The Neoliberal Corporate Purpose of Dodge v. Ford and Shareholder Primacy: A Historical Context 1919–2019

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Abstract

This article provides a historical context of the most iconic case in corporate law, *Dodge v. Ford Motor Co*. The case famously asserted that "there should be no confusion" that corporate purpose is "primarily for the profit of the stockholders." This statement succinctly encapsulates the idea of shareholder primacy, the corporate rule requiring managers to prioritize shareholder profit maximization over other interests. Pointing to *Dodge*, commentators assert that shareholder primacy has always been a polestar in modern corporate law. This is mythmaking. A unique period in history gave rise to *Dodge*'s political statement. Overt politicism explains why the case split the panel of judges then, and why *Dodge* was never influential among courts and was ignored by academics until the neoliberal turn of the 1980s. For much of the twentieth century, American capitalism had no use for the idea in *Dodge* because shareholder primacy conflicted with the prevailing political order and economic system. *Dodge* found late influence in legal academia only when America's political order embraced neoliberalism. Its pithy shibboleth fit the moment when a new intellectual framework was needed for a new economic system based on the policy preference for capital. Empirical evidence in the form of a citation study clearly demonstrates *Dodge*'s irrelevance for much of its life in the twentieth century until neoliberalism came along.

This historical analysis makes three basic points: (1) shareholder primacy did not exist and could not have existed in law or academic consensus prior to the advent of neoliberalism in the 1980s because it conflicted with the prevailing political order and economic system; (2) shareholder primacy is not a discovery of some natural law of economics after a 250-year search in modern economics, but is a rule of law of the existing political order and economic system—a rule that, like other laws, came to be because it served the unique policy needs and preferences and the societal conditions of the specific time period; (3) because there is no such thing as the end of history of political order and economic system, and because rules of law are functions of prevailing policy preferences as they change over time, the decline of neoliberalism calls into question the future of *Dodge* and shareholder primacy.

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Introduction

Most judicial decisions are like people—the gradual wear of time and toil weighs on robustness and relevance. Like genes, some legal principles continue in generations of progeny, but others do not, their traits sorted out as flaws or superfluity in the competition of ideas. Some cases convey enough good wisdom for the young to take the mantle into the future; some lie entombed in old law reporters, never to see again the splendor of a courtroom; some wilt in the ruthless cross examination of want and need. Most cases in old age die in obscurity, having done their job of settling the dispute without swords crossing. Over one hundred years have passed since the Michigan Supreme Court published *Dodge v. Ford Motor Co.*,[2] a case that ought to have become obscure and lost to the dust of time. But the case today is considered "iconic"[3] and continues to capture the attention of legal scholars, among others.[4] Why?

Some cases deserve the stature of a regal matriarch, grandly presiding still over a large family of doctrines and rules. An example is *Meinhard v. Salmon*.[5] Cardozo's rejection of the "morals of the market place" and embrace of "the punctilio of an honor the most sensitive" still capture the essence of the fiduciary loyalty.[6] *Meinhard* has had profound influence on not just partnership law, but the laws of business organizations and fiduciaries generally.[7] *Dodge* obtained equal fame when it gratuitously remarked: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[8] Glitzy fame aside, *Dodge* is no *Meinhard*. Despite its celebrity status as the oldest canonical

2. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (hereafter "Dodge").

3. Mark J. Roe, *Dodge v. Ford: What Happened and Why?*, 74 VAND. L. REV. 1755, 1756 (2021). *Dodge* is presented in most business associations textbooks. *Id.* at 1759 n.4 (citing textbooks). *E.g.*, JEFFREY D. BAUMAN, RUSSELL B. STEVENSON, JR. & ROBERT J. RHEE, BUSINESS ORGANIZATIONS LAW AND POLICY 153 (10th ed. 2022).

4. *E.g.*, *supra* note 3; Michael J. Vargas, *Dodge v. Ford Motor Co. at 100: The Enduring Legacy of Corporate Law's Most Controversial Case*, 75 BUS. LAW. 2103 (2020); Alan M. Weinberger, *Henry Ford's Wingman: A Perspective on the Centennial of Dodge v. Ford*, 14 N.Y.U. J.L. & BUS. 1013 (2018); Linda Kawaguchi, *Introduction to Dodge v. Ford Motor Co.: Primary Source and Commentary Material*, 17 CHAP. L. REV. 493 (2014); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008). *See infra* Section II.B. (showing that *Dodge* has been cited 1,145 in law reviews during 1919–2019).

5. Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). The case has been cited by other courts 1,266 times as of July 12, 2022, and 1,279 times in law reviews according to Westlaw. Both *Meinhard* and *Dodge* are generally acknowledged as canonical cases and are discussed by leading scholars in two textbooks covering such cases. Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, in THE ICONIC CASES IN CORPORATE LAW 1-11 (Jonathan R. Macey ed., 2008); Geoffrey P. Miller, *A Glimpse of Society via a Case and Cardozo: Meinhard v. Salmon*, *id.* at 12-29; M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again, in* CORPORATE LAW STORIES 37-75 (J. Mark Ramseyer, ed., 2009); Robert B. Thompson, *The Story of Meinhard v. Salmon: Fiduciary Duty's Punctilio*, *id.* at 105-33.

6. Meinhard, 164 N.E. at 546.

7. *See, e.g.*, Andrew S. Gold, *The Fiduciary Duty of Loyalty*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW at 385 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff, eds., 2019) ("Perhaps the most famous description of fiduciary loyalty is Judge Cardozo's account in *Meinhard v. Salmon*: fiduciaries owe each other 'a punctilio of honor the most sensitive.'").

8. Dodge, 170 N.W. at 684.

case in modern corporate law, *Dodge* has never been influential in American courts.[9]

Having led an undistinguished existence for much of its life, *Dodge* was an unusual late bloomer. It found stardom not in courtrooms where most cases toil for relevance, but instead in the theater of the legal academy where it became a star in the bright lights of law reviews. Like Forrest Gump, it found its calling when history stumbled into it. History lifted this prosaic case from obscurity and gave it a featured role in the age of financial capitalism and neoliberalism in the late twentieth century.

Dodge came to be seen as a canonical case advancing shareholder primacy, the idea that shareholder profit maximization is the sole corporate purpose.[10] Since the inception of the modern corporation and corporation law at the dawn of the twentieth century, shareholder primacy has been in tension with stakeholderism,[11] the idea that corporate purpose includes advancing the interests of various stakeholders, including employees, communities, and the nation itself.[12]

This article explains the historical context of *Dodge*—a 1919 prosaic legal opinion with immoderate embellishments that divided the court, but that became a legal star six decades later when most cases, resigned and without rage, have gone gentle into that good night.[13] The story of its birth, obscure midlife, and fame in old age can only be explained by a confluence of historical events. Its legal history connects to a grander history of political orders and economic systems.[14] The case rode along three different time periods in its 100-year history: the years 1917–1919, mid-twentieth century 1929–1969, and the Reagan and neoliberal period 1980–2019.[15]

This article explains that *Dodge*'s dictum on shareholder primacy was a political commentary influenced by the undertow of two great currents in the Atlantic: on the western shore, the advent of American corporate industrial capitalism and the counterforce of a progressive labor movement; on the eastern shore, the end of World War I, the death of European empires and mortal wound to colonialism, and the rise of socialism. In midlife covering the New Deal and the post-1945 global liberal order,

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9. *See infra* Section II.A. (analyzing the citations to *Dodge*).
10. Shareholder primacy refers to the prevailing idea today that corporate purpose is to maximize shareholder profit, thus mandating managers to not consider other interests that may conflict with this purpose. *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1989-90 (2018) (documenting judicial embrace of the idea of "profit maximization").
11. *See infra* note 111 (discussing the Berle–Dodd debate of the 1930s).
12. *See generally* STAKEHOLDER THEORY: THE STATE OF THE ART (R. Edward Freeman et al., eds., 2010); THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY (Jeffrey R. Harrison et al., eds., 2019). *See also infra* notes 185 and accompanying text (describing managerialism as a way to effectuate stakeholderism) and 242.
13. Dylan Thomas, *Do Not Go Gentle Into That Good Night*, Poets.org, https://perma.cc/DMY8-JEJ4.
14. "Political order" is defined in this article as a prevailing political ideology that has reached consensus status, notwithstanding any diligent dissent. GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA 2 (2022). "A key attribute of a political order is the ability of its ideologically dominant party to bend the opposition party to its will." *Id.*
15. Of course, history does not march in clear base of tens. The indications of decades are bookmarks of the approximate time period. A hundred-year 1919–2019 survey provides a longterm perspective on *Dodge*'s influence.

Dodge was ignored by courts and legal scholars because it was irrelevant to law and policy. Labor and capital were in détente; managerialism prevailed; the political order was preoccupied with the Cold War and competing political ideologies; the American economy dominated the globe. The late twentieth century saw the decline of the New Deal order, the discontent of capital, and the rise of Reagan and neoliberalism. It was here, in old age, that *Dodge* found its purpose in the halls and classrooms of the legal academy. The case became a shibboleth, a pithy legal statement of the rule of shareholder primacy, and it served to advance a new legal and economic intellectual framework of a policy preference for capital, *i.e.*, the pecuniary interest of shareholders.

Section I provides the background of *Dodge*'s history. It analyzes the case opinion, showing it to be a prosaic case of minority shareholder oppression, business judgment, and asset distribution. *Dodge* achieved its iconic status by famously stating the idea of shareholder primacy, which was gratuitous and odd when the statement is viewed through the lens of judicial craft. The court's commentary was based on a purposeful mischaracterization of Henry Ford's motive, a propped-up strawman.

Section II presents empirical facts on *Dodge*'s influence in the judicial and academic literature for the period 1919–2019. A citation study shows that *Dodge* was never influential among courts and largely ignored by scholars for much of the twentieth century. Citations to *Dodge* exploded after 1980, but only in law reviews. This influence corresponds to a change in the political order and economic system when neoliberalism took hold.

Section III discusses the historical context of *Dodge*. The case was a political statement unique to the history of 1917–1919. Three time periods are segmented: the years of *Dodge*'s birth, midlife irrelevance during the New Deal era, and late life stardom in the late twentieth century era of neoliberalism. A historical examination reveals a key takeaway: *Dodge* notwithstanding, shareholder primacy was not established in American law until the neoliberal turn of the Reagan era and the 1980s.

