 shows a supply curve, much of which is atypically flat. The flat supply line communicates the monopolist's pricing discretion straightforwardly. The monopolist could accommodate purpose pressure and would not be run out of business. In a competitive market, all producers price at the intersection of the supply and demand curves, and they cannot deviate from that price or cost. More typical supply curves slope upward throughout as shown in Appendix Figures 1 & 2. And for explanatory completeness: the supply curve includes the minimum return that capital requires. The return to capital is a cost of the business.

The monopoly firm is not as hamstrung as the competitive firm. It can agree to costly ESG programs, with the costs coming out of its monopoly profits. The firm's monopoly profits could sink $50, from $120 to $70. But the suppliers, employees, and capital providers could still be fully paid. The monopolist may give up $50 to increase the chance that it retains the remaining $70.

The firm in a hypercompetitive industry cannot absorb the costs of accommodating purpose pressure.[33] The monopolist can, and it does so by giving up some of the monopoly rectangle in Figure 1. True, managers who work unremittingly for shareholders—or corporate governance regimes that force them to do so—will still seek to keep every dollar for shareholders even in the firm with monopoly power. But as long as one strong restraint requiring them to do so, namely product market competition, is important to that corporate governance package, then, when it goes missing, managers and boards can stray further from shareholder primacy.[34]

Consider a simpler pressure possibility. A newly founded vaccine research and manufacturing firm has no prior products but has perfected a vaccine that confers immunity to a serious disease. It is the only producer of the vaccine, which many people value highly. It chooses a price, P_m, to be most profitable. In choosing P_m, it balances the costs and benefits of the broad inputs to profits: revenue and cost, of course, but also branding, reputation, employee morale, and

33. An aside, for completeness: a micro-economist would indicate that the monopoly firm faced with rising costs would typically raise its price some and reduce its monopolist profit some. If the monopolist passed on all of the costs and raised prices heavily, it would lose sales. Those lost sales would deprive the monopolist of some remaining monopoly profit in that rectangle. So, the monopolist that can calculate—most can only estimate—will build the ESG and CSR costs into its price until the extra dollar of passed-on costs destroys a remaining dollar of monopoly profit. This is pictured in Appendix Figure 2.

34. A few words on capitalization of the rents: expected rents will be priced in stock market transactions. If I own stock in that steel firm obtaining rents of $120 per year per share, from selling for $1,120 what costs $1,000 to produce, and the capitalization rate is ten percent, then I will insist on an extra $1,200 above the competitive price when I sell the stock (from $120/.1), and the buyer will pay it. But then that profit-oriented buying stockholder expects to receive the rent, will militate in corporate governance to keep it, and will be disappointed in managers that give it up.

Still, the monopoly firm with capitalized rents is not as confined as the competitive one. First, the competitive firm that gives up profit for ESG will damage its access to capital markets because it can no longer credibly promise capital-providers the competitive rate of return. The monopoly firm that takes on costly purpose, but pays for it out of the firm's monopoly profit, can still access capital markets as long as it can credibly promise a competitive rate of return going forward, which it can. Second, the stark sequence—rents are acquired and capitalized, and *then* the firm spends on purpose—is not the necessary, or I suspect the usual, sequence. Instead, the firm simultaneously corners rents and spends on purpose. When some of each occurs simultaneously, as I suspect is common, the rents are never fully and separately capitalized; hence, they are not there to lose, but a hidden potential gain.

potential regulatory intervention if the price is too high. The price at P_m captures the monopoly profits in Figure 1. That price is above the price, P_c, that would be charged if there were competition. And at a price below P_c, the firm could not produce the vaccine.[35]

Then a purpose campaign begins. The campaigners convince the relevant actors that vaccine manufacturers, although they cannot lose money, should serve society and not just shareholders.[36] Pricing should be just above cost; patent protection should be modest or nil. The net result: the besieged firm, fearing damage to its image, to its employees' morale, or from the authorities, lowers the vaccine's price. The successful campaign reduces the monopolist's excess profit and increases the stakeholders' surplus (because more patients get the vaccine more cheaply and more quickly).

The monopolistic vaccine maker can react to, and absorb the costs of, purpose pressure by spending some of the monopoly profit in a way that the competitive vaccine maker could not.[37]

Theory and concept are clear: hypercompetitive industries cannot do corporate purpose that does not pay for itself. They cannot lower their price and stay in business. Monopolistic firms can.

Next, how much does this analysis correspond to recent reality?

II. EMPIRICAL REALITIES

In this Part we assess whether the abstractions from Part I have empirical foundations by examining two questions. First, is there evidence of competition declining in the United States? And, second, do more profitable firms facing weak competition pay employees better or spend more on CSR/ESG?

Considerable evidence points to both, although not all agree. I aim here not to establish these empirical foundations beyond doubt but to

35. Costs are here not just the costs of production but include the total costs of development. Most drugs fail, so a successful drug has to pay for the failures.

36. Posit that the purpose campaign does not directly affect the profitability of an expanded purpose. That is, a purpose campaign could demoralize the scientists on whom the firm depends on to develop the next vaccine, could raise the odds of price regulation, and could tarnish the company's brand and reputation. If it has those effects, the company may accede for profit-based reasons. *See infra* Part IV.B. But over and above those costs, in the text's hypothetical the purpose pressures change the firm's decision-making structure or corporate conscience, or both.

37. This is not to justify monopoly. It is only to show that purpose pressure here mitigates the monopoly's negative impact. A competitive vaccine market would price at Pc, which is less than Pm. The point is that the purpose pressure has limited impact on the firm pricing at Pc but can have more of an effect on the firm pricing at Pm.

show that considerable evidence favors them. The link between rising purpose pressure and anti-corporate populism, on the one hand, and decreasing competition, on the other, is plausible and maybe probable, even if unproven. Weakened competition did not alone cause increased purpose pressure, but pressure can succeed more often in a less competitive industry than in a competitive one.

A. Decreasing Competition: The Evidence

Industrial concentration has increased from what it once was.[38] While more concentration does not mean less competition[39]—because three firms may compete as ferociously as six[40]—important

38. *See* COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 1 (2016), https://obamawhitehouse.?archives.gov/?sites/?default/files/ page/files/20160502_ competition_issue_brief_updated_cea.pdf [https://perma.cc/3XR8-QCCM]; William A. Galston & Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, (Jan. 5, 2018), https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/[https://perma.cc/SB5U-LVBD] (discussing rising concentration); Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697, 697 (2019) ("Since the late 1990s, over 75% of US industries have experienced an increase in concentration"); Lawrence J. White & Jasper Yang, *What Has Been Happening to Aggregate Concentration in the U.S. Economy in the Twenty-First Century?*, 38 CONTEMP. ECON. POL'Y 483, 483 (2020) ("[A]ggregate concentration . . . appears to have risen moderately but steadily since the mid-1990s.").

39. Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition?*, 1 CRITERION J. ON INNOVATION 47, 62 (2016); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets,* 33 J. ECON. PERSPS. 69, 76 (2019); White & Yang, *supra* note 38, at 484; Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, 33 ANTITRUST 74, 78 (2018); David Wessel, *Is Lack of Competition Strangling the U.S. Economy?* HARV. BUS. REV., Mar.–Apr. 2018, at 106.

40. *See* White & Yang, *supra* note 38, at 484. On concentration not reducing competition: if 1000 firms merge down to 100 but the remaining firms compete across 10 markets instead of only one—in the way of the old conglomerates—then competition could be just as strong as before the mergers, with 10 competing firms in each market. *Id.* But corporate governance trends indicate this not to be so on the ground. Broad conglomerates like General Electric have failed, others have broken up, and new ones are not arising. Firms have more than ever de-diversified. More than fifty percent were in multiple market segments in 1981. By 1997 less than seventeen percent went beyond a single segment. Nilanjan Basu, *Trends in Corporate Diversification*, 24 FIN. MKT. PORTFOLIO MGMT. 87, 91 tbl.1 (2010); *accord* Monika Schommer, Ansgar Richter & Amit Karna, *Does the Diversification-Firm Performance Relationship Change Over Time? A Meta-Analytical Review*, 56 J. MGMT. STUD. 270 (2019). Concentration could increase nationally while masking a decrease locally—and the local market could be key. This paradox would arise if the enlarged (and more concentrated) national firms entered more local markets, making them less concentrated and presumably more competitive. Estevan Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, 35 NBER MACROECONOMICS ANNUAL 2020, at 115. *Cf.* C. Lanier Benkard, Ali Yurukoglu & Anthony Lee Zhang, *Concentration in Product Markets* (Nat'l Bur. Econ. Res. Working Paper 28745, Apr. 2021), https://www.nber.org/papers/w28745 (high-profile mega-firms, like Amazon and Apple, and high-profile mergers belie the general trend).

analyses also see competition declining as concentration increased.[41] Four tendencies point to decreasing competition in the American economy: the increasing concentration itself, rising corporate profits as a proportion of gross domestic product, increasing markups (or profit-to-cost ratios), and declining dynamism.[42]

In many industries, fewer firms compete today than did decades ago. The Herfindahl-Hirschman Index (HHI)—long the gold standard for quantifying industrial concentration—has risen greatly across the economy.[43] Some blame the 1980s' relaxing of merger guidelines,[44] unregulated exclusionary practices,[45] lax antitrust enforcement in general,[46] and large firms regularly acquiring potential competitors[47] or using network strengths to "amplify and extend [the] magnitude, durability and scope [of their market power],"[48] particularly in digital and tech markets.[49] We have appreciably fewer firms in many markets. Markups of price over cost have been rising steeply,

---

41. COUNCIL OF ECON. ADVISERS, *supra* note 38; AM. ANTITRUST INST., A NATIONAL COMPETITION POLICY: UNPACKING THE PROBLEM OF DECLINING COMPETITION AND SETTING PRIORITIES MOVING FORWARD (2016), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/AAINatlCompPolicy-1.pdf [https://perma.cc/9N96-AB9J].

42. THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 9–10, 51–56 (2019); Shapiro, *supra* note 39, at 70–72.

43. COUNCIL OF ECON. ADVISERS, *supra* note 38, at 4–5; PHILIPPON, *supra* note 42, at 45–47, 51–52. The Herfindahl-Hirschman Index (HHI) is "a commonly accepted measure of market concentration. [It] is calculated by squaring the market share of each firm competing in [a given] market and then summing the resulting numbers." DEP'T OF JUSTICE, *Herfindahl-Hirschman Index* (July 31, 2018), https://www.justice.gov/atr/herfindahl-hirschman-index [https://perma.cc/26NZ-98ER]. While antitrust authorities rely heavily on HHI measurements, academic economists see the power to raise price as the touchstone, with HHI not assuredly indicating power over price.

44. Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S68–S69 (2014); Gilbert B. Becker, *The U.S. Horizontal Merger Guidelines After One Half Century: Three Steps Forward and One Step Back*, 63 ANTITRUST BULL. 137, 140–41 (2018).

45. JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 14–17 (2019).

46. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 158 (2014) (indicating that "most studied mergers result in competitive harm, usually in the form of higher price. In a great many cases that harm is substantial"); PHILIPPON, *supra* note 42, at 197, 203 (attributing much lax enforcement to campaign contributions and electoral influence).

47. And acquiring actual competitors as well. Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44, 59–62 (2019); *see generally* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 29 J. POL. ECON. 649 (2019) (describing how dominant firms in "killer acquisitions" in the pharma industry eliminate their potential competitors by "killer acquisitions").

48. Joseph E. Stiglitz, Towards a Broader View of Competition Policy 9 (Roosevelt Inst. Working Paper, June 2017); *see also* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

49. BAKER, *supra* note 45, at 18–20; *see also* John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497 (2019); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

suggesting that firms are raising prices beyond what they would need to charge in a competitive market.[50] Authorities such as Edmund Phelps lament the declining business dynamism in the United States.[51] Says another authority: "[M]arket entry by smaller, entrepreneurial start-ups is on the decline. Entrepreneurs commercialize a disproportionate number of disruptive innovations that drive market entry . . . . But . . . the rate of firm entry in the U.S. is in an almost 40–year free fall."[52]

Moreover, profits as a portion of the gross domestic product are up steeply since the 1980s, by fifty percent—a rise that competition should have eroded if it were strong.[53] New entry would have pressed profits down, but it has not in this view because new entry and new firm formation are sharply down. As one analysis, from economist Carl Shapiro (otherwise skeptical as to competitive erosion) concludes:

> [Even if concentration trends are not definitive,] . . . profits have risen as a share of GDP. This . . . points to a rise in incumbency rents, i.e., excess profits earned by firms whose positions are protected by high barriers to entry. . . . [High profits are the mark of success, but] perhaps we should hold our applause [for American capitalism's

50. *See* Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561, 561 (2020) (markups rose "from 21% above marginal cost [in 1980] to 61% [in 2020]"); PHILIPPON, *supra* note 42, at 54 (profits are a steeply rising share of GDP); Federico J. Díez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and its Macroeconomic Implications* 8 (IMF Working Paper No. WP/18/137, 2018), https://www.imf.org/en/Publications/WP/Issues/2018/06/15/Global-Market-Power-and-its-Macroeconomic-Implications-45975 [https://perma.cc/H7T4-99TX]; Shapiro, *supra* note 39, at 70–71; Robert E. Hall, *Using Empirical Marginal Cost to Measure Market Power in the US Economy* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25251, 2018), https://www.nber.org/papers/w25251 [https://perma.cc/B7MM-5PUR]; Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421, 2422 (2020). I examine alternate explanations for rising markups in Part III.

51. EDMUND PHELPS, MASS FLOURISHING: HOW GRASSROOTS INNOVATION CREATED JOBS, CHALLENGE, AND CHANGE 237, 240 (2013); *see also* Ian Hathaway & Robert E. Litan, *What's Driving the Decline in the Firm Formation Rate? A Partial Explanation*, ECON. STUD. BROOKINGS (Nov. 2014), https://www.brookings.edu/wp-content/uploads/2016/06/driving_decline_firm_formation_rate_hathaway_litan.pdf [https://perma.cc/L3NT-YECM]; Ufuk Akcigit & Sina T. Ates, *What Happened to U.S. Business Dynamism?* (Nat'l Bureau Econ. Rsch. Working Paper No. 25756, 2019), https://www.nber.org/papers/w25756 [https://perma.cc/AEP6-HAH4]. *But cf.* Fatih Karahan, Benjamin Pugsley & Aysegül Şahin, *Demographic Origins of the Startup Deficit*, FED. RES. BANK N.Y., STAFF REP. NO. 888 (2019), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr888.pdf [https://perma.cc/4J23-3GUD] (declining dynamism due to demographics: aging, fewer births, lower immigration, and slowing of the rise of female participation in the workforce).

52. AM. ANTITRUST INST., *supra* note 41, at 6; *see also* Ryan A. Decker, John Haltiwanger, Ron S. Jarmin & Javier Miranda, *Declining Dynamism, Allocative Efficiency, and the Productivity Slowdown*, 107 AM. ECON. REV. 322 (2017).

53. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 732 (2018).

> winners] until we understand better why competitive forces have not (yet?) been more effective at eroding these profits. Profits necessary to induce risky investments are one thing; incumbency rents are quite another.[54]

These trends all suggest declining competition.

A more complex corporate finance fact points to competitive atrophy. Some industries' stock prices are high relative to their assets' value, signaling strong investment opportunities that should have led to more investing to rake in more profit.[55] Such industries traditionally obtained more funding from capital markets than those with low stock prices relative to their asset values—but no longer. Since the end of the twentieth century, cash has been flowing *out* from such high-stock-price-to-asset-value industries. The best explanation why, according to researchers, is that these high-stock-price-to-asset-value industries refused to invest more in their operations *because* they had market power.[56] If they invested more and produced more, they would have had to lower their prices and become less profitable.

* * *

Thus, significant data and analyses from multiple perspectives see competition as having declined sharply in recent decades. The view is not unanimous, but the evidence is substantial, and the view widespread.[57]

B. Firms with More Market Power Do More CSR and ESG: The Evidence

Highly profitable firms—often in weakly competitive markets—do better for their *stake*holders than those in highly competitive markets.

The classical evidence. Hannan and Mavinga showed decades ago that managers and employees at banks facing weak competition did

54. *Id.* at 737.

55. Dong Lee, Han Shin & René M. Stulz, *Why Does Equity Capital Flow Out of High Tobin's q Industries?* 2, 33 (Fisher Coll. Bus. Working Paper No. 2020-03-002, 2020), https://www.ssrn.com\abstract=3535841 [https://perma.cc/WU7X-XZT4].

56. *Id.* More precisely, the high cash outflow, despite the companies' high value relative to existing assets, indicates that the firms had large rents.

57. The implications for this Article's thesis of the other explanations for the data are examined in Part III. Rents from other sources lead to a similar conclusion: that such firms are congenial to corporate purpose pressure.

better than those at banks facing stiff competition.[58] Later work confirmed this result with further data,[59] finding that wages in banking fell after deregulation opened banking up to more competition.[60]

Another instance: union workers in the trucking industry obtained part of the monopoly rents accruing to the trucking firms' owners from the industry's weak competition.[61] Industrial concentration allowed the monopolist-firm to pass union wage premiums on to consumers.[62] Other scholarship concludes that many industries' monopoly profits—which too often did not show up in the firms' bottom lines—must be either mismeasured or captured by stakeholder inputs, like labor, when labor was more powerful and more unionized than it is now.[63]

International evidence is similar: in studying the relationship between market power and wages in the United Kingdom, Stephen Nickell and Daphne Nicolitsas conclude that "falls in market power [i.e., greater competition] . . . lead to . . . lower pay rises . . . ."[64] Similar results are found for Canada, Denmark, France, Germany, Italy, Portugal, and Sweden.[65] Across developed nations,

---

58. Timothy H. Hannan & Ferdinand Mavinga, *Expense Preference and Managerial Control: The Case of the Banking Firm*, 11 BELL J. ECON. 671, 676, 678–79 tbls.2 & 3 (1980) (tables show employees paid better at banks with higher market share—and office expenditures higher as well).

59. Allen N. Berger & Timothy H. Hannan, *The Efficiency Cost of Market Power in the Banking Industry: A Test of the "Quiet Life" and Related Hypotheses*, 80 REV. ECON. &. STAT. 454, 455 (1998) (banks facing weak competition have more employees than banks facing strong competition because "market power . . . may allow managers to pursue objectives other than firm profits . . . [such as] expansion of staff . . . beyond levels justified by profit maximization. . . ."); Marcello Estevão & Stacy Tevlin, *Do Firms Share Their Success with Workers? The Response of Wages to Product Market Conditions*, 70 ECONOMICA 597, 609 (2003) (the "variation in rents explains a substantial part of wage variation . . .").

60. Sandra E. Black & Philip E. Strahan, *The Division of Spoils: Rent-Sharing and Discrimination in a Regulated Industry*, 91 AM. ECON. REV. 814, 814 (2001).

61. Nancy L. Rose, *Labor Rent Sharing and Regulation: Evidence from the Trucking Industry*, 95 J. POL. ECON. 1146, 1148, 1175 (1987).

62. Kim B. Clark, *Unionization and Firm Performance: The Impact on Profits, Growth and Productivity*, 74 AM. ECON. REV. 893, 898–900 (1984).