Section IV presents another key takeaway. Shareholder primacy should not be considered some intrinsic truth finally discovered by economists and lawyers in the late twentieth century. Clearly, rules of law and the construction of an intellectual framework around them change to reflect new social and economic priorities. Given this dynamic, this section discusses the potential future of *Dodge*, which surprisingly may have a second act. Its dictum on shareholder primacy notwithstanding, the actual holding in *Dodge* and the Ford Motor saga are early examples of stakeholderism at work. This interpretation would make *Dodge* not only iconic but also ironic.

I. Background on Dodge

A. Dodge as Prosaic Case on Minority Oppression

Like people, all legal cases have their unique wrinkles. *Dodge* involved a prominent corporation, a magnetic corporate founder, and a large dollar amount. But these features make for a celebrity case, not necessarily an important or profound case. *Dodge* was a prosaic case from a lawyer's perspective of facts and law. It was an ordinary case of minority oppression and the limits of managerial authority with respect to dividend

distribution and capital expenditure.[16]

The basic facts are well known. The Ford Motor Co. was organized in 1903 and eventually was capitalized at $2 million.[17] Henry Ford was the majority and controlling shareholder, and John and Horace Dodge were minority shareholders.[18] The company was phenomenally successful. It paid 5% monthly ordinary dividends on $2 million of capital, which is $1.2 million per year and 60% return on capital on ordinary dividends.[19] From 1911 to 1915, it paid total special dividends of $41 million.[20] Despite these extraordinarily high dividend payments, the company still held a surplus in excess of capital of about $112 million.[21]

The legal dispute arose when Ford announced that he planned to cut dividends and limit them to the ordinary 5% monthly dividends.[22] He stated two reasons for the change in distribution policy. First, he foresaw certain large capital expenditures including a planned large factory at River Rouge.[23] Second, he wanted to withhold dividends because he wanted to reinvest profits "back into the business."[24] Both were a form of reinvestment of profits back into the company, and the court had to decide whether the decision was within sound managerial discretion or an abuse of minority shareholders.

The case should have been unremarkable. Ford famously stated that he wanted to make capital expenditures, to pay employees better wages, to expand the "industrial system," to benefit society, and to reinvest "profits back into the business."[25] Were this the testimony of corporate directors today, would any competent modern court, understanding the business judgment rule, hold these motives repugnant to corporate law, sufficient to impose a legal sanction such as overruling a business decision? Nor does the case's being decided in 1919 change the analysis. By this time, the modern era of corporate law and its liberalization were well underway.[26] The business judgment principle had already been established in American law.[27] Ford asserted the business

16. *See* Stout, *supra* note 4, at 167-68. The case is still cited as an exception to the general rule that directors have broad discretion to make distribution decisions. *See, e.g.*, BAUMAN, STEVENSON & RHEE, *supra* note 3, at 447-48.
17. Dodge, 170 N.W. at 669-70.
18. "Henry Ford is the dominant force in the business of the Ford Motor Company." *Id.* at 683.
19. *Id.* at 670.
20. *Id.*
21. *Id.* (as of July 1916).
22. *Id.* at 671, 683.
23. *Id.* at 671.
24. *Id.*
25. *Id. See infra* note 44 & accompanying quote.
26. *See generally* Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323 (2007) (describing the competition among states to enact liberalized corporation statutes in the early twentieth century).
27. *See* Marcia M. McMurray, *An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule*, 40 VAND. L. REV. 605, 613-18 (1987) (citing various cases from the nineteenth century).

judgment principle as a defense.[28] The opinion, while not explicitly invoking the modern formulation of the business judgment rule,[29] repeatedly recognized and contended with the principle of business judgment and managerial deference. *Dodge* is replete with references to managerial "discretion."[30] There is no question that the court understood the principle of business judgment.

The trial court ordered the issuance of special dividends in the amount of over $19 million and enjoined Ford Motor's planned capital expenditures.[31] Although *Dodge* is seen as a canonical case upholding shareholder primacy, the supreme court's decision on appeal was Solomonic; the court provided concessions to various stakeholders, including shareholders and managers.[32] Management (Henry Ford), in turn, considered the interests of other stakeholders including employees, communities, and the larger economy.[33] The court reversed the trial court's injunction and permitted the company's capital expenditures, but affirmed the trial court's order to issue dividends.[34] The court expended little effort on the capital expenditure portion of the decision.[35] On this issue, the court recited and relied on a classic refrain of the business judgment principle: "The judges are not business experts."[36]

Dodge's iconic statement is found in the dividend discussion. The decision to distribute assets to shareholders is a specific business decision. At the time, the rule on dividend distribution, which is a specific application of the business judgment rule, was also well established.[37] The court found that by withholding dividends from

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28. Dodge, 170 N.W. at 678 (Ford asserting: "The management of the corporation and its affairs rests in the board of directors, and no court will interfere or substitute its judgment so long as the proposed actions are not ultra vires or fraudulent.").

29. *E.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

30. For example, the court stated: "There is committed to the discretion of directors, a discretion to be exercised in good faith, the infinite details of business . . . ." *Dodge*, 170 N.W. at 684. The court favorably cited case law stating the business judgment rule. *Id.* at 682 (quoting *Park v. Grant Locomotive Works*, 3 A. 162, 165 (N.J. Ch. 1885): "[Directors] are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over [corporations] is absolute so long as they act in the exercise of an honest judgment."). *See* Weinberger, *supra* note 4, at 1033 (noting that the court's analysis "foreshadows [the business judgment rule] doctrine").

31. Dodge, 170 N.W. at 677-78.

32. *See infra* Section IV.B. (providing further discussion of the Solomonic nature of the court's decision).

33. *See infra* Section III.B. (section discussing Henry Ford's interest in advancing the interests of stakeholders including employees).

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

35. *Id.* at 684-85.

36. *Id.* at 684. More modern cases have expressed similar sentiments. *See* Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. 1968) ("That is beyond our jurisdiction and ability."); Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979) ("[C]ourts are ill equipped . . . to evaluate what are and must be essentially business judgments."); Curtis v. Nevens, 31 P.3d 146, 151 (Colo. 2001) (en banc) (quoting *Auerbach*).

37. "The rule which will govern courts in deciding these questions is not in dispute." Dodge, 170 N.W. at 681. The court cited various authorities, all stating the same principle that dividend policy is squarely in the board's discretion absent fraud, bad faith, or abuse of

minority shareholders Ford abused his discretion. The case turned on fact. The averred abuse against the Dodge brothers occurred in the context of a closely held company. The court held that Ford did not comply with "the duties which in law he and his codirectors owe to protesting, minority stockholders."[38]

Of course, *Dodge* is iconic for its gratuitous, embellished exposition justifying the holding on the dividend issue. The majority court, per Justice Ostrander, was clearly irritated by Ford's thinking. It set the table for its iconic discussion by painting Ford's trial testimony and other statements in these strokes:

His testimony creates the *impression*, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken. We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company—the policy which has been herein referred to.[39]

After setting forth its "impression" of Ford's thinking, the court repudiated his vision of corporate industrial capitalism with its iconic pontification on corporate purpose:

The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. *There should be no confusion (of which there is evidence)* of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority shareholders. *A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end*.[40]

A generation of academic commentary has interpreted the above statement as the earliest, clearest evidence of shareholder primacy, and by doing so has suggested or implied that shareholder primacy has been a constant polestar in modern corporate law.[41] This is a lore of corporate law. The analytical method of this mythmaking

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discretion. *Id.* at 682. After this recital, it ended the discussion by stating: "It is not necessary to multiply statements of the rule." *Id.* Restatements of law existing at the time confirm the correctness of the court's legal analysis and conclusion. *See* THE NATIONAL CYCLOPEDIA OF LAW: THE LAW OF PRIVATE CORPORATIONS, ch. XIV, § 81, *Stockholders' Right to Dividends*, at 182 (1913) (stating that dividend "depends upon a declaration thereof by the directors but in clear cases a court of equity will compel the declaration of the dividend" and that boards have "a large discretion . . . unless there is a clear abuse of discretion").

38. Dodge, 170 N.W. at 684.

39. *Id*. at 683-84 (emphasis added).

40. *Id.* at 684 (emphasis added).

41. *E.g.*, STEPHEN M. BAINBRIDGE, CORPORATE LAW 141 (2d ed. 2009) ("It is well-settled that directors have a duty to maximize shareholder wealth.") (citing *Dodge v. Ford Motor Co.*); Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015) https://perma.cc/T2ZP-4X9Y ("Despite contrary claims by some academics and Occupy-Wall-Street-type partisans, this [referring to Dodge v. Ford Motor Co.] remains the law today."); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed*

narrative constructs a legal canon by pointing to several sentences in *Dodge*. Such a method is suspect. Search the judicial literature long enough, and one can find all sorts of commentary supporting one's view. It is not credible to believe that a two-sentence odd dictum in the form of a political statement established shareholder primacy as legal canon within modern corporation law in light of two inconvenient facts: (1) the case never influenced courts in any time period and did not influence academics until 60 years later in the 1980s; and (2) the idea of shareholder primacy existing since 1919 is wholly belied by historical context (*i.e.*, large historical events, political orders and economics systems).[42] The idea that shareholder primacy was always the true north star of corporate law is a false narrative.[43]

Dodge was a celebrity case because it involved Henry Ford and Ford Motor, probably the most famous businessman and the most valuable corporation at the time. It would be today's equivalent to an ordinary contract dispute between Elon Musk and Google. But the facts and law in *Dodge* were all too pedestrian. The court did not make new law. The holding on capital expenditures was properly held to be within the realm of business judgment. The holding on dividends turned not on new law but on fact, whether the decision was an abuse of discretion or in good faith. The court was "convince[d] that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give."[44] Of course, if Ford, as controlling shareholder, made an arbitrary decision on dividends, it is merely evidence of minority shareholder oppression in a closely-held corporation.[45] One could come down on either side of the factual matter,[46] but the case is no more interesting than a tort case turning on the fact of whether the light was green or red. The court could have simply reasoned that in light of the company's phenomenal financial success and past history of dividend distributions, Ford acted in bad faith by oppressing minority shareholders who were planning to compete against him.[47] The court's holding is exactly this—but this factual finding

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Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 WAKE FOREST L. REV. 761, 776-77 (2015) ("*Dodge v. Ford* and [*eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010)] are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty."); Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 103 (2020) (citing *Dodge* and stating: "By the beginning of the 1920s, the idea that the main purpose of the business corporation was to make profits for shareholders was widely accepted and sanctioned by case law.").

42. *See infra* Section III (explaining the status of shareholder primacy throughout the twentieth and twenty-first centuries of American political orders and economic systems).

43. *See infra* Section II (showing Dodge's influence among courts and academics throughout the 100-year history of *Dodge*).