63. Michael A. Salinger, *Tobin's q, Unionization, and the Concentration-Profits Relationship*, 15 RAND J. ECON. 159, 166, 169 (1984).

64. Stephen Nickell & Daphne Nicolitsas, *Wages, Restrictive Practices and Productivity*, 4 LABOUR ECON. 201, 214 (1997).

65. *See* Brian Bell, Paweł Bukowski & Stephen Machin, *Rent Sharing and Inclusive Growth* 6–8 (LSE Int'l Inequalities Inst., Working Paper No. 29, 2019), http://eprints.lse.ac.uk/101868/ [https://perma.cc/KV4N-V8MG] (gathering sources).

"anticompetitive regulations tend to raise wage premia in all industries."[66]

Executives at American firms in weakly competitive markets work less assiduously for shareholder value than at firms facing more severe product market competition,[67] as theory predicts.[68] Weak competition gives executives more leeway and more freedom from shareholders. Executives in monopolistic industries are less beholden to their shareholders than executives in competitive industries. That slack facilitates labor, particularly union labor, gaining at shareholders' expense. Unions in the United States were historically less effective "in establishments facing competitive product market conditions [than] in establishments with . . . product market power as a result of facing limited competition."[69]

The academic literature is not undivided, however. Some research finds that product market conditions affect wage rates only modestly, or interprets the rent-sharing data as not dispositive.[70] Others look for an impact from a specific event—like ending a trade agreement, with competition declining after its termination, or cartelizing legislation—and find no wage impact.[71] Still others find for the United Kingdom that while "companies with higher market power share on average more of their rents than companies with low power," the strength of this effect varied over time.[72]

High profits and high market share correlate with more CSR and ESG: the evidence. Financially successful firms are more likely than financially constrained firms to be ESG-friendly.[73] True, some ESG

66. Sébastien Jean & Giuseppe Nicoletti, *Product Market Regulation and Wage Premia in Europe and North America: An Empirical Investigation* 6 (OECD Econ. Dep't, Working Paper No. 318, 2002), https://www.doi.org/10.1787/016668388552 [https://perma.cc/SG6Q-SFFY].

67. Franklin R. Edwards, *Managerial Objectives in Regulated Industries: Expense-Preference Behavior in Banking*, 85 J. POL. ECON. 147, 148–49 (1977).

68. For a classic view, see GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39–47 (2d ed. 1971).

69. Mark B. Stewart, *Union Wage Differentials, Product Market Influences and the Division of Rents*, 100 ECON. J. 1122, 1135 (1990).

70. David Card, Ana Rute Cardoso, Joerg Heining & Patrick Kline, *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LABOR ECON. S13, S21–S22 (2018).

71. George Symeonidis, *The Effect of Competition on Wages and Productivity: Evidence from the United Kingdom*, 90 REV. ECON. & STAT. 134, 135 (2008).

72. Bell et al., *supra* note 65, at 4.

73. Punit Arora & Ravi Dharwadkar, *Corporate Governance and Corporate Social Responsibility (CSR): The Moderating Roles of Attainment Discrepancy and Organization Slack*, 19 CORP. GOVERNANCE: INT'L REV. 136, 136 (2011); M.K. Chin, Donald C. Hambrick & Linda K. Treviño, *Political Ideologies of CEOs: The Influence of Executives' Values on Corporate Social Responsibility*, 58 ADMIN. SCI. Q. 197, 214–15 (2013).

may cause higher profits by bolstering the corporate image and morale, and ESG proponents assert that ESG raises profit.[74] But at least some, and maybe much, ESG arises *from* the slack that high profitability provides the firm and its managers.[75] Strong evidence suggests that raising ESG/CSR across the board from current levels is not profit-friendly. Equity prices reacted negatively to European Union mandates for more disclosure of public firms' ESG activity.[76]

Shareholder activists seeking a broad corporate purpose targeted more than 600 companies globally during the 2005–2014 decade to foster ESG measures. Tams Barko, Martijn Cremers, and Luc Renneboog found that these engagements were more likely to succeed in companies with a higher market share.[77] This evidence supports this Article's thesis: higher market share usually gives a firm more room to maneuver. Firms facing less competition do more CSR, with CSR declining "as we change industry structure from monopoly to oligopoly and eventually to perfect competition."[78] "[I]ncreasing competition in a product market . . . reduce[s] aggregate CSR."[79]

Other studies confirm the generality: financially "[l]ess constrained firms spend more on goodness."[80] More ESG and more social responsibility follow strong financial performance.[81] ESG

---

74. Hao Liang & Luc Renneboog, *Corporate Social Responsibility and Sustainable Finance: A Review of the Literature* 5 (Eur. Corp. Gov. Inst., Working Paper No. 701/2020, 2020), https://www.ssrn.com/abstract=3698631 [https://perma.cc/BKX9-XXUS].

75. Sandra A. Waddock & Samuel B. Graves, *The Corporate Social Performance-Financial Performance Link*, 18 STRATEGIC MGMT. J. 303, 303 (1997); Orlitzky et al., *supra* note 23, at 406.

76. Jody Grewal, Edward J. Riedl & George Serafeim, *Market Reaction to Mandatory Nonfinancial Disclosure*, 65 MGMT. SCI. 3061, 3061 (2017).

77. Tamas Barko, Martijn Cremers & Luc Renneboog, *Activism on Corporate Social Responsibility* 2, 3, 21–22, 45 tbl.4 (Eur. Corp. Governance Inst. Working Paper No. 509, 2017), https://www.ssrn.com/abstract=2977219 [https://perma.cc/7PL7-E5B4]. Post engagement profits, however, increase.

78. Olga Hawn & Hyoung-Goo Kang, *The Effect of Market and Nonmarket Competition on Firm and Industry Corporate Social Responsibility*, *in* 38 SUSTAINABILITY, STAKEHOLDER GOVERNANCE, AND CORPORATE SOCIAL RESPONSIBILITY 313, 327 (Sinziana Dorobantu, Ruth V. Aguilera, Jiao Luo & Frances J. Milliken eds., 2018).

79. *Id.* at 329.

80. Harrison Hong, Jeffrey D. Kubik & Jose A. Scheinkman, *Financial Constraints on Corporate Goodness* 1, 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18476, 2012), https://www.ssrn.com/abstract=1734164 [https://perma.cc/UG82-9KGR] (an unexpected rise in financial freedom from the internet bubble of the late 1990s decreased restraint and increased "goodness").

81. Jean B. McGuire, Alison Sundgren & Thomas Schneeweis, *Corporate Social Responsibility and Firm Financial Performance*, 31 ACAD. MGMT. J. 854, 869 (1988). Similar results in Waddock & Graves, *supra* note 75, at 311 ("better financial performance leads to improved" CSR). And firms anticipating stronger financial performance did more CSR. Thomas Lys, James P. Naughton & Clare Wang, *Signaling Through Corporate Accountability Reporting*, 60 J. ACCT. & ECON. 56, 56 (2015).

engagements in the 1999–2009 decade were more likely for larger firms and firms having higher market share, in one study,[82] and more likely to succeed at firms with higher abnormal returns and better long-term stock returns, according to another.[83] The authors of a review of the early literature conclude that:

> A simple compilation of the findings suggests there is a positive association, and certainly very little evidence of a negative association, between a company's social performance and its financial performance.[84]

Another compilation concludes that "[t]he majority of studies show a positive relationship between [CSR] and financial performance (63%); 15% . . . report a negative relationship, and 22% report a neutral or mixed [relation]."[85] A recent literature review concluded that nine-tenths of the 2000 available empirical studies on the subject find strong financial results correlate with more CSR.[86]

These results fit tightly with the thesis here that corporate purpose is, on the ground, often a contest to divide up the firm's extra profits, with weakly competitive firms more easily able to divide up pre-purpose profits than firms in highly competitive industries.

* * *

However, the evidence is not uniform here either. Two studies find that more competitive industries can have high corporate social responsibility scores, with one seeing "these results as evidence that CSR is strategically chosen"[87] and the other finding "a contagion

82. Elroy Dimson, Oğuzhan Karakaş & Xi Li, *Active Ownership*, 28 REV. FIN. STUD. 3225, 3244 (2015).

83. Jiaying Wei, *Environmental, Social and Governance Proposals and Shareholder Activism*, 46 J. PORTFOLIO MGMT. 49, 49 (2020). And targeted firms had more market share than firms not targeted. *Id.* at 51, 56.

84. Joshua D. Margolis & James P. Walsh, *Misery Loves Companies: Rethinking Social Initiatives by Business*, 48 ADMIN. SCI. Q. 268, 277 (2003).

85. John Peloza, *The Challenge of Measuring Financial Impacts from Investments in Corporate Social Performance*, 35 J. MGMT. 1518, 1521 (2009); *See also* Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, *in* CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

86. Gunnar Friede, Timo Bush & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INVS. 210, 210 (2015); *see also* Ulrich Atz, Tracy Van Holt, Zongyuan Zoe Liu & Christopher Bruno, Do Corporate Sustainability and Sustainable Finance Generate Better Financial Performance? (Mar. 4, 2021) (unpublished manuscript), https://www.ssrn.com/abstract=3708495 [https://perma.cc/7LXT-MTBN].

87. Daniel Fernández-Kranz & Juan Santaló, When Necessity Becomes a Virtue: The Effect of Product Market Competition on Corporate Social Responsibility, 19 J. ECON. MGMT. STRATEGY 453, 453 (2010).

effect in the industry: the higher the CSR engagement of the firm's competitors, the higher is its own engagement in CSR."[88] Another finds that nations with stronger competition laws do more CSR.[89] Similarly, sharp competition-increasing reductions in U.S. tariffs were said to lead domestic producers to "increa[se] their CSR . . . to . . . differentiate themselves from their foreign rivals."[90]

Purpose pressure runs in two causal chains: in some competitive industries, competition for purpose-driven consumers demands that the firms be purpose-driven. But, in weakly competitive industries, purpose pressure can lead those industries' firms to share their excess profits via purpose-oriented acts. In the first, the firm constructs a purpose that appeals to customers. In the second, the firm yields to stakeholder pressure. In the first, the firm seeks purpose, in the second the firm accommodates it. Both can be in play.