44. *Dodge*, 170 N.W. at 683.

45. *See, e.g.*, Smith v. Atlantic Props., Inc., 422 N.E.2d 798, 803-04 (Mass. App. 1981). Nothing more than a finding of abuse would have been needed to resolve the case.

46. *E.g.*, Henderson, *supra* note 5, at 67 ("Today, the Court's holding on the dividend issue is not good law: courts will not compel dividends, probably even in the face of silly and over-the-top testimony.").

47. *See* Weinberger, *supra* note 4, at 1034-35 (noting this "conventional wisdom among historians and legal scholars" is that Ford wanted to stymie the Dodge brothers). Other

is no more interesting. The court's gratuitous dictum on shareholder primacy was an unnecessary tangent.[48]

B. Dodge as Iconic Oddity

The majority court's commentary on shareholder primacy is odd. It relies on a strawman characterization of Ford's business motives to advance an unwarranted political claim about corporate purpose.

The court's commentary reads like an overreaction to a provocation, as if the court felt compelled to reproach Ford for harboring an aberrant thought. It is oddly situated in the opinion from the point of view of judicial craft. The court's "impression" mischaracterized Ford's testimony.[49] The court specifically pointed to this statement made by Ford:

My ambition is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business.[50]

Citing this statement (made originally to a newspaper),[51] the court implied that Ford harbored illicit ideas about corporate capitalism. By propping up this strawman, the court was able to knock it down with its iconic commentary on shareholder primacy.[52]

The artifice is apparent. When viewed in isolation, Ford's comment is innocuous. Businesses routinely put profit back into the business. It is the reason why boards have great discretion on distribution policy, a rule that the majority court recognized.[53] Also, if spreading the benefits of the industrial system and helping employees build up their lives are illegal, illicit motives, the court must have had a ruthless, primitive view of corporate capitalism in which zero-sum exploitation is the source of profit. Perhaps the court held such a view in light of the era of laissez-faire capitalism, but one would like to think otherwise. A view of inevitable exploitation would have made the Michigan judges strange bedfellows with Marxists, though the former must have thought that such alienation was a good thing for the advancement of capitalism. But, for reasons explained below, it is unlikely that the Michigan court harbored a primitive view of how capitalism does and should work.

Instead, there was a broader context to Ford's comment that the court likely

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scholars have proffered other explanations for Ford's motive. *See id.* at 1036 (arguing that tax avoidance related to dividends was the critical motivation); Roe, *supra* note 3, at 1768-1777 (noting that Ford needed to conserve cash in light of the $5/day wage policy and plans for capital expenditures); Henderson, *supra* note 5, at 66 (noting a substantial tax issue related to dividend distribution).

48. *See* Stout, *supra* note 4, at 167 (characterizing the commentary on shareholder primacy as dictum); Henderson, *supra* note 5, at 73 (same).

49. *See* Vargas, *supra* note 4, at 2106, 2118 n.83 (stating that "the court abandoned Henry Ford's testimony and offered its own take on his motivations" and noting that the court "cherry-picked quotes from newspapers").

50. Dodge, 170 N.W. at 683.

51. Kawaguchi, *supra* note 4, at 567.

52. Dodge, 170 N.W. at 683-84.

53. *See supra* note 37 and accompanying text.

considered.[54] Ford provided plenty of fodder that, if cherry-picked, could have supported the court's mischaracterization. In an article in the Evening News, Ford stated: "I do not believe we should make such awful profits on our cars. As reasonable profit is right, but not too much."[55] At trial, Ford confirmed his "awful profit" comment in testimony:

Q. Your mind changes often. Now, I will ask you again, do you still think that those profits were awful profits, and not right?

A. Well, I guess I do, yes.

Q. You still do?

A. Yes.

Q. And for what reason you were not satisfied to continue to make such awful profits?

A. We don't seem to be able to keep the profits down.

Q. You are not able to keep them down; are you trying to keep them down? What is the Ford Motor Company organized for except for profits, will you tell me, Mr. Ford?

A. Organized to do as much good as we can, everywhere, for everybody concerned.[56]

The "awful profit" comment supports the court's mischaracterization of Ford as harboring some illicit anti-capitalistic views.

Although the court cherry-picked snippet quotes, the record showed clearly that Ford was, no doubt, a *bona fide* capitalist—meaning he was interested in making profit.[57] In an interview in the Detroit News, Ford stated by selling as many cars and hiring as many workers as he could, he could make "a fair amount of profit for myself and the men associated with me in business" and that his business policies "increase our own profits beyond anything we had hoped for or even dreamed of when we started."[58] With respect to the "awful profit" comment, Ford explained further at trial testimony that such profit level "isn't good business for the institution."[59] His thoughts on business strategy were sophisticated.

According to the court, Ford's sin was the company's business strategy based on making and selling as many cars as possible, requiring as many employees as possible, and thus delivering the benefits of this industrial system to the greater public.[60] Obviously, setting the appropriate price of the product was a key strategic decision (it is a key strategic decision in any company). At trial, Ford returned to the topic of "awful

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54. Although the court focused on the above Ford quote, it reviewed other facts in the appellate record, including Ford's testimony, but did not present specific comments other than Ford's quote. *See* Dodge, 170 N.W. at 683 (indicating the court examined "[t]he record, and especially the testimony of Mr. Ford").

55. Kawaguchi, *supra* note 4, at 536-37.

56. *Id.* at 538.

57. This is obvious in hindsight in light of the history of the Ford Motor Co. and Fordism, and it should have been obvious at the time in light of the phenomenal profits the company already made.

58. *Kawaguchi*, *supra* note 4, at 517, reprinting *Ford Makes Reply to Suit Brought by Dodge Brothers*, DETROIT NEWS (Nov. 4, 1916).

59. *Id.* at 537 (providing trial testimony).

60. *See supra* note 44 and accompanying quotation.

profit."

Q. You say you do not think it is right to make so much profits? What is this business being continued for, and why is it being enlarged?

A. To do as much as possible for everybody concerned.

Q. What do you mean by "doing as much good as possible?"

A. To make money and use it, give employment, and send out the car where the people can use it.

Q. Is that all? Haven't you said that you had money enough yourself, and you were going to run the Ford Motor Company thereafter to employ just as many people as you could, to give them the benefits of the high wages that you paid, and to give the public the benefit of a low priced car?

A. I suppose I have, and incidentally make money.

Q. Incidentally make money?

A. Yes, sir.

Q. But your controlling feature, so far as your policy, since you have got all the money you want, is to employ a great army of men at high wages, to reduce the selling price of your car, so that a lot of people can buy it at a cheap price, and give everybody a car that wants one?

A. If you give all that, the money will fall into your hands; you can't get out of it.[61]

Ford confirmed that this business strategy would result in enormous profit ("money will fall into your hands") and that such profit was inevitable ("you can't get out of it").[62] He testified further that he wanted to increase market share,[63] and that the reason why he could lower prices on cars was that his factory system increased efficiency, and thus reduced the cost of manufacturing.[64] Of course, cheap price delivered to consumers is one of the reasons why companies like Amazon and Walmart are so highly valued today. This observation of business strategy and valuation is not just a modern perspective. Ford's testimony and statements explicitly laid out the logic of mass production, cheap prices, and market share as Ford Motor's core corporate strategy.

Neither Ford's statement quoted in the opinion nor other comments at trial and newspapers can be read to conclude that Ford intended to give away the value of private wealth like an altruistic philanthropist or a Marxist socialist. Read fairly, Ford's thoughts are not antithetical to the profit motive. If one were to conduct a survey of corporate mission statements today, one would likely find many statements about how the corporation seeks to do good for society, employees, communities, and the

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61. *Kawaguchi*, *supra* note 4, at 543-44.

62. Shortly after the litigation, Ford repeated the same in his autobiography: "So it has been my policy to force the price of the car down as fast as production would permit, and give the benefits to users and laborers—with surprisingly enormous benefits to ourselves." HENRY FORD, MY LIFE AND WORK 162 (1922).

63. *See* Kawaguchi, *supra* note 4, at 536-37, 565 (confirming in testimony a comment to a newspaper that he wanted to sell more cars by reducing the price, thus increasing market share but decreasing profit per car); *id.* at 517 (reprinting Ford's statement in the Detroit News).

64. *Id.* at 546-47.

world. In a recent statement, the Business Roundtable said exactly this.[65] Though such statements may be deeply held or cynically promoted for public relation purposes, they are thoroughly prosaic and uncontroversial under the principle of business judgment, which was well established in 1919.

The court mischaracterized Ford's statements to prop up a strawman. Did the court *really* believe that after making over $160 million in profit on capital of $2 million between 1903 and 1916,[66] Ford would turn the enterprise into a philanthropic venture? Is philanthropy the reason why he wanted to make massive capital expenditures to increase the size and market share of the business, a disputed issue that the court decided in favor of Ford with short commentary? It is implausible that the court really believed this.[67]

The court's thought process is odder still because it is internally incoherent. The court recognized that a "business, one of the largest in the world, and one of the most profitable, has been built up" and that the "experience of the Ford Motor Company is evidence of capable management of its affairs."[68] It acknowledged that the Dodges charged Ford with attempting to crush their competitive venture and seeking a monopoly.[69] Eliminating competitors is not the motive of an altruistic philanthropist. The court's rejection of the monopoly argument is also telling. It concluded that the plaintiff failed to show that Ford Motor's business policy "will involve a monopoly other than such as accrues to a concern which makes what the public demands and sells it at a price which the public regards as cheap or reasonable."[70] In other words, in terms of pricing and selling goods, the fundamental activity of a for-profit corporation operating in a market in a capitalist system, Ford Motor was doing a pretty good job.

Nor was it Ford's legal position on appeal that Ford Motor would or should become "a semi-eleemosynary institution."[71] Ford's counsel argued, as the court acknowledged, that a business corporation "cannot engage in humanitarian works as its principal business" but it can carry on "charitable works as are incidental to the main business of the corporation."[72] Ford's counsel framed the issue as whether a

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65. "While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders [and identifying stakeholders as customers, employees, suppliers, communities and shareholders]. . . . We commit to deliver value to all of them, for the future success of our companies, our communities and our country." *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE STATEMENT ON CORPORATE GOVERNANCE (Aug. 19, 2019) ("Business Roundtable Statement"), https://perma.cc/55DC-38YE.

66. This is a rough calculation based on $41 million in total special dividends, approximately $15 million in total ordinary dividends, and $112 million in surplus from 1903 to 1916.