* * *

Overall, most of the academic literature on the subject thus supports the concept that employees do better at firms in low competition environments than in highly competitive environments.[91] The potential parallel for purpose pressures is clear. The firm's capacity and willingness to satisfy purpose pressures seem likely to parallel its capacity and willingness to accommodate employee pressure for better wages.

---

88. Hawn & Kang, *supra* note 78, at 321; *see also* Donald S. Siegel & Donald F. Vitaliano, *An Empirical Analysis of the Strategic Use of Corporate Social Responsibility*, 16 J. ECON. & MGMT. STRATEGY 773 (2007).

89. Wenzhi Ding, Ross Levine, Chen Lin & Wensi Xie, Competition Laws, Norms and Corporate Social Responsibility 5 (June 30, 2020) (unpublished manuscript), https://www.ssrn.com/abstract=3605990 [https://perma.cc/G7SY-JGH7]. The study does not tell us whether competitive industries in the United States do more CSR than less competitive American industries.

90. Caroline Flammer, *Does Product Market Competition Foster Corporate Social Responsibility? Evidence from Trade Liberalization*, 36 STRATEGIC MGMT. J. 1469, 1471 (2015); *see also* Marion Dupire & Bouchra M'Zali, *CSR Strategies in Response to Competitive Pressures*, 148 J. BUS. ETHICS 603 (2018); Maretno Harjoto, Indrarini Laksmana & Robert Lee, *Board Diversity and Corporate Social Responsibility*, 132 J. BUS. ETHICS 641 (2015) (higher board diversity is associated with stronger CSR in more competitive consumer product industries); Johan Graafland & Hugo Smid, *Competition and Institutional Drivers of Corporate Social Performance*, 163 DE ECONOMIST 303, 316–17 (2015) (concluding that "branding of their products" with "a good CS[R] reputation" is particularly critical in technological industries, to motivate their employees and customers).

91. An expanded analysis would look at whether workers do better overall, because while those who are employed at the monopoly firm receive a wage bonus, total employment is lower than it would be otherwise.

III. AND WHAT IF COMPETITION IS NOT DECREASING?

Declining competition is a widely supported conclusion, but important economic analyses instead see rising concentration and rising profits as resulting from *fiercer* competition that yields "skill, foresight, and industry" winners—built by innovative entrepreneurs with better ideas,[92] often from technological innovation sheltered by patent protection.[93] Other monopolies arise from networks where costs decline greatly for a firm that services all consumers or where consumers get more value when they find other consumers on the same network.[94] Facebook is an archetypal network monopoly.[95] Still others see much of the new concentration as resulting from old-fashioned economies of scale[96] with high fixed costs.[97]

Each of these analyses sees more concentration than ever before—after the winners prevail in the second interpretation, they too have more market power and higher rents. As a recent, extensive analysis summarizes:

> [multiple] authors . . . believe that concentration as well as rising markups and profits are 'good,' since they . . . manifest[] efficiency and superior technology . . . . [Others] believe that rising concentration as well as increasing markups and profits are 'bad,' since they . . . manifest[] rising market power, . . . entry barriers, and,

---

92. Susanto Basu, *Are Price-Cost Markups Rising in the United States? A Discussion of the Evidence*, 33 J. ECON. PERSPS. 3, 3 (2019) ("industrial concentration can [come from] more efficient firms . . . gain[ing] market share"); Shapiro, *supra* note 39, at 72, 79–80; John Van Reenen, *Increasing Differences Between Firms: Market Power and the Macroeconomy* (LSE Ctr. for Econ. Performance, Working Paper No. 1576, 2018), https://cep.lse.ac.uk/pubs/download/dp1576.pdf [https://perma.cc/RA8F-V3XL].

93. David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 703 (2020) ("technological dynamism, rather than simply anti-competitive forces, is an important driver"); Akcigit & Ates, *supra* note 51, at 3 (slowing of knowledge diffusion from leading to laggard firms has slowed dynamism).

94. Berry et al., *supra* note 47, at 53–54, 56; James Bessen, *Information Concentration and Information Technology* (B.U. Sch. L., Law & Econ. Paper No. 17-41, 2017), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1269&context=faculty_scholarship [https://perma.cc/M9EX-8MRV].

95. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 90–92 (2019).

96. Berry et al., *supra* note 47, at 45 ("higher fixed (or sunk) costs can lead to fewer firms in a market, which can result in softer competition, higher prices, and reduced consumer welfare"). The capacity of the firm to raise prices—even though derived from economies of scale—increases its ability to satisfy corporate purpose pressures. The paper's thesis straddles both sides of the decreased competition debate. *See infra* Part III.

97. Berry et al., *supra* note 47, at 54.

> ultimately, . . . a less dynamic economic environment and declining productivity.[98]

Either way, rents are up.

Since declining competition is not the only explanation for rising concentration, a reader could think that this Article's thesis depends on which explanation is correct. However, the thesis or a close cognate *also* holds for the major alternate explanations of increasing concentration, as each entails rising rents. Only persistence of traditional multi-firm competition and shallow rents would contradict it.[99]

A. The New Economies of Scale, the New Networks, and the New Skill, Foresight, and Industry

Consider rising economies of scale, extended networks, and the rising importance of winner-take-all skill, foresight, and industry success.

Scale economies. Steeply rising economies of scale are making firms bigger, thereby explaining increasing concentration, according to several analyses. These bigger firms compete, but on a larger scale. The cost of today's upfront investment, in this understanding, is a high fraction of a product's final value.

Rising markups have been taken to indicate declining competition.[100] But what look like high markups (of selling price over costs) are really high markups of the selling price over the *variable* costs (of raw materials and labor), in this view, and not high markups over the full costs. The discrepancy, according to the critics, comes from a greater proportion of costs today being embedded in the big initial investment in factories, patents, and organizational capital. Capital and other fixed costs are greater than they were decades ago, and that increases the markup of the selling price over variable costs,

98. Pauline Affeldt, Tomaso Duso, Klaus Gugler & Joanna Piechucka, *Market Concentration in Europe: Evidence from Antitrust Markets* (Ctr. Econ. Stud. Ifo Inst., Working Paper No. 8866, 2021), https://www.ssrn.com/abstract=3774674 [https://perma.cc/25YX-TQTR].

99. Support for that contradicting proposition could be found in White & Yang, *supra* note 38, and Rossi-Hansberg et al., *supra* note 40, among others.

100. *See supra* sources cited in note 50.

without any less competition.[101] Today's markups must recover more upfront capital costs.

Hence, increasingly higher economies of scale cause *both* more industrial concentration *and* higher markups. If the lowest cost production is from a firm with high economies of scale, then these firms *must* have high markups of price over variable costs to recover their bigger fixed investments needed to acquire that scale.[102] If the larger efficient scale means the industry can only support three firms instead of six, then the industry will be more concentrated. Competition, in this view, today demands scale and high markups.[103]

Networks. A second alternative explanation for increased concentration is that networks are now more important than ever.[104] Facebook, for example, gives more value to a customer if more people can be reached on Facebook. A bigger network is more valuable to users and advertisers than a small one, inducing greater market concentration.[105]

Skill, foresight, and industry. The third alternative is technological. Firms succeed, now more than ever, by their competitive skill, foresight, and industry by coming up with a better product, a better patent, or a better industrial secret that garners most of the market.[106] In many industries, superstar firms emerge from winner-take-all competition.[107]

* * *

These critiques of the decreasing competition thesis are not claiming that old-style competition among multiple producers is increasing. The scale, the network, and the skill, foresight, and

101. Basu, *supra* note 92, at 9; JONATHAN HASKEL & STIAN WESTLAKE, CAPITALISM WITHOUT CAPITAL: THE RISE OF THE INTANGIBLE ECONOMY 240 (2017). A response to Basu gathers data that, even after adjusting for Basu's criticisms, markups above marginal cost are at historical highs. De Loecker et al., *supra* note 50, at 603.

102. Berry et al., *supra* note 47, at 48, 54.

103. *Cf.* Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 J. ECON. PERSPS. 23, 27 (2019) ("[R]eductions in trade, transport, or search costs . . . shift[] activity away from smaller, higher-cost producers and toward larger, lower-cost producers.").

104. Patrick Barwise & Leo Watkins, *The Evolution of Digital Dominance: How and Why We Got to GAFA*, *in* DIGITAL DOMINANCE: THE POWER OF GOOGLE, AMAZON, FACEBOOK, AND APPLE 21, 26 (Martin Moore & Damian Tambini eds., 2018).

105. *See generally* Srinivasan, *supra* note 95, at 40–43.

106. Bessen, *supra* note 94, at 2–3; James Traina, *Is Aggregate Market Power Increasing?* 16 (Stigler Ctr., Working Paper No. 17, 2018), https://pdfs.semanticscholar.org/8059/7e4e80edebd66d3eef57e28d324623ad9ee0.pdf [https://perma.cc/TP6C-LEYW?type=image].

107. Autor et al., *supra* note 93, at 649.

industry critiques each contend that the decreasing competition thesis is false because new competitive modes arose *that led to highly concentrated winners that often have higher margins and markups*.[108] And these new competitive modes yield industrial structures more susceptible to purpose pressure than old-style competition, as we see next.

B. Expanded Susceptibility to Purpose Due to Scale Economies, Networks, and Skill, Foresight, and Industry

A rise in new modes of competition via these three channels makes purpose pressure more likely to succeed than before. What matters for this Article's thesis is that profits are well above marginal cost, that stakeholders can contest how these profits are distributed, and that purpose pressure is one way for stakeholders to obtain a share of them.

Here too, the new industrial organization does not operate like classic intense day-to-day competition. When the firm has invested much in industrial and organizational capital that cannot be readily redeployed, stakeholders can contest that investment. In its starkest form, once a firm invests in a fixed, immovable asset, its counterparties can appropriate the value of that asset for themselves.

The steel example from before illustrates. The competitive cost per ton of steel was $1,000 per ton. That cost included payments to employees and for raw materials and $100 for capital costs—here, the per-ton cost of building a huge multi-million-dollar furnace. If the steel mill has no customers other than one sharp-eyed user—perhaps there is a single transportation outlet to a single user—and if that sharp-eyed user can buy steel from elsewhere, that user could in theory push the price down to $900 because the steelmaker has already sunk the capital costs of building the mill and can only make steel with a steel mill.

108. Or the economy is indeed less competitive but the nature of new and better technologies demands that decreased competition. The net result, in this view, still increases welfare.

This is a long-standing problem in industrial organization,[109] analyzed most famously by Oliver Williamson.[110] This holdup potential—from the sharp-eyed user—pushed firms toward vertical integration, with the steel user and the steel mill joining forces in a single firm because the mill owner did not trust the user to buy the steel at full price. Williamson's Nobel-Prize-winning insight was that this holdup problem explains why entities that could hold up one another in market transactions end up vertically integrated, inside the same corporation.

The analogue here for purpose pressure starts with the observation that large firms today invest more than ever in fixed investments that cannot be redeployed.[111] In Williamson's classic formulation, this investment exposes the firm to holdups and exploitation by those with whom it had to deal.

Successful purpose pressures can parallel Williamson's holdups in their capacity to extract value from the firm with dedicated capital. The enterprise's sunk investment can pay for better purpose (just as the monopoly profits in the weak competition scenario analyzed in Part I.C. can).[112]

Some industrial organization analysts see this scale economy trait as more widespread and deeper than ever. If so, the potential for corporate purpose extraction of that invested value is also more widespread than ever.

C. Cartelization as Monopolization in Competitively-Structured Industries: The New Horizontal Shareholding

Consider a competing firm that decides after a pressure campaign that more ESG/CSR is wise. Executives conclude it is the right thing to do. But the added expense then becomes unviable because the

109. Victor P. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426, 432–33 (1976).

110. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 103 (1985); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 26–30 (1975).

111. *See* Basu, *supra* note 92, at 4, 7. The political economy phrase here is that the high fixed cost creates a quasi-rent—the profit above that necessary to recover variable costs. The extra profit from "skill, foresight, and industry" or from a low-cost input is sometimes called a Ricardian rent.

112. This is true for pressures on the firm that has already sunk large value into its operations. But firms anticipating sinking such value will be wary and include in their expected cost the probable value needed for purpose. They may decline to invest if the net cost of purpose pressure diminishes expected profit too much.

firm's competitors do not incur the same ESG/CSR costs. They are leaner, we posit, and charge less for their goods. Their employees remain motivated and their brands intact.

For this socially conscious firm to survive in a competitive market, its competitors must also incur these purpose costs. The firm could seek regulation requiring the ESG/CSR characteristic for all in the industry. It could suggest an industrywide ESG/CSR campaign to shareholder activists. Or it could look for industrywide codes of conduct, applicable to all.[113]

A major academic foray in recent years sees horizontal shareholding by the new major institutional investors—which own a slice across the entire stock market—as anticompetitive. Common ownership of firms in an industry that would otherwise be competitive leads to less vigorous competition, according to the thinking.[114] Academic acceptance of this decline in competition due to horizontal shareholding is substantial but contested.[115]

Common ownership can also induce firms to accept purpose pressure. If the purpose activists can press a code of conduct or a wider-than-shareholder-value perspective on the institutional investors owning a slice of each firm in the industry, those institutional investors can in turn pressure all their portfolio firms in an industry to comply.[116]

113. On the recent proliferation of stewardship codes, see Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes*, *in* GLOBAL SHAREHOLDER STEWARDSHIP (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming).

114. José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016); Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669 (2017); *see also* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020); Nathan Shekita, Interventions by Common Owners (Dec. 15, 2020) (unpublished manuscript) www.ssrn.com/abstract=3658726 [https://perma.cc/K6E7-TRGQ]; Yaron Nili, *Horizontal Directors*, 114 NW. U. L. REV. 1179 (2020).

115. *E.g.*, Edward B. Rock & Daniel L. Rubinfeld, *Does Common Ownership Explain Higher Oligopolistic Profits?* (NYU L. & Econ., Res. Paper No. 20-18, 2020), https://www.ssrn.com/abstract=3627474 [https://perma.cc/HXU4-JNUJ]; Lucian A. Bebchuk & Scott Hirst, *The Misguided Attack on Common Ownership* (Harv. Pub. L., Working Paper No. 19-10, 2019), https://www.ssrn.com/abstract=3298983 [https://perma.cc/QFJ7-S673]; Andrew Koch, Marios Panayides & Shawn Thomas, *Common Ownership and Competition in Product Markets*, 139 J. FIN. ECON. 109 (2021); C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L.J. 1392 (2020); *see also* José Azar & Xavier Vives, Revisiting the Anticompetitive Effects of Common Ownership (Mar. 22, 2021) (unpublished manuscript), www.ssrn.com/abstract=3805047 [https://perma.cc/DS5L-DF7Y].

116. *Cf.* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 238–40 (1986); *see also* Christopher Flavelle,

Tight competitive constraints loosen if competition is reduced by arrangement among the competitors, or by coordinating ringmasters. If large institutional investors push a code of conduct that all in an industry be "purpose-positive," then this purpose-driven cartelization will boost purpose. The institutional investors who own a slice of the industry become antitrust-style ringmasters of a purpose-cartelized industry.

That is, the purpose advocates' strategy can be (1) do not directly pressure the firm, (2) pressure investors instead, and (3) induce compliant institutional investors to pressure an industry for a wider purpose. The effect is as if the industry cartelized, with the institutional investor as the ringmaster coordinating the cartelization. And this cartelization is no more than a collective monopoly that accommodates the purpose pressures that a competitive firm alone cannot. Sure enough, evidence is now developing that industries with significant horizontal ownership do more CSR than other industries, with common ownership's biggest impact occurring in industries that would otherwise be more competitive.[117]

D. Disruptions in Long-Standing Division of the Monopoly Rectangle

A fourth industrial organization channel to purpose pressure could be in play. Perhaps supracompetitive profits, represented by the monopolists' "rectangle," have not grown but rather they have come to be divided differently. Decades ago, labor obtained a big share of the rectangle, but its share then declined, with executives and shareholders capturing it.[118] In this interpretation, purpose pressure is, first, a means for employee-stakeholders to recover their portion of

---

Climate Change Poses 'Systemic Threat' to the Economy, Big Investors Warn, N.Y. TIMES, July 22, 2020, at B3 (" 'The climate crisis poses a systemic threat to financial markets . . . ,' reads the letter, which was signed by more than three dozen pension plans, fund managers and other financial institutions that together manage almost $1 trillion in assets.").

117. Xin Dai & Yue Qiu, *Common Ownership and Corporate Social Responsibility*, REV. CORP. FIN. STUD. (forthcoming 2021) (manuscript at 13), https://www.ssrn.com/abstract=3668483 [https://perma.cc/P36X-V6UZ?type=image]. How powerful this result is in practice (how much more CSR do they really do?), and whether this finding will be replicated, remain to be seen. *See generally* Jeffrey G. Gordon, *Systematic Stewardship* 1 (Colum. L. & Econ., Working Paper No. 640, 2021), https://www.ssrn.com/abstract=3782814 [https://perma.cc/TLX5-KMRL]. For indication that it could be substantial, see José Azar, Miguel Duro, Igor Kadach & Gaizka Ormazabal, *The Big Three and Corporate Carbon Emissions Around the World*, J. FIN. ECON. (forthcoming) (manuscript at 31) ("[F]irms under the influence of the Big Three [institutional investment funds] are more likely to reduce corporate carbon emissions.").

118. Or the rectangle was competed away in globalized competition.

that rectangle and, second, a way other ESG/CSR pressures (say, for more environmental protection) can obtain part of that newly more available, and more contestable, monopoly rectangle.

What would have caused this shift in the distribution of the rectangle? According to labor academics, the weakening of union power is one cause.[119] Globalization is another.[120] Corporate governance changes may be another. From the shareholders' perspective, what was once lax corporate governance in, say, the 1970s, has tightened, such that effective executives no longer split that monopoly rectangle generously with employees. They instead keep it for themselves and shareholders.

IV. EXTENSIONS AND IMPLICATIONS

A. Normative Implications

For the most part in this Article, I analyze viability, not normative desirability.

The relationship between purpose and competition has normative implications, however. In a competitive industry, the utilitarian goal is plausibly best reached via shareholder primacy. CSR's and ESG's relevance there would be in whether they made the organization work better, with nonprofitable CSR and ESG externalities and distribution best handled by better regulation. Income inequality, for example, is best addressed via tax transfers.[121] While stated starkly here, I think this view is generally correct—most clearly in competitive industries and competitive economies.

---

119. Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/papers/w27193 [https://perma.cc/Q6CK-HDUP]; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1824–25 (1983).

120. The globalization hypothesis fits poorly with the competitive decline hypothesis that I led with in this Article. If globalized markets competed down the wage rate, then they presumably rendered markets more competitive overall, not less. If globalization made corporate rents disappear, then this Article's core thesis is not in play. Only a combination, sequential effect could correspond to the thesis here. If globalization squeezed out labor rents in the 1970s and 1980s, and simultaneously weakened labor's legal authority, then it presumably *also* squeezed out firm rents at that time. If firms *thereafter* acquired new rents (either from more large-scale operations or more skill, foresight, and industry success), *but* labor never reacquired its former power, then this Article's general framework would be back in play. For now, I leave it for others, presumably labor economists and labor law authorities, to evaluate this fourth channel and its interaction with globalization.

121. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 33–34 (2002).

But when an industry is not competitive and especially when an entire economy's competitive vigor declines, these conclusions become less certain for those who, like myself, are otherwise shareholder primacists.[122] This ambiguity can be seen in a simple shareholder primacy command to a monopolist: the directive to maximize shareholder profits instructs the monopolist to *raise its price and cut production* because that is how monopolists make the most money for their shareholders. But this result is inconsistent with a *utilitarian* greatest-good instruction—the best justification for shareholder primacy in the first place—because shareholder primacy commands the monopolist to deny some consumers the firm's product and to charge others too much. Purpose pressure—to serve consumers and other stakeholders over shareholders, or just to expand production—is more likely to yield a utilitarian greater good in an uncompetitive industry than in a competitive one.[123]

So, since the pure case for primacy requires competition, even primacy advocates need to reexamine purpose norms if competition is weak. The utilitarian-best is to achieve the competitive condition (via, say, improved antitrust), use primacy to motivate production, and handle externalities by regulation and inequality by taxation. But this might not be achievable if antitrust is intrinsically ineffective for the problem or if the source of the weakened competition is, say, more skill, foresight, and industry monopolies. When the utilitarian-best is not achievable, the analysis is subject to a longstanding qualification in economic theory: once one condition for welfare maximization is seriously breached, it becomes uncertain whether breaching another condition will help or hurt us in getting closer to the greatest-good-for-the-greatest-number.[124] This doubt weakens the certainty of the classical justifications for shareholder primacy. Ironically, Milton Friedman recognized that monopoly could in principle degrade his

122. Other financial areas are ripe for reassessment in markets where competition is low and rents are high. Thus, a traditional view of the corporate tax—that it is a tax on capital—is called into question if the American economy now is suffused with widespread rents due to decreased competition. Edward G. Fox & Zachary D. Liscow, *A Case for Higher Corporate Tax Rates*, 167 TAX NOTES FED. 2021, 2022 (2020); Reveun S. Avi-Yonah, *A New Corporate Tax*, TAX NOTES FED. 653 (2020).

123. In the abstract, the monopoly distortion would be better remedied without purpose pressure. Better antitrust policy would bolster competition, or targeted taxes would take a firm's supracompetitive profit.

124. R.G. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1957).

profit-maximizing prescription.[125] But for Friedman the American economy was workably competitive[126]—and when it was not, the government acted, viz. the major antitrust suits of his day against IBM and ATT. Hence, for Friedman, the implications of weak competition were theoretical, not real.

Still, even though weakened competition calls primacy's justifications into question, those justifications do not collapse. For example, since a rule (primacy or non-primacy) is likely to be across the board, one would have to judge what would be lost in utilitarian output in the remaining workably competitive industries. And key justifications for primacy—such as managerial accountability—would persist even in weakly competitive industries. Reducing primacy in weakly competitive markets might just lead opportunistic executives to capture value for themselves rather than distribute it to the more deserving.[127] All true. But the point for this Section is that as market power rises, shareholder primacy less assuredly leads to the biggest economic pie.[128]

B. How Purpose Pushes Its Way into the Corporation: Agency Costs and How Purpose Becomes Profitable

Purpose pushes itself into the corporation via several means.

Congress can reallocate the rectangle: purpose as lobbying. Large firms attract political attention. Large firms with market power attract even more political attention. And firms with large rents have more reason to avoid political animosity so they can retain those rents,

---

125. FRIEDMAN, CAPITALISM AND FREEDOM, *supra* note 7, at 119–36. The point was not made (or at least not made strongly) in the famous *Times* essay.

126. *Id.* at 121 ("[monopoly's] relative unimportance [in] the economy as a whole.").

127. And for firms with market power, shareholders facing managerial slack may prefer that managers not capture the value that is up for grabs. They may prefer that employees get it, or that the public gets a better environment. The shareholders may prefer this for profits—if they think managers already earn more than their marginal productivity and employees' welfare and social welfare would redound to the shareholders' benefit. Or the shareholders-as-citizens, *see generally* Hart & Zingales, *supra* note 24; Elhauge, *supra* note 24, may prefer that employees or the public capture the value that is up-for-grabs.

128. In Part III, I showed why the major rebuttals to competitive decline *also* call forth more purpose pressure and facilitate its success because they also raise rents—firms' supracompetitive profits. Hence, either industrial organization channel could produce successful purpose pressure—the thesis in this Article. However, the *normative* implications would not be identical for the two. If it is economies-of-scale, networks, or skill, foresight, and industry that cause the increasing concentration, then these industrial changes do not justify further deviation from shareholder primacy in the way that competitive decline does. To get these efficient results, shareholder primacy boosts the firm and the economy toward efficient outcomes.

which the polity could confiscate. In response to this threat, some firms take on a public purpose, as a form of lobbying. They give up some rent to raise the probability they will retain the rest of the rent.[129] ESG and CSR pressures can be precursors to, or call forth, political action. Direct ESG and CSR pressures on a firm are generally weak relative to the power of the U.S. Congress, which can snap that monopoly rectangle away from the firm. Boards and executives have good reason to reduce the possibility of Congress doing so.[130]

Purpose as managerial agency cost. The second ESG/CSR avenue into the firm is managerial agency costs. The monopoly firm affords executives more slack than the competitive firm, and that slack can make managers more responsive to purpose pressure. The pressure may affect the manager's conscience, convincing him or her of the activity's perniciousness. In a competitive market, the manager's conscience-directed range of actions is circumscribed. But the manager of a firm with market power can more readily satisfy his or her heightened misgivings. Profits will be lost but the firm can continue to provide the capital owners with a competitive rate of return.

If corporate governance is tight, powerful, and shareholder-profit-focused—owing to shareholder activism, shareholder control of the board, managerial incentive compensation, or capital structure—then corporate governance will keep executives loyal to shareholders even in firms with market power. But if these constraints on executives and boards are imperfect, such that competition is part of the package that

129. The firm can also pursue less wholesome actions to bolster the probability of retaining much of the rent. It could spend half of the rent on lobbying, for example, to increase the probability of retaining the other half. Or it could fight the pressure. The extra resources from the rents give the firm power to resist, and an incentive to resist.

130. A striking instance is in two nearly adjacent *New York Times* reports in a single day's business section, one reporting that Amazon raised its base wage to $15 per hour, even in regions where it could pay less, and the other that the Biden administration was appointing an advisor hostile to "the great power of the tech platforms, especially . . . Amazon." *Compare* Cecilia Kang, *Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES, Mar. 6, 2021, at B3, *with* Ben Casselman & Jim Tankersley, *$15 an Hour at Amazon Has a Ripple*, N.Y. TIMES, Mar. 6, 2021, at B1. *Cf.* Cecelia Kang, *Biden Expected to Name Critic of Tech Giants to an F.T.C. Job*, N.Y. TIMES, Mar. 10, 2021, at B6 ("Ms. Khan recently served as legal counsel for the House Judiciary's antitrust subcommittee [which] investigat[ed] . . . the tech giants' monopoly power"); Brent Kendall & Ryan Tracy, *Congress Weighs Stricter Antitrust Laws*, WALL ST. J., Mar. 12, 2021, at A2 ("Both [political] parties have been galvanized by concerns about powerful tech firms including . . . Amazon . . . . Debate over those firms' power in the U.S. economy—and over swaths of American society—has elevated antitrust to a trendy Washington issue."). The wage could be juxtaposed as well with an Amazon unionization drive—a type of stakeholder action.

encourages executives to be loyal to shareholders, then more firms with more market power weaken shareholder-profit-focused corporate governance and give more room for ESG and CSR to succeed. Or, as seen below, it bolsters the incentives and opportunities for shareholder activists to retain, or gain, value for shareholders.

Shareholder disunity: for and against purpose. Shareholder disunity is a third way purpose has become more prominent. Today, some institutional shareholders seek to expand corporate purpose. Some no longer rigidly pursue pure profit maximization (or they say that purpose produces profit), while another shareholding segment does (and sees purpose as undermining profit).[131] New slack in profit seeking is between and among shareholders, some of whom pursue profit unremittingly, and some of whom do not.

Consider how this aspect interacts with, and weakens, the influence of profit-oriented shareholder hedge funds. Profit-oriented activists seek to orient firms' boards and managers toward shareholders. To succeed, these activists need the votes of institutional investors, like the index funds that together now own about twenty percent of the stock market.[132] But index funds and pension funds increasingly espouse CSR/ESG goals.[133] As such, the profit-seeking activists who want to bolster a target firm's profitability by making it forsake its new ESG and CSR[134] will have

---

131. Mark R. DesJardine, Emilio Mari & Rodolphe Durand, *Why Activist Hedge Funds Target Socially Responsible Firms: The Reaction Costs of Signaling Corporate Social Responsibility*, ACAD. MGMT. J. (forthcoming); MORGAN STANLEY, SUSTAINABLE REALITY: 2020 UPDATE 3 (2020), https://www.morganstanley.com/content/dam/msdotcom/en/assets/pdfs/3190436-20-09-15_Sustainable-Reality-2020-update_Final-Revised.pdf [https://perma.cc/3NTA-DY29]. It remains to be seen whether the ultimate owners fully perceive that purpose, if given more than lip service, will affect their risk-return. Many may believe that heightened purpose can be achieved without cost to capital owners—i.e., without cost to themselves.

132. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 867 (2013).

133. Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/YPY3-NG5Y]. Fink is the CEO of BlackRock, one of the three largest stockholding institutional investors in the United States.

134. Danone, for example, sought a wider purpose and attracted shareholder activists who disagreed. *Danone Rethinks the Idea of the Firm*, ECONOMIST, Apr. 11, 2018. Danone's "unique model of a purpose-driven company" was successfully challenged by shareholder activists—they focused on Danone's profitability, which lagged competitors, presumably due to Danone's purpose commitments. Lauren Hirsch, *A boardroom shake-up at the food giant Danone sets off shareholder infighting*, N.Y. TIMES (Mar. 16, 2021), https://www.nytimes.com/2021/03/16/business/Danone-Emmanuel-Faber.html [https://perma.cc/FX36-AJAU] (Danone adopted "greater consideration of social and environmental

difficulty finding allies among the ESG/CSR-sympathizing indexers and pension funds. The profit-focused activists will find they cannot succeed.

This is a new quasi-"agency" cost: diverging goals between shareholder groups as pro-profit investors disagree with the ESG/CSR sympathizing institutions. Executives and boards now face two "masters." One is the set of profit-focused investors. The other is the set of investors seeking more ESG and CSR—which is easier to accomplish when the firm, its executives, and ESG-motivated investors are spending rents and not eating into competitive profits.[135]

Purpose can turn nonprofitable actions profitable. Lastly, purpose pressure can *change* the firm's profitability calculation. The pressure can affect employee morale, consumer acceptance of the firm, and the like. Profit-oriented shareholders and executives could find that resisting the pressure lowers employee morale and consumer loyalty. So, to keep profits up or to minimize losses, they adjust to the new pressure, staving off losses in morale and market share. Monopoly firms can adjust to the new profit profile easily; competitive firms must look over their shoulders to see what their rivals are doing.

We have seen one such shift. In a competitive industry, the firm that pays up will (at the limit) disappear. But for the firm with rents, strong private purpose pressure signals the possibility of *public* purpose pressure arising, which would have government administrators or legislators acting against the firm and its profits. The high-rent firm has more incentive to accede to private pressure that gives up one-third of its rents if that concession lowers the probability of government action causing it to lose the remainder. For such a monopoly, accommodating the pressure is profitable, because doing so better assures future rents. There is no analogous calculation for the competitive firm.

An employee wage negotiation illustrates. The profit-oriented board at first maximizes profit with an hourly wage rate of $7.25 for

issues in their business model," but shareholder activism in reaction led to management changes). *See also* articles cited *infra*, note 137.

135. For rents' relevance to ESG/CSR-oriented investors, consider two shareholders who are ESG-focused, one owning a firm with supracompetitive rents and the other owning one earning just basic competitive profit. Both firms seriously spend on costly ESG/CSR. Eventually the firm without rents will shrink and, at the limit, disappear, unless it can find subsidies. The first firm with rents need not disappear; its productive capacity need not even shrink. It will find itself earning, however, something closer to the competitive return.

its unskilled workforce. The profit-focused directors ignore calls to pay more. A union then organizes the workforce and strikes, and the firm settles the strike with wages going up to $15 per hour. The firm adjusts. If its competitors pay less, however, then the firm may fail. But if the firm does not face stiff competition, it more readily adjusts its output and production configuration to accommodate the higher wage rate. If it still earns the competitive rate, it survives. Or consider a no-union possibility: pressure demoralizes the firm's employees (or its customers, suppliers or executives), so the firm adjusts the wage scale upward. In these (and other real-world) scenarios, purpose pressure changes the profit calculation.

C. Corporate Governance, Disrupted

If market power is rising, then executives and boards have more discretion. But shareholder-profit-oriented activists will have more to defend for profit-focused shareholders, namely those monopoly profits. This will disrupt corporate governance and possibly poison it.

Many (like me) have seen shareholder activists' role as primarily to discipline executives who failed to run their companies well. But with this Article's industrial-organization analytic in mind, the executives could operate their companies optimally (by raising prices while constricting production, while efficiently operating the factories) and then distribute a chunk of that monopoly value to employees and other stakeholders.

Profit-focused shareholder activists will disagree on the soundness of that distribution. They have the incentive to seek that a larger portion of the monopoly pie be allocated to shareholders and I expect that this incentive will increasingly motivate activism.[136] Evidence is already emerging that it is. Activists now interpret more CSR from a firm as signaling that it is not guarding every dollar for shareholders. Firms with more powerful CSR signals have been targeted more often

136. I focus in this section on shareholder activism as the force that seeks to pull executives and boards back. But other corporate governance institutions of shareholder value will also be in play: the board election machinery (already compromised with executives having major influence over the election structure), executive incentive pay, capital structure. All of these would become fields for social dispute.

by activists in the past two decades.[137]

Some specifics: posit that the board allocates some or much of the monopoly rent bonus to employees and other stakeholders, and does so *without damaging operational efficiency*. Profit-oriented shareholder activists will *still* have reason to stop boards and executives from allocating rents to stakeholders. They want all of it for shareholders. *Hence, activists could improve shareholder profit* *without* *improving their targets' operations.* Stakeholders and social activists will fight back, seeking to weaken the shareholder-value activists because if the latter are weakened, they will be less able to reverse executive action favoring stakeholders.[138]

Whether these pure-profit-oriented activists will succeed or not remains to be seen. If solely seeking to cut back ESG and CSR, they will face difficulties (i) in obtaining the index and pension funds' support (as they are increasingly ESG-oriented), (ii) from public opinion backlash, (iii) from destroying corporate value if ESG and CSR become norms that all are expected to respect, and (iv) in incurring lawmakers' ire.

In a *non*competitive market, activists will have *two* motivations to intervene—to discipline weak management *and* to keep the monopoly rectangle for shareholders. A *stake*holder-executive coalition could seek to shut down both the activists' operational and their distributional interventions. (This double motivation adds ambiguity for policymaking but does not require one to abandon the activists. If the larger impact is to discipline managers in competitive industries and to reduce wasteful managerial slack in noncompetitive ones, then, if the purpose benefits are modest, activism is a net benefit. Activism, however, will become harder to evaluate in weakly competitive industries.)

137. DesJardine et al., *supra* note 131; *cf.* Steven J. Davis et al., *The Economic Effects of Private Equity Buyouts* (Nat'l Bureau Econ. Rsch., Working Paper No. 26370, 2019), https://www.nber.org/papers/w26371 [https://perma.cc/49ZG-YLPX] (private equity buyouts of public firms reduce employment by 13%, although limited impact on wage level); Azimjon Kuvandikov, Andrew Pendleton & Marc Goergen, *Activist Hedge Funds and Takeovers: Their Effects on Employment and Performance*, BRIT. J. MGMT. (forthcoming 2021) (activists have no impact on operating performance but reduce employment).

138. On activism reallocating returns from bondholders to stockholders, see April Klein & Emanuel Zur, *The Impact of Hedge Fund Activism on the Target Firm's Existing Bondholders*, 24 REV. FIN. STUD. 1735, 1766 (2011).

When activists seek to pull rents back from stakeholders, corporate conflict will rise. That corporate conflict over dividing the excess profit can spill over and exacerbate political conflict.

D. Instability: Political, Corporate, and Otherwise

Thus far I have focused on how and why stakeholder pressure and anti-corporate populism can lead to social pressure groups capturing a slice of the monopoly rectangle. But before we conclude, I add a pessimistic view on labor and the monopoly firm.

The classic view is that monopoly power and profit are controlled by the firms' owners, boards, or executives. Their firms' market power gives them the luxury of choosing to bestow value on labor inputs (or it gives labor the opportunity to grab some of that value). Market power frees executives and boards from having to return every dollar of potential profit to owners; they have slack and can return a competitive profit to shareholders even without squeezing every dollar of supracompetitive profit from the firm's operations for shareholders.

In recent years, observers have lamented that labor's share of American national income has decreased, with new (but contested) scholarship blaming monopoly/monopsony power for the result.[139] This provides a new perspective on monopoly's impact on stakeholders: the monopolist can share excess profit with stakeholders, but it can also *suppress* the stakeholders' share, lowering labor's portion of the firm's and the industry's revenues.[140]

Several economic changes could have caused that shift—technology and globalization being most prominent.[141] One major study finds that while labor's share of the economy has declined across the board—it is "those industries where concentration has risen the most [that] exhibit the sharpest falls in the labor share."[142]

139. *See* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Power*, 132 HARV. L. REV. 536 (2018); Gatti & Ondersma, *supra* note 14.

140. *Cf.* Barkai, *supra* note 50, at 2460 ("increases in industry concentration are associated with declines in the labor share").

141. Loukas Karabarbounis & Brent Neiman, *The Global Decline of the Labor Share*, 129 Q. J. ECON. 61 (2014). Changing demographics can play an important role. Unions are less powerful today than before. *See* Bell et al., *supra* note 65.

142. Autor et al., *supra* note 93, at 703. Autor et al. attribute labor's falling share largely to the rise of superstar firms that, due to network effects or a sharply declining cost curve, capture a great deal of the market. These are similar to, or an instance of, "skill, foresight, and industry" or scale economy monopolies, each of which I analyze for congruence with this paper's thesis in Part III.