67. *See* Henderson, *supra* note 4, at 65 ("The Court reasoned, somewhat speciously, that it was not, and that Ford was running (or was going to run) the Ford Motor Company as 'a semi-eleemosynary institution and not as a business corporation.'" (quoting Dodge, 170 N.W. at 683)).

68. Dodge, 170 N.W. at 683-84.

69. *Id.* at 673 (quoting paragraph 28 of the complaint averring "the creation of a complete monopoly").

70. *Id.* at 681.

71. *Id.* at 683.

72. *Id.* at 684.

business decision can be "influenced to some extent by humanitarian motives."[73] The court agreed with Ford's counsel and stated that there is a "difference between an incidental humanitarian expenditure of corporate funds for the benefit of employees . . . and a general purpose and plan to benefit mankind at the expense of others."[74] This famous passage by the court makes clear that there was no daylight between the Ford counsel's legal argument to the court and the court's thinking. The court positioned Ford's argument as one needing repudiation, except that Ford's counsel made the exact legal arguments to the court that the court claims as its own. The court was preaching to the choir.

The court's stated "impression" is not credible. It could not have really believed its narrative. It acknowledged later in the capital expenditure discussion that "the alleged motives of the directors" with respect to capital expenditures did not "menace the interests of shareholders."[75] Thus, on the dividend issue Ford was an altruistic philanthropist bent on turning Ford Motor into a public charity project, but on the capital expenditure issue he was an acceptable capitalist who would return profit for shareholders.

If accepted at face value, the court's stated impression of Ford's motive and its reasoning process appear to be acutely unsophisticated. The court appears to be incapable of processing a multitude of subtle facts; it appears instead to have latched onto a single statement and constructed an imagined version of Ford's comments and actions. But a narrative of a simpleton court is not plausible. It does not explain how the *Dodge* dictum came to be.

Additional facts suggest that something was amidst. Despite prolific scholarship on *Dodge*, commentators have not focused attention on the fact that three justices of the full panel of eight concurred in the majority's decision. The inattention is understandable because the concurrence provides no substance to analyze. It agreed entirely on the majority court's holding and opinion on the capital expenditures. It also agreed on the holding on the dividend issue. But the three judges wrote separately to dissociate themselves from the opinion on dividends: "I do not agree with all that is said by [Ostrander] in his discussion of the question of dividends."[76] Cryptic, and nothing more is said on the point.

The exact mental impressions of the concurring judges are not known. But we know with some certainty on the point of disagreement. Deductive reasoning leads to only one plausible conclusion—the concurrence dissociated itself from Ostrander's discussion of corporate purpose and shareholder primacy. The extant law was settled.[77] The majority court's discussion of the rule on dividend distribution was workmanlike.[78] Since the concurrence joined the holding on the dividend issue, they

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73. *Id.* Of course, counsel's argument today would be entirely uncontroversial because all corporation statutes grant corporate power to make charitable contributions. *E.g.*, DEL. CODE ANN. tit. 8, § 122(9); MOD. BUS. CORP. ACT § 3.02(m) (2020).

74. Dodge, 170 N.W. at 684.

75. *Id.*

76. *Id.* at 685 (Moore, J., concurring, joined by Bird, C.J., and Kuhn, J.).

77. *See supra* notes 26-31 and accompanying text.

78. *See* Dodge, 170 N.W. at 677-78.

explicitly agreed on the factual finding of abuse of discretion and oppression.[79] In light of the business judgment principle, that fact is the only path to the dividend holding in favor of the Dodge brothers. Facts and law thus were prosaic matters. The one possibility of disagreement in the dividend portion of the opinion, sufficiently substantive for three justices to write separately, was the majority court's extraneous reasoning grounded in shareholder primacy. No other portion of the discussion on dividends is out of place. The sole oddity—the commentary that would eventually make *Dodge* iconic—was the tangent on corporate purpose, a forceful and forced political commentary that was unnecessary to deciding the case.[80]

II. Influence of Dodge

A. Judicial Influence from 1919–2019

A citation study supports the conclusion that *Dodge* is a prosaic case. *Dodge* has never penetrated the judicial literature in the way that "iconic" cases do.[81] In the one hundred years 1919–2019, *Dodge* has been cited only 70 times in judicial opinions.[82] From the perspective of legal precedent and judicial influence, *Dodge* has always been irrelevant.

Sixty-two (62) citations have been for ordinary propositions: 24 cases state the rule for dividend distribution;[83] 25 cases state other well established corporate law

79. "I do agree with [Ostrander] in his conclusion that the accumulation of so large a surplus establishes *the fact* that there has been an arbitrary refusal to distribute funds that ought to have been distributed to the stockholders as dividends." *Dodge*, 170 N.W. at 685 (Moore, J., concurring, joined by Bird, C.J., and Kuhn, J.) (emphasis added).

80. We know *what* the concurrence dissociated themselves from, but not *why*. There are several possibilities on why the concurrence rejected the commentary on shareholder primacy. The concurring judges could have disagreed with the substantive idea of shareholder primacy. They could have agreed with Ostrander on the idea, but thought the commentary unnecessary in terms of judicial craft. They could have believed that the language was indecorous, too political or controversial for the time. They could have desired not to rebuke publicly Ford in a personal way. Each of these reasons is plausible.

81. *See supra* note 5 (contrasting with *Meinhard v. Salmon*).

82. This is based on Westlaw as of July 21, 2022. Compare 70 total citations to *Meinhard v. Salmon*, which has been cited 1,266 times in cases. *Supra* note 5. Of the 70 cases, 20 are citations by Michigan courts.

83. Gesell v. Tomahawk Land Co., 200 N.W. 550, 556 (Wis. 1924); Farmers' Loan & Trust Co. v. Pierson, 130 Misc. 110, 113 (N.Y. Sup. 1927); Kales v. Woodworth, 20 F.2d 395, 398 (E.D. Mich. 1927); Kales v. Woodworth, 32 F.2d 37, 38 (6th Cir. 1929); In re Joy's Estate, 225 N.W. 878, 879 (Mich. 1929); City Bank Farmers Trust Co. v. Hewitt Realty Co., 231 A.D. 702, 703 (N.Y. App. Div. 1930) (Martin, J., dissenting); Jones v. Van Heusen Charles Co., 230 A.D. 694, 696 (N.Y. App. Div. 1930); Morehead Mfg. Co. v. Washtenaw Cir. Judge, 236 N.W. 911, 912 (Mich. 1931); City Bank Farmers Trust Co. v. Hewitt Realty Co., 177 N.E. 309, 311 (N.Y. 1931); Tower Hill-Connellsville Coke Co. of W. Va. v. Piedmont Coal Co., 64 F.2d 817, 827 (4th Cir. 1933); Polish Am. Pub. Co. of Detroit v. Wojcik, 273 N.W. 771, 774 (Mich. 1937); N.Y. Pa. N.J. Utilities Co. v. Public Serv. Comm'n of N.Y., 23 F.Supp. 313, 314 (S.D.N.Y. 1938); Johnson v. Lamprecht, 15 N.E.2d 127, 131 (Ohio 1938); Joliet & C. R. Co. v. United States, 118 F.2d 174, 178 (7th Cir. 1941) (Kerner, J., dissenting); Ostlind v. Ostlind Valve, 165 P.2d 779, 789 (Or. 1946); Schuckman v. Rubenstein, 164 F.2d 952, 957 (6th Cir. 1947); Swinton v. W.J. Bush & Co., 199 Misc. 321, 323 (N.Y. Sup. Ct. 1951); Romick

principles (mostly the rule of business judgment and the limits of managerial discretion);[84] 13 cases cite miscellaneous propositions (mostly restating factual aspects of the case with some being tax cases).[85] During 1980–2019, the period covering the height of

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v. Bekins Van & Storage Co., 197 F.2d 369, 369 n.1 (5th Cir. 1952); W.O. Barnes Co., Inc. v. Folsinski, 60 N.W.2d 302, 307-308 (Mich. 1953); Meadows v. Bradshaw-Diehl Co., 81 S.E.2d 63, 69 (W. Va. 1954); Gordon v. Elliman, 119 N.E.2d 331, 334 (N.Y. 1954); United States. v. Gates, 376 F.2d 65, 78 n.12 (10th Cir. 1967); Raymond V. Miller v. Magline, Inc., 256 N.W.2d 761, 764 (Mich. Ct. App. 1977); Guy C. Blackwell v. Allen Nixon, 1991 WL 194725, at *4 (Del. Ch. 1991).

84. Person v. Bd. of State Tax Comm'ns, 115 S.E. 336, 342 (N.C. 1922) (defining capital stock); Barrows v. J.N. Fauver Co., 274 N.W. 325, 328 (Mich. 1937) (stating principle of business judgment); Ayres v. Hadaway, 6 N.W.2d 905, 907 (Mich. 1942) (same); Iron St. Corp. v. Mich. Unemployment Compensation Comm'n, 9 N.W.2d 874, 878 (Mich. 1943) (stating discretion to make capital expenditures); Williams v. Green Bay & W.R. Co., 326 U.S. 549, 557-58 nn. 10-11 (1946) (stating principle of business judgment); Pettengill v. Monteith Land Co., 55 N.W.2d 130, 134 (Mich. 1952) (stating principle of business judgment and court's power to intervene upon fraud or breach of trust); Reed v. Burton, 73 N.W.2d 333, 336 (Mich. 1955) (stating principle of business judgment); Hall v. John S. Isaacs & Sons Farms, Inc., 163 A.2d 288, 295 (Del. 1960) (discussing minority freezeout through dividend nonpayment); Shlensky v. Wrigley, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) (stating principle of business judgment); Levin v. Mississippi River Corp., 59 F.R.D. 353, 365 (S.D.N.Y. 1973) (stating principle of judicial noninterference in corporate affairs and mentioning the exception when "the directors were running the corporation for the benefit of persons other than the stockholders"); Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505, 514 (Mass. 1975) (discussing minority freezeout and dividend nonpayment); Zidell v. Zidell, Inc., 560 P.2d 1086, 1089 (Or. 1977) (stating principle of business judgment and judicial noninterference); Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 278 (Alaska 1980) (stating principle of business judgment); Dirks v. SEC, 463 U.S. 646, 675-76 (1983) (Blackmun, J., dissenting) (stating "philanthropic motives did not permit him to set Ford Motor Company dividend policies to benefit public at expense of shareholders"); Matter of Estate of Butterfield, 341 N.W.2d 453, 458 (Mich. 1983) (stating principle of business judgment); CFTC v. Weintraub, 471 U.S. 343, 348-49 (1985) (stating principle of fiduciary duty); Matter of Mich. Boiler and Engineering Co., 87 B.R. 465, 469-70 (Bankr. E.D. Mich. 1988) (stating principle of fiduciary duty); Lytle v. Malady, 566 N.W.2d 582, 593 n.25 (Mich. 1997) (stating principle of business judgment); Scherer v. Buha, 2002 WL 1065609, at *5 (Mich. Ct. App. 2002) (same); Wojcik v. McNish, 2006 WL 2061499, at *3 (Mich. Ct. App. 2006) (same); Hill v. State Farm Mut. Auto. Ins. Co., 83 Cal.Rptr.3d 651, 692 (Cal. App. 2008) (stating principle of business judgment and noting profit expectation of business corporations); Fitzpatrick v. Am Int'l Grp., Inc., 272 F.R.D. 100, 107 (S.D.N.Y. 2010) (stating principle of fiduciary duty); Rogan v. Oliver, 110 So.3d 980, 983 (Fla. Dist. Ct. App. 2013) (same); Diez v. Davey, 861 N.W.2d 323, 331 (Mich. Ct. App. 2014) (stating principle that profits belong to the corporation and not shareholders); In re Think3, Inc., 529 B.R. 147, 181 (Bankr. W.D. Tex. 2015) (stating principle of business judgment).

85. Kingston v. Nichols, 192 N.W. 768, 777 (Mich. 1923) (comment on patents); Dodge v. U.S., 64 Ct.Cl. 178, 189 (Ct. Cl. 1927) (financial facts in case); Couzens v. Comm'r of Internal Revenue, 11 Bd. Tax App. 1040, 1055 (Tax App. 1928) (financial facts in case); Gray v. Commission of Internal Revenue, 12 Bd. Tax App. 916, 921 (Tax App. 1928) (background on tax case); Goodenough v. Commission of Internal Revenue, 12 Bd. Tax App. 935, 940 (Tax App. 1928) (same); Gray v. Commission of Internal Revenue, 12 Bd. Tax App. 956, 960 (Tax App. 1928) (same); Louis K. Liggett Co. v. Lee, 288 U.S. 517, 554 n.23 (1933) (legal limits on capital stock); Continental-Illinois Nat'l Bank & Trust Co. of Chicago v. United States, 67 F.2d 153, 153-56 (7th Cir. 1933) (background on tax case); Anderson v. United States, 6 F.Supp. 851, 852 (Ct. Cl. 1934) (same); Dodge v. Scripps, 37 P.2d 896, 902 (Wash. 1934) (financial facts in case); Goodenough v. United States, 19 F.Supp. 254, 255 (Ct. Cl. 1937) (background on tax case); Kales v. Comm'r of Internal Revenue, 101 F.2d 35, 37 (6th

the neoliberal political order and financial capitalism, the case was cited only 14 times.[86]

Only 8 cases can be fairly characterized as invoking *Dodge*'s comment on shareholder primacy. All 8 cases reference *Dodge*'s dictum in passing, and several interpret *Dodge* for the weaker proposition that corporate actions should profit or benefit shareholders, which of course no one disputes.[87] A few cases cite *Dodge* but then assert a counterpoint or a qualification, such as questions concerning corporate philanthropy.[88] In the most recent Michigan case dated 2022, the Michigan Supreme Court quoted *Dodge*'s iconic two-sentence dictum. It then immediately recharacterized the iconic

Cir. 1939) (same); Masterson v. Pergament, 203 F.2d 315, 332 (6th Cir. 1953) (background facts in case).

86. *See supra* notes 76-78. There are five post-2019 cases as of July 2022. *See* Murphy v. Inman, 509 Mich. 132, 148 (Mich. 2022) (restating *Dodge*'s dictum on shareholder primacy); Law Office of James P. Grifo, LLC v. Am. Fed'n of State, Cnty. & Mun. Emp., 2022 WL 1763662, at *5 n.8 (Wash. App. 2022) (stating principle of fiduciary duty); Appel v. Wolf, 2022 WL 2318692, at *10 (S.D. Cal. 2022) (same); Smith v. Smith, 2020 WL 2308683, at *4 (E.D. Mich. 2020) (stating rule for dividend distribution); State v. Doyle, 235 A.3d 482, 503 (R.I. 2020) (stating principle of fiduciary duty).

87. *See* Gilbert v. Norfolk & W. Ry. Co., 171 S.E. 814, 815 (W.Va. 1933) (noting that *Dodge* holds for the proposition "the general rule that a private business corporation is carried on primarily for the profit of its stockholders" but noting nevertheless that "it has, nevertheless, been generally held that such corporations may, for the ultimate benefit of the corporation itself translated into profit, use the funds of such corporation for purposes which might appear directly to be charitable and humanitarian"); Wagner Electric Corp. v. Hydraulic Brake Co., 257 N.W. 884, 887 (Mich. 1934) (quoting *Dodge* "[i]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others" but concluding that "such does not appear to be the fact in this case"); E. I. DuPont de Nemours & Co. v. Clark, 88 A.2d 436, 444 (Del. 1952) (Tunnell, J., dissenting) (citing *Dodge* to suggest that corporation actions should be "designed to promote the success of the company's business"); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 584 (N.J. 1953) (noting that *Dodge* holds for the proposition "those who managed the corporation could not disburse any corporate funds for philanthropic or other worthy public cause unless the expenditure would benefit the corporation" in an era "when corporations were relatively few and small" but that "the 20th Century has presented a different climate"); Hirshhorn v. Mine Safety Appliances Co., 203 F.2d 279, 284 (3d Cir. 1953) (citing *Dodge* for holding that "as the fiduciary corporation, not only was under no duty to its cestuis to permit them to share in its business opportunities, profits and inventions, but that such gratuities might well subject it to attack by its own stockholders"); Long v. Norwood Hills Corp., 380 S.W.2d 451, 476 (Mo. App. 1964) (noting plaintiff's argument and citation to *Dodge* that "the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders and that it is for this purpose the capital has been advanced" but court implied that *Dodge* involved "misappropriation of the assets of the corporation or misconduct of the majority stockholders or [board] of directors"); In re Rigden, 795 F.2d 727, 737 (9th Cir. 1986) (Hall, J., concurring and dissenting in part) (noting that *Dodge* holds for the proposition managers "have the duty to maximize the value of the corporation's assets for the benefit of the corporation's residual claimants"); Churella v. Pioneer State Mut. Ins. Co., 671 N.W.2d 125, 132 (Mich. Ct. App. 2003) (noting that *Dodge* holds for the proposition "the purpose of a business corporation is to provide profit to its shareholders" the court distinguished a business corporation from a mutual insurer whose purpose is to provide insurance coverage to members).

88. *See supra* note 87 (citations and accompanying parentheticals to Gilbert v. Norfolk & W. Ry. Co., A.P. Smith Mfg. Co. v. Barlow, Long v. Norwood Hills Corp., Churella v. Pioneer State Mut. Ins. Co.).

statement into the generic assertion that shareholders are owed fiduciary duties, which no one disputes.[89] The Michigan court reduced *Dodge*'s iconic statement into a trivially obvious axiom, from *Dodge*'s command that the corporate purpose must be "primarily for the profit of the stockholders" to the uncontroversial principle that as a first consideration "directors owe fiduciary duty to the corporation and its shareholders."[90]

Although *Dodge* has never been influential in the courtroom, this does not mean that its idea of shareholder primacy never took root. In the neoliberal era starting in the 1980s, shareholder primacy *did* become a rule of law,[91] but ironically *Dodge* had nothing to do with it. Even at the moment in which *Dodge*'s vision was finally realized sixty years later, the case remained a cipher. Courts continued to ignore it. When courts were adopting shareholder primacy as a rule of corporate law, why did they ignore the most iconic case on the subject? The answer is easy. Courts work at the instrumental level of rules and facts and have little use for political statements. At the instrument level of a rule of law, *Dodge* is internally incoherent and inoperable.

A rule of law based on *Dodge*'s idea cannot exist because courts cannot simply order (command) corporations to maximize profit upon penalty of legal sanction, which is the scheme of fiduciary duties and legal enforcement. A command as such would be legally impotent. At the instrumental level, if courts and statutes defer to managers under the business judgment rule, they cannot concurrently implement a fiduciary duty to maximize profit under the rule-sanction framework of the typical derivative action where shareholders can obtain real remedies.[92] In other words, shareholders should not be able to bring a legal action for breach of duty on the specific theory that directors "failed to maximize profit."[93] Such a framework would impinge

89. "As we stated in *Dodge v. Ford Motor Company*, 'A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.' In other words, under this state's common law, *directors owe fiduciary duties first and foremost to the shareholders of the corporation*; their roles within, and obligations to, the corporation cannot be properly understood without first recognizing *this fundamental tenet of corporate law* in Michigan." Murphy v. Inman, 509 Mich. 132, 148 (Mich. 2022) (emphasis added).

90. *E.g.*, Nichols v. HealthSouth Corp., 281 So.3d 350, 361 (Ala. 2018) ("directors owe fiduciary duties to the corporation and its stockholders"); Citigroup Inc. v. AHW Inv. P'ship, 140 A.3d 1125, 1139 (Del. 2016) ("directors owe fiduciary duties to the corporation and its stockholders"); Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C., 436 S.W.3d 189, 194 (Ky. 2013) ("corporate directors owe fiduciary duties to the corporation and its shareholders").

91. *See generally* Rhee, *supra* note 10.

92. *See* DEL. CODE ANN. tit. 8, § 141(a) ("The business and affairs . . . shall be managed by or under the direction of a board of directors . . . ."); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (stating the business judgment rule).

93. Courts have always rebuffed shareholders who brought lawsuits on the specific allegation that managers failed to maximize economic profit. *Cf.* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that when "the break-up of the company was inevitable . . . [the board's fiduciary duty] changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit"). Shareholders cannot bring an action on the theory that managers failed to maximize profit. "No court has ever imposed liability for breach of fiduciary duty on the specific reason that the board, in managing operational matters, failed to maximize shareholder profit, though it made the decision informedly, disinterestedly, and in good faith." Rhee, *supra* note 10, at 1961. *See* Jill E. Fisch, *Measuring*

on the primacy of managerial authority, which has been a foundational rule since the inception of the corporate form. Thus, the lack of judicial craft in *Dodge* was not simply a matter of style, but was an unfixable flaw in how the rule of shareholder primacy can be implemented.

In short, the law of shareholder primacy had to solve a complex legal problem.[94] An entire legal architecture supports a corporate governance mechanism in which managers, who must have the primacy of legal authority,[95] are nevertheless steered without legal enforcement toward the new rule of corporate purpose.[96] In this way, the outcome of such compunction is high compliance with a rule of law *sans* enforcement mechanism. The rule is not localized to a single source such as a single statement in case law or statute, but is instead a filamentary principle that weaves through all corporate law and governance.[97] The rule has been legitimized by many courts since the 1980s, but not in the way that *Dodge* did it. Courts instead acknowledged, repeated, endorsed, and integrated the idea of profit maximization into their opinions, thus giving the idea an overall judicial endorsement that works at the level of indoctrination and indirect legal risk.[98] The complex legal architecture provides managers both

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Efficiency in Corporate Law: The Role of Shareholder Primacy, 31 J. CORP. L. 637, 651 (2006) ("Although Dodge v. Ford is frequently cited, no modern court has struck down an operational decision on the ground that it favors stakeholder interests over shareholder interests."). In fact, many cases, some canonical, hold exactly the opposite. *E.g.*, Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. 1968); Kamin v. Am. Express Co., 387 N.Y.S.2d 807 (N.Y. Sup. Ct. 1976); Gregory v. Helvering, 293 U.S. 465 (1935). "Courts have held that shareholders cannot challenge a board's decision on the specific reasons that, for example, the company paid its employees too much; it failed to pursue a profit opportunity; it did not maximize the settlement amount in a negotiation; or it failed to lawfully avoid taxes." Rhee, *supra* note 10, at 1962.

94. *See id.* at 2001-016 (explaining how the legal architecture of the rule of shareholder primacy actually works to elicit high compliance with the command to maximize profit without an enforceable legal mandate).

95. *See supra* note 92 and accompanying text.

96. For example, the legal architecture of shareholder primacy requires large compensation to corporate managers, relative to the average corporate employee, so that they are incentivized to obey the rule. Without high executive pay directly linked to stock price, shareholder primacy does not work as a rule of law. The growing disparity between CEO compensation and average employee pay is the result and further contributes to the growing wealth inequity in society. *See* Steven N. Kaplan & Joshua Rauh, *Wall Street and Main Street: What Contributes to the Rise in the Highest Incomes?*, 23 REV. FIN. STUD. 1004, 1004 (2010) (identifying executive pay as a major source of increasing income disparity). *See also* Robert J. Rhee, *Intrafirm Monitoring of Executive Compensation*, 69 VAND. L. REV. 695, 707 (2016) ("Advocates of shareholder primacy do not connect the role of executive compensation to the broader problem of economic inequity.").

97. *See* Rhee, *supra* note 10, at 1954-55 ("It exists as a filament of the corporate system, weaving through the architecture of the corporate system, its rules of law, corporate governance practices, and market mechanisms.").

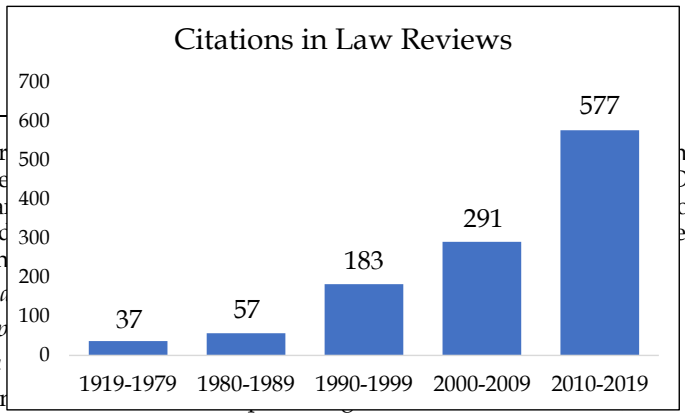
98. *See id.* at 1984-2001 (providing empirical evidence of how courts rapidly embraced the principle of shareholder profit). *E.g.*, Granada Investments, Inc. v. DWG Corp., 823 F.Supp. 448, 459 (N.D. Ohio 1993) ("As corporations developed and grew, a central principle of corporate law emerged: the sole duty of a corporation's officers is to maximize shareholder wealth. As time passed, calls rose for corporations to be more socially responsible, nonetheless, the principle that a corporate officer's overriding duty is to maximize shareholder wealth remains intact. Today, this appears to be the dominating goal

positive and negative incentives to pursue shareholder primacy. The positive incentive is the rise of executive compensation tied to stock price performance.[99] The disincentive is the risk that, given judicial embrace of the principle of shareholder primacy in all aspects of judicial consideration, managers face legal risk if they explicitly embrace stakeholder interests. Lastly, social norms in the form of a new ideology, built on an intellectual framework and accepted by institutions and elites, steer compliance with the new rule. In this systematic scheme, shareholder primacy became the new value system that a critical mass of managers, policymakers, and academics embraced. The collective force of these pressure points, weaving through the architecture of corporate law and governance as a filamentary principle, ensures that the primacy of managerial authority is not undermined as a matter of formal legal power while at the time steering the application of that power toward the end purpose of shareholder wealth maximization.

In the neoliberal era, shareholder primacy became a rule of law. The rule is complex, efficacious, and efficient.[100] It is ingenious in the way that it achieves high compliance *sans* the need for legal enforcement through fiduciary duty and derivative actions.[101] Courts played a substantive role in its implementation, but *Dodge* played no role in the way they went about it. In terms of judicial influence, *Dodge* has always been a legal cipher.

B. Academic Influence from 1919–2019

If *Dodge* has always been irrelevant in courtrooms, the story is quite different with respect to the halls and classrooms of the legal academy. Again, following the citations tells the story. In the one hundred years 1919–2019, *Dodge* has been cited 1,145 times in law review articles. But during the six decades 1919–79, the case was cited only 37 times.[102] Over the next four decades 1980–2019, citations exploded to 1,108.[103] The following table breaks down the citations by decades from 1919 to 2019, except that the first period combines the first six decades from 1919 to 1979.[104]



of corpor…nestic Holdings, Inc. v. Ne…Delaware corporation ca…openly eschews stockhold…ectors' fiduciary duties un…

99. *See genera…*
100. Rhee, *sup…*
101. *See supra …*
102. *See infra …*
103. The total citations in law review articles to date compare well to another iconic case: *Dodge* 1,265, and *Meinhard v. Salmon* 1,279. *See supra* note 5.
104. A curiosity is that of the 37 articles cited over the six decades 1919–1979, just four law reviews account for 33 articles: Harvard Law Review (14), Yale Law Journal (7), University of Pennsylvania Law Review (7), and Texas Law Review (5). *See supra* note 93.

Like courts, legal scholars largely ignored *Dodge* in the first sixty years 1919–1979. Of the 37 citations, 23 articles cited *Dodge* for propositions other than a statement of shareholder primacy. The citations were for ordinary propositions concerning the rules of dividend distribution,[105] and other matters including the business judgment rule and minority freezeout.[106]

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105. *Corporations—Distribution of Dividends—Arbitrary Withholding on the Part of Directors*, 28 YALE L.J. 710 (1919); Note, *Cumulation of Dividends on Non-Cumulative Preferred Stock*, 42 HARV. L. REV. 805, 808 & n.21 (1929); *Income Tax.What Is Income.Deduction for Loss on Securities of Another Corporation Distributed as Dividends*, 45 HARV. L. REV. 1262 (1932); Note, *Rent Paid by Lessee to Lessor's Stockholders as Income Taxable to Lessor*, 45 YALE L.J. 181, 183 n.12 (1935); Gregory D. Hornstein, *Rights of Stockholders in the New York Courts*, 56 YALE L.J. 942, 954 & n.68 (1947); Talbot Rain, *The Fund Available for Corporate Dividends in Texas*, 26 TEX. L. REV. 273, 273 & n.3 (1948); *Minority Shareholder Suits to Compel Declaration of Dividends*, 64 HARV. L. REV. 299, 300 & n.4 (1950); David W. Purcell, Note, *Corporations—Dividends—Receivers—Corporation Compelled to Declare Dividends.—Patton v. Nicholas, 279 S.W.2d 848 (Tex. Sup. 1955)*, 34 TEX. L. REV. 936, 937 (1956); Note, *Protection for Shareholder Interests in Recapitalizations of Publicly Held Corporations*, 58 COLUM. L. REV. 1030, 1045 n.109 (1958); Note, *Distinguishing Between Direct and Derivative Suits*, 110 U. PA. L. REV. 1147, 1148 n.15, 1050 n.34 (1962); *Fifty Years of American Equity*, 50 §. 171, 190 n.120 (1936); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 n.125 (1967); Morris Mendelson, *Payout Policy and Resource Allocation*, 116 U. PA. L. REV. 377, 378 & n.10, 379 & n.16 (1968); Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities*, 82 YALE L.J. 313, 332 n.99 (1972); Alan L. Feld, *The Implications of Minority Interest and Stock Restrictions in Valuing Closely-Held Shares*, 122 U. PA. L. REV. 934, 936 n.13 (1974).

106. *Anti-Alien Land Legislation*, 31 YALE L.J. 299, 303 n.20 (1922) (stating background facts in case); E. Merrick Dodd, Jr., Book Review, *A Treatise on the Principles of Law Governing Corporate Directors*, 44 HARV. L. REV. 1315, 1315 (1931) (noting the omission of *Dodge* in book on corporate governance without additional comment); Note, *Suit by Stockholder When Directors Refuse to Bargain Collectively with Employees*, 46 YALE L.J. 1424, 1425 & n.12, 1427 & n.23 (1937) (discussing minority freezeout); Note, *Business, Public, and Private Law Considerations in Employee Profit Sharing*, 61 HARV. L. REV. 493, 509 & n.123 (1948) (stating *Dodge* could be interpreted as not for shareholders' benefit); David S. Ruder, *Public Obligations of Private Corporations*, 114 U. PA. L. REV. 209, 226 n.78 (1965) (citing *Dodge* for the proposition that managers might use corporate funds to lower prices); Comment, *The Aftermath of the Riot: Balancing the Budget*, 116 U. PA. L. REV. 649, 676 n.126 (1968) (stating business judgment rule); Recent Cases, *Corporations—Close Corporations—Stockholders' Duty of "Utmost Good Faith and Loyalty" Requires Controlling Shareholder Selling a Close Corporation Its Own Shares to Cause the Corporation to Offer to Purchase a Ratable Number of Shares from Minority*, 89 HARV. L. REV. 423, 431 n.49 (1975) (stating business judgment rule);

Only 14 articles can be fairly read to touch on the issue of shareholder primacy, and the citations are in passing.[107] Six articles cite *Dodge* for a discussion on sacrifice of profit, role of a manager's personal view of corporate purpose, or corporate purpose defined in terms of shareholder benefit or not only for philanthropy.[108] Four articles cite the case to discuss corporate ethics or responsibility or to express a counterpoint.[109] Two articles cite *Dodge* in the context of a specific discussion of corporate philanthropy.[110] Lastly, in the 1930s, Adolf Berle and Merrick Dodd each mentioned *Dodge* in passing in their famed academic debate on shareholder primacy and corporate purpose.[111]

Robert Charles Clark, *The Regulation of Financial Holding Companies*, 92 HARV. L. REV. 787, 847 n.218 (1979) (discussing distribution policy and capital structure).

107. *See infra* notes 108-111.

108. Harlan M. Blake, *The Shareholders' Role in Antitrust Enforcement*, 110 U. PA. L. REV. 143, 176 n.132 (1961) (interpreting *Dodge* as stating the proposition that "controlling directors are not to be permitted to impose upon other shareholders their views of social organization or other values"); Henry G. Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 417 & n.54 (1962) (interpreting *Dodge* as involving the sacrifice of profit for the benefit of stakeholders); Frank Clover, Comment, *Political Contributions by Labor Unions*, 40 TEX. L. REV. 665, 674 n.63 (1962) (stating that *Dodge* holds for the proposition that a business corporation cannot be run for charitable purposes); Jerrold L. Walden, *Antitrust in the Positive State: II*, 42 TEX. L. REV. 603, 623-24 & n.47 (1964) (discussing *Dodge* in context of corporate philanthropy and corporate purpose); Note, *Community Development Corporations: A New Approach to the Poverty Problem*, 82 Harv. L. Rev. 644, 658 n.61 (1969) (stating and quoting *Dodge*: "corporations operate 'primarily for the profit of the stockholders,' and the role of directors is to implement this purpose"); Douglas H. Ginsburg, *Making Automobile Regulation Work: Policy Options and a Proposal*, 2 HARV. J.L. & PUB. POL'Y 73, 86-87 n.30 (1979) (stating: "[I]ts ultimate legitimate purpose is maximizing profit in the interests of the shareholders. Both management and the directors are obliged by law to pursue this end.").

109. Donald R. Richberg, *Developing Ethics and Resistant Law*, 32 YALE L.J. 109, 117-18 n.13 (1922) (stating that the dominant idea in "all industrial law" has been "the enrichment of the owner of the property or tools utilized in the industry" and that this "underlying premises have been little affected by ideas of social responsibility"); L.C.B. Gower, Comment, *Corporate Control: The Battle for the Berkeley*, 68 HARV. L. REV. 1176, 1192 & n.58 (1955) (discussing *Dodge* in the context of shareholder primacy but also noting that the "decision in this case is not a categorical affirmation of the view that the interests of the stockholders alone may be considered"); Comment, *Herald Co. v. Seawell: A New Corporate Social Responsibility*, 121 U. PA. L. REV. 1157 (1973) (stating that corporate law has been antithetical to corporate social responsibility and quoting *Dodge*); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 16 n.49 (1979) (quoting *Dodge*: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

110. *Corporation—Right of Corporation to Donate to Charitable Purposes*, 1 TEX. L. REV. 477 (1923) (stating that "corporation may not contribute to a charity as such, nor donate from its funds to a community welfare enterprise or humanitarian undertaken"); *Corporations—Charities—Statute Making Contributions to Charity by Corporations Intra Vires*, 52 HARV. L. REV. 538, 538 (1939) ("a corporation exists solely for the purpose of making money for its stockholders and that only such quasi-charitable expenditures as contribute to that purpose are within its powers").

111. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1061 & n.33 (1931) (stating rule for dividend distribution in the context of corporate purpose); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1146 & n.3, 1147 & n.6, 1157 & n. 31 (1932) (discussing *Dodge* as stating a rule of shareholder primacy).

Like its impact on courts, *Dodge* had minimal impact on legal scholarship for the first six decades. But from the 1980s, citations in law reviews exploded. *Dodge* became truly iconic—not in the courtroom but in the academy.[112] It became a legal star when legal academics argued that shareholder primacy had been the constant polestar on corporate purpose all along.[113] This narrative mythicizes *Dodge*.[114] As suggested by this citation study, shareholder primacy was never a constant north star in corporate law. Underneath it is a policy preference, and such preferences change over time. *Dodge* is an unusual story. Sixty years after publication, legal scholars picked up this obscure, undistinguished case from the dusty heap of the first edition Northwest law reporters. Why?

III. Historical Context of Shareholder Primacy

A. Political Orders and Economic Systems

Shareholder primacy is singularly distinct as a rule of corporate law because it has such broad impact on society—the economist's "externalities." Most rules of state corporate law are fairly technical, suiting the needs of internal constituents (principally

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Berle and Dodd engaged in the first important academic debate on corporate purpose, but gave only passing attention to *Dodge*. Berle argued that "all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears." Berle, *supra*, at 1049 (1931). He cited *Dodge* as an example of this principle, specifically the "rule that dividends must be withheld only for a business reason: private or personal motives may not be indulged." *Id.* at 1060-61 & n.33. In response, Dodd countered that a corporation "has a social service as well as a profit-making function." Dodd, *supra*, at 1148. Managers are "primarily fiduciaries for the institution rather than for its members" and if "we may then properly modify our ideas as to the nature of such a business institution as the corporation and hence as to the considerations which may properly influence the conduct of those who direct its activities." *Id.* at 1163. He cited *Dodge* as standing for the "vigorous assertion" that the "sole function of the corporation is [] conceived to be the making of profit for its stockholder-members." *Id.* at 1146 & n.3. But he further argued: "Neither the language of [*Dodge*] nor the relief granted necessarily involves an unqualified acceptance of the maximum-profit-for-stockholders formula. . . . [T]he court was careful so to limit its decree as not to interfere seriously with the expansion program. Its avowed reason for so doing was that expansion might be made profitable despite Mr. Ford's expressed indifference to profit. One may suspect that it was also motivated, consciously or unconsciously, by a reluctance to prevent the growth of a socially important enterprise." *See id.* at 1157 n.31. *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).

112. Stout has argued that *Dodge* achieved its privileged position in the legal canon "because it serves law professors' needs." Stout, *supra* note 4, at 174-75. They need "a simple answer to the question of what corporations do." *Id.* at 175. It is debatable whether law professors sought simplicity as Stout argued, or whether, in light of the prevailing political order and economic system, the legal academy was a part of the process of constructing a new intellectual framework that supported policies consistent with neoliberalism, which came with the vigorous dissent, explaining the explosive stardom of *Dodge* post-1980s.

113. *See supra* note 41.

114. *See infra* Section III (explaining why shareholder primacy was not law and policy under the neoliberal turn of the 1980s).

managers and shareholders), and have little impact on society as far as marginal efficiency and wealth creation go. The fundamental architecture of corporate law—the uniform set of core rules that is found in all corporation laws and that enhances wealth creation[115]—has long been agreed upon, and inter-state differences in corporate law rules do not matter in terms of noticeable social impact based on the criterion of efficiency and firm value.[116] Most academic or professional disputes over state corporate law rules are intermural, among shareholders and managers, and technical organization matters, while certainly important, but they do not affect society at large.[117] Shareholder primacy is different because it invokes moral, philosophical, and economic considerations that have broad effect on the rest of society.[118] Consider an ordinary example: when corporations exert political power to reduce their taxes so that shareholder profit can be maximized, the reduction in public revenue has great impact on the rest of society and the government's fiscal status. Corporate actions affecting profit and society are myriad, and thus shareholder primacy has pervasive and profound social impact.

Under the orthodox approach, any externalities of corporate law and governance are simply written off as such, *i.e.*, externalities that have nothing to do with corporate law and governance.[119] The problem for critics is obvious. How does one write off something as having no relation to corporate law and governance when the first rule of corporate law and governance states that profits must be maximized to the fullest within the bounds of law irrespective of externalities? One plausible answer could be that the solution lies in the bounds of other laws to remediate the external effects of

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115. These rules include limited liability, legal personhood, perpetual existence, separation of ownership and control, centralized authority in a board, managerial discretion, fiduciary duties of managers, fundamental rights of shareholders, free alienability of stock, permissive contracting for capital structure, and privateness of internal affairs.

116. *See* Robert J. Rhee, *The Irrelevance of Delaware Corporate Law*, 48 J. CORP. L. 101 (2022) (providing empirical study showing that Delaware corporate law does not create more value than other states' laws and that inter-state differences in laws have no efficiency basis once the fundamental rules have been adopted by all states); Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U.L. REV. 542, 544 (1990) (advancing the "triviality hypothesis" that states corporate law is trivial because it "is an empty shell that has form but no content").

117. For example, the standard for determining whether a plaintiff shareholder has standing to bring a derivative action does not invoke a significant social issue. *Compare* Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984) and Rales v. Blasband, 634 A.2d 927, 933-34 (Del. 1993); *with* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1058 (Del. 2021).

118. Even strong proponents of shareholder primacy readily concede the moral dimensions and effects of the corporate enterprise. *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 39 (1991) ("We do not make the Panglossian claim that profit and social welfare are perfectly aligned."). Another rule that goes beyond the categorization of intermural disputes is limited liability, which affects not just internal and contractual constituents, but also the broader society, which may suffer the externalities of corporate activities. *See generally* Robert J. Rhee, *Bonding Limited Liability*, 51 WM. & MARY L. REV. 1417 (2010).

119. *E.g.*, EASTERBROOK & FISCHEL, *supra* note 118, at 39 ("To view pollution, or investment in South Africa, or other difficult moral and social question as *governance* matters is to miss the point.").

shareholder primacy.[120] But another plausible answer could be that the problem lies in the source rule, shareholder primacy, and therefore the problems of externalities have a direct relation to corporate law and governance. Over the past four decades of the neoliberal era, proponents and opponents of shareholder primacy have sparred over these basic differences, which explains the post-1980 explosion of citations to *Dodge*.

The unusual story of *Dodge* cannot be fully understood without a historical context. Shareholder primacy as a rule of law or an ideology does not arise from abstraction; it is a product of a particular political order and economic system. A political order is defined as a prevailing political ideology that has reached a level of consensus, notwithstanding vigilant dissent by some.[121] A political order and an economic system refer to the philosophy and policies that implement democracy and capitalism, America's particular and constant political economic commitment. It is literally the operating system—the set of rules, principles, and policies that operate the political and economic systems. For example, New Deal progressivism and post-1980 neoliberalism are different political orders with different economic systems, though both eras were committed to democracy and capitalism as a political economy.

A political order may prescribe particular forms of capitalism that operate under different assumptions and principles, such as, for example, laissez-faire capitalism of the Lochner era, managerialism over industries with oligopolistic characteristics of midcentury America, and financial capitalism of neoliberalism. Consider the political orders and economic systems in place throughout two-decade jumps in time, 1920, 1940, 1960, 1980, 2000, and 2020. Even in each of these short intervals, American history underwent great changes, and in a few spots the entire political order and economic system changed. When they change, policies change also, producing new rules, including rules in corporate law and governance. The unusual life story of *Dodge* can only be fully explained by the historical context of changing political orders and economic systems. When shareholder primacy became a rule of law during the neoliberal turn, *Dodge* became relevant to form the intellectual underpinnings of a new policy that advantaged the stockholding elite, thus becoming the legal star of the neoliberal political order and economic system. *Dodge* has been and is still, first and foremost, a political case. Its overt politicism explains the oddities in the case and how it was perceived throughout different eras of the twentieth century by courts and legal scholars.

Let's return to *Dodge* to see how the historical conditions of the time influenced the case. Consider also the clear evidence in the citation studies: *Dodge* was never influential among courts and not influential among academics until 1980. A historical context shows how *Dodge* and the idea of shareholder primacy evolved in the historical context of changing political orders and economic systems.

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120. *E.g.*, Bebchuk & Tallarita, *supra* note 41, at 94 ("In our view, the most effective way to do so is by adopting laws, regulations and government policies—such as labor-protecting laws, consumer-protecting regulations, and carbon-reducing taxes—aimed at protecting stakeholder groups.").

121. *See supra* note 14.

B. New Century: 1917–1919

The action in *Dodge* was initiated on November 2, 1916,[122] and was ultimately decided by the Michigan Supreme Court on February 7, 1919. The years 1917–1919 were historic and consequential.[123] There is sometimes the lore that courts are apolitical, decisions are made in the vacuum of facts and law, and judges are immune from the currents of history or politics. But one does not have to be a Realist to view such Platonic abstraction as naïve.[124] Most garden-variety cases comport with this innocent view of judges and courts because this sort of historical or political context is irrelevant to the case considerations at hand, but a small set of cases certainly requires this context. The proclivity of iconic or canonical cases generally leans to susceptibility to political or historical influence. *Dodge* is such a case. The oddity of the court's reasoning and the dictum on shareholder primacy cannot be isolated from its historical context.

The period 1917–1919 was no ordinary time in world history. Consider a broad-stroke sketch of events around this period. In 1917, the Russian Revolution led by the Bolsheviks overthrew the czarist Russian empire, and civil war ensuing over the next several years ushered in socialism in eastern Europe. In 1918, the guns of world war fell silent.[125] In addition to the Russian empire, three empires of the war losers collapsed, and the empires of the victors were crippled. Arguably, 1919 augured the modern post-colonial world. In America, it was the triumph of industrial capitalism in the Lochner era, and in the afterglow of the Gilded Age and the robber barons.[126] The corporate industrial revolution and factory system, epitomized by Ford Motor, and mass aggregation of assets and financialization of property rights through the corporate form as analyzed by Berle and Means in 1933 were well underway and transforming America.[127] The new industrial capitalism was not gentle on the body or the soul.[128] The period was in the midst of a clash between the philosophies of laissez-faire and

122. Dodge, 170 N.W. at 673 (Ford Motor answered the complaint on November 28, 1916).

123. *See generally* ANN HAGEDORN, SAVAGE PEACE: HOPE AND FEAR IN AMERICA, 1919 (2007); WILLIAM KLINGAMAN, 1919: THE YEAR OUR WORLD BEGAN (1987).

124. An example of raw political considerations affecting the judicial process from the early twentieth century is Roosevelt's epic clash with the Supreme Court over New Deal legislation. *See generally* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2011). Examples of political calculations affecting judicial decisions sprinkle judicial history. *E.g.*, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973); *id.* at 2319-20 (Breyer, J., dissenting) ("The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. . . . Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law.").

125. The war was referenced in *Dodge*. Dodge, 170 N.W. at 673.

126. Lochner v. New York, 198 U.S. 45 (1905), *overruled by* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . has long since been discarded."). *See generally* H.W. BRANDS, AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM 1865–1900 (2010).

127. *See generally* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (1933). At the time of the litigation, Ford Motor was producing millions of cars. Dodge, 170 N.W. at 670 (providing data on the number of cars manufactured).

128. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 350 (3d ed. 2005) ("The Industrial Revolution added an appalling increase in dimension. The new machines had a marvelous, unprecedented capacity for smashing the human body.").

progressivism,[129] between capital and labor, the rich and the poor.[130] Racial violence and riots were also prevalent during this time.[131] In the realm of business and politics, a palpable pall of post-war socialism hung over America and Europe.[132] In 1917–1919, political and social orders and national and global economic systems were rapidly changing and uncertain.[133]

A historical context of *Dodge* should not ignore the influence of the first Red Scare. Today, the specter of communism as a competitive political economic system seems like a quaint relic of the twentieth century.[134] But much of the twentieth century was defined by a geopolitical conflict of political economic ideologies.[135] The seed of this conflict was planted in 1848, when Marx and Engels infamously foretold that "the spectre of communism" was haunting Europe. Seventy years later in 1917, this haunting materialized in the form of the Bolshevik revolution, which claimed the decrepit Russian empire as a proletariat dictatorship. In 1918, the world was uncertain as to which political order and economic system would follow after the funeral marches of dead and dying European empires. In America, the possibility of communism was thought to be real, and it scared the public. The first Red Scare in America was well afoot in the 1917–1919 period.[136]

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129. *E.g.*, West Coast Hotel v. Parrish, 300 U.S. 379, 392, 400 (1937) (upholding Washington's minimum wage law enacted 23 years prior and noting that "freedom of contract is a qualified, and not an absolute, right") (quoting Chicago, Burlington & Quincy R. Co. v. McGuire, 219 U.S. 549, 565 (1911)). *Parrish* ended the Lochner era. Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not be Just for the Rich*, 6 CHAPMAN L. REV. 31, 31 n.2 (2003).

130. *See* DANIEL BELL, MARXIAN SOCIALISM IN THE UNITED STATES 56 (1952) ("In this fervid onslaught against American capitalism, sympathy with socialism and its aims was easy and natural. The tremendous industrial expansion had produced a new race of wealthy, and the chasm between rich and poor was deep and visible, and growing wider.").

131. *See* KLINGAMAN, *supra* note 123, at 443-46, 451-53; HAGEDORN, *supra* note 123, at 303-06, 312-19.

132. *See generally* THEODORE DRAPER, THE ROOTS OF AMERICAN COMMUNISM 13, 97-113, 131-47 (2003) (stating that the Bolshevik Revolution energized the American communist movement, and that the late nineteenth and early twentieth centuries were a period of radical left foment having links to socialist, communist, and labor movements); ALBERT S. LINDEMANN, A HISTORY OF EUROPEAN SOCIALISM 185-219 (2009) (stating that the years 1914-1924 gave birth to communism and: "The bolsheviks, often ignored or ridiculed by western socialists before 1917, became the presumptive leaders of a renovated world socialism, soon to take up the name 'communism.'"); BELL, *supra* note 130, at 55 ("The years from 1902 to 1912 were the 'golden age' of American socialism.").

133. *See* ALAN GREENSPAN & ADRIAN WOOLDRIDGE, CAPITALISM IN AMERICA 187-88 (2018) (discussing the transformation in America immediately after World War I: "America nevertheless moved significantly to the left: the America of 1918 was a very different country from the America of the late nineteenth century").

134. One hastens to add that those specters of the twentieth century have morphed into other forms of illiberalism and authoritarianism today that threaten the post-1945 liberal order.

135. *See* EDMUND FAWCETT, LIBERALISM: THE LIFE OF AN IDEA 20-21 (ed ed. 2018) (2014) (describing the conflict between liberal democracy and fascism and communism during much of the twentieth century).

136. KLINGAMAN, *supra* note 123, at 15-16, 204-05, 552. *See also* HAGEDORN, *supra* note 123, at 30-31, 225 (noting "the shadow war" in 1918 in America against Bolshevism, targeting socialists, anarchists, pacifists, labor activists, and African-Americans, and "the Red Scare

This historical context suggests that the *Dodge* court was not a simpleton. Ostrander and the majority court were obviously troubled by Ford's newfangled, seemingly anti-capitalistic philosophy, which was leaching into Ford Motor's corporate policy, and they felt compelled to issue a political statement and a personal rebuke. The opinion is a repudiation of what Fordism could become under Ford, an idiosyncratic visionary and the most famous businessman of the day.[137] We deduce this conclusion from a close reading of the incoherence of the majority opinion and its manipulation of facts therein,[138] and the historical context in which the case was decided.

The key turn in the opinion was the court's mischaracterized "impression" of Ford's testimony, which propped up the strawman so that the court could knock it down with its commentary on shareholder primacy. The court was purportedly "convince[d]" that Ford believed his company "has made too much money, had had too large profit, and that, although large profits might be still earned, a sharing of them with the public . . . ought to be undertaken."[139] The court explicitly warned that under Ford's dominant leadership,[140] the company could become a public, communal project: "a sharing of [profit] with the public" for "philanthropic and altruistic" purpose.[141] Ford's idiosyncratic ideas on business and a corporation's role in society, which he eagerly shared with the public at large through the press,[142] were too proximate to socialist ideology as may have been perceived at the time, close enough to feel the warmth of the European conflagration. By 1919, that illicit fire was already spreading in America.[143] In this political climate, suspicion of Ford's political ideology—whether he was a socialist—was already out in the open.[144]

If socialism gains a foothold in labor's discontent and is allied with workers'

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of 1919"). Later in 1919 and early 1920, the first Red Scare culminated in the Palmer raids in which the federal government captured and deported suspected anarchists, communists, labor antagonists, and other radicals. *See* KLINGAMAN, *supra* note 123, at 597-99; HAGEDORN, *supra* note 123, at 382-82, 420-22.

137. *See generally* JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES 325-54 (2021) (describing Fordism as an economic model based on mass production of consumer goods with cheap cost achieved through the factory system and assembly line technique).

138. *See supra* Section I.B.

139. Dodge, 170 N.W. at 683-84.

140. "Henry Ford is the dominant force in the business of the Ford Motor Company." *Id.* at 683.

141. *See supra* note 39 (accompanying quotation).

142. Dodge, 170 N.W. at 671 (noting