The fit with this Article's thesis is clear: New economic trends press down on labor compensation. In less competitive industries, labor can push back better than in highly competitive industries because competing firms vie for workers via pay and benefits. But, in the decline-in-labor-share version, labor is struggling to *recapture* what it once had and then lost to the monopsonist. The firm with monopoly and monopsony power pushed stakeholders' share below what it once was. Stakeholders fight back in the political and social spheres—with corporate purpose pressure as one of the weapons—pushing purpose pressures on the firm, its board, and its executives to share the gains with stakeholders.[143]

Or, as I stated above, a different formulation (and one that I find more convincing) is not that monopsony power has increased, but that labor's power to obtain a good-sized slice of already-existing oligopolistic industries' above-competitive profit has waned.[144] Labor has been weakened either due to a decreased credibility of threats to unionize, or to a tightened corporate governance structure that has reduced organizational slack, or to a globalized competition in some industries, especially manufacturing.[145]

The new ideology of corporate purpose then becomes a twenty-first century means to redivide the corporate pie. Broadly stated, union pressure and older norms led to supracompetitive profits being shared. Over time shareholders and executives got the upper hand in that sharing contest in the United States, reducing labor's share. And now new ways to contest the monopoly profit division arise, with the new corporate purpose pressures and ideology being central.[146]

This concept of the monopoly rectangle being contested today by pressure activists, labor, the public authorities, and shareholder-

143. This dynamic can also be seen as stakeholders making broadened purpose profitable: if purpose is widely seen as legitimate and if customers will be less willing to pay a premium price to a bad-purpose firm, then stakeholders will have made broadened purpose profitable.

144. *See supra* Part II.D.

145. Each of these three—weakened union power, empowered shareholders, and globalization—play out differently for the Article's main lines of analysis. Globalization, for example, fits badly with the framework here, as I indicated *supra* note 120. If globalization pressured above-market wages down to competitive levels, it probably also squeezed those firms' rents—eliminating the foundation for this paper's core thesis. But if globalization squeezed out labor rents in the 1970s and 1980s, and if firms thereafter acquired *new* rents (either from weakened antitrust or more large-scale operations or more skill, foresight, and industry achievements), it would be in play. Or at least it would be if labor never reacquired its former power. The thesis of Autor et al., *supra* note 93, at 696, on successful, superstar firms now showing the "sharpest falls in the labor share" broadly fits this sequential possibility.

146. *See supra* Part I.A–B.

profit-focused activists parallels classic antitrust-based insights from Richard Posner and Gordon Tullock, namely that the monopoly rectangle will be contested, with firms spending to corner it. Hence, they concluded that the social costs of monopoly are not just the loss due to high price, but also the resources spent and socially wasted by firms seeking to acquire and maintain the advantage.[147] Corporate purpose pressure can become an ongoing contest for dividing that rectangle.

* * *

The implications of the prior analysis should be made explicit: corporate governance institutions could become more politicized.

Consider rising contemporary political tension: if corporate profit is becoming more of a distributional battlefield inside the corporation, that conflict will contribute to tension in the polity. Corporate governance institutions—like board elections, capital structure, and shareholder activism—have long been seen as means to tie executives and boards more tightly to shareholder goals. But now the contest is shifting to include *social values* more often. Institutions that once were primarily instruments to control managerial slack become more suffused with social considerations.

CONCLUSION

Much of the corporate purpose controversy is over what the right thing is for the corporation to do, motivated by a sense that all must do their fair share to combat economic and social degradation. Unexamined are the economic and structural conditions that facilitate, or impede, widening social purpose.

Here I bring a new "supply-side" perspective to this analysis: purpose pressure is rising and succeeds more readily if the underlying industrial organization arrangements allow it. I show how four trends in industrial organization make wider purpose more possible than before. First, according to many, the strength of basic competition has eroded. A single firm in a highly competitive industry cannot easily sustain costly purpose; in competitive industries, purpose must by and

147. Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 6 W. ECON. J. 224 (1967).

large pay for itself in higher productivity, better branding, or other benefits. Less competitive industries have more discretion.

Second, winner-take-all industries have a bigger gap between costs and prices. That gap gives these firms more discretion than those facing traditional competition. The competitive winner sits atop the industry for a time and, for as long as it does, it can accommodate purpose pressures. A similar rise in discretion comes from increasing economies of scale and the widening value of networks.

Third, shareholder concentration, with major institutional investors owning stock of each firm in an industry can cartelize an industry to more readily implement purpose pressure. Among industrial organization academics, the view is widespread that at least one of these three changes has been substantial—although they disagree as to which one—but *each* tendency brings forth larger rents.

Fourth, labor seems less capable of obtaining value in industries with supracompetitive profits. Purpose pressure is a means (1) for labor to recover some of those lost rents and (2) for other stakeholders (or executives and shareholders) to obtain value from the more-available-than-before monopoly rectangle.

Identical purpose pressure campaigns, each with the same moral appeal, could in a competitive industry fail but succeed in an industry with large rents. Both theory and evidence support this proposition. The theory is clear—competitive firms cannot incur expensive purpose costs: the expanded purpose must make stakeholders more productive, make consumers more willing to buy, or save the firm from another, greater cost. The evidence, on balance, supports the proposition that, all else equal, firms in weakly competitive industries or industries that otherwise produce large rents have a larger financial purse and do better for their employees and for their stakeholders.

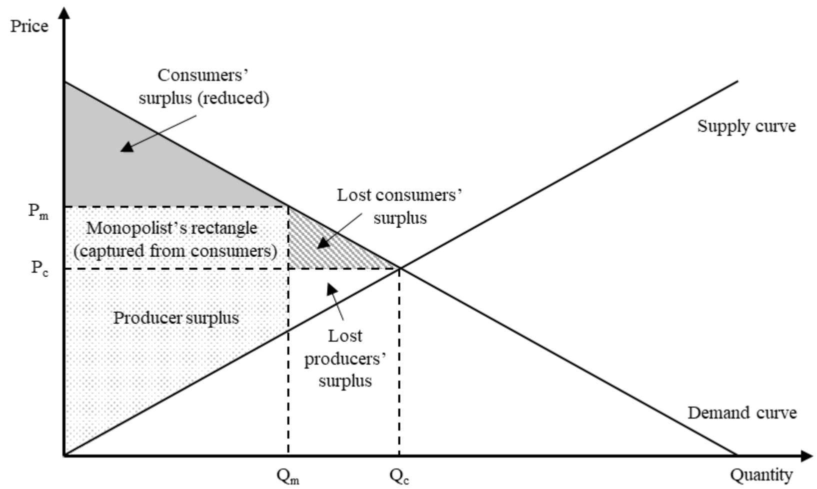
* * *

This competitive-decline analysis has normative implications. Shareholder primacy in oligopolistic or monopolistic industries is less valuable in implementing the utilitarian greatest good than it is in competitive ones. An instruction to a monopolist to maximize shareholder profit tells it to reduce production (thereby making the society poorer and denying consumers the firm's product) and to raise price (thereby making the stockholders and executives richer at consumers' expense). The same shareholder-oriented instruction in a competitive industry does not have the same negative effect.

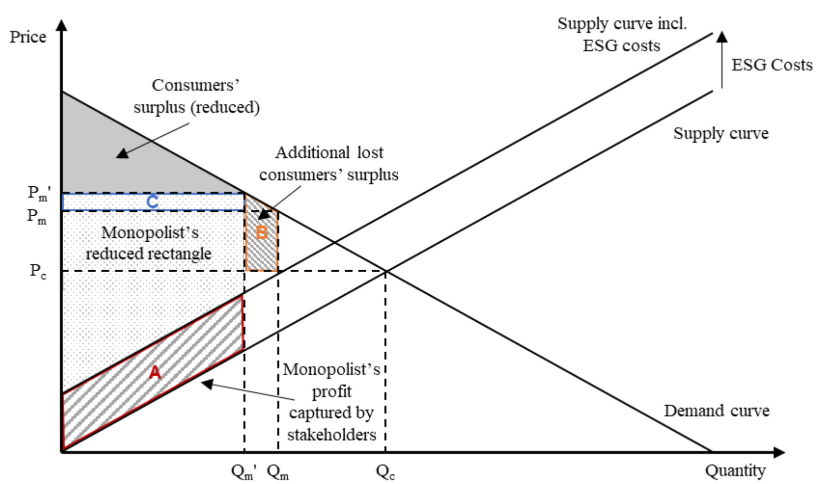
True, the optimal effort is to restore competition (if weak competition is the rents' source) and protect stakeholders with rules, widely shared norms, and appropriate tax-based redistribution. Because the virtues of primacy are several, weak competition only reduces the strength of one of its utilitarian justifications but not the strength of the others. But, regardless, the interaction between industrial organization and purpose, given the observed trends in industrial organization, makes more complex the utilitarian case for primacy.

And, finally, the industrial changes coupled with rising purpose pressure carry political risks for the affected firms. Growing monopoly profit rectangles lead to efforts to grab value from those monopolies—by shareholders and capital-owners; by executives and employees; and by the public, stakeholders, and consumers. The growing but contestable pot of value in the corporation with market power will mean more and longer lasting contests to divide the corporate spoils. Activism and purpose pressure will contest how to divide up rents. If we are lucky, this division of the spoils will just consume some minor extra resources. If we are unlucky, the contest will burn value and contribute to the increasing polarization and instability of the polity.

Appendix Figure 1. The Monopolist's Profit, Before Purpose Pressure Mounts



Appendix Figure 2. The Monopolist Accommodates Purpose by Sharing Profit and Raising Price



The ESG costs raise the amount the monopoly firm expends in Appendix Figure 2. These, however, are distributional costs, creating a surplus for the ESG beneficiary (like the surplus that the monopolist gets via the rectangle). That is, the monopolist pays more but social costs do not rise. To see this, think of the ESG beneficiaries as employees who once earned $10/hour and after successful purpose pressure earn $15/hour for the same effort. There's a *transfer* of $5/hour from the monopolist to the employees, but it does not cost the employees $5 more per hour to do the work—they work no harder. (If a product originally costs $10 but became *more* expensive to produce, because more raw materials were needed and that necessitated a final price of $15, then the $5 rise would be an expenditure of real resources by the supplier.) Or think of the expenditure as an environmental one. Consumers get the same product, but this time with cleaner air and unpolluted streams. They benefit, without their own direct expenditure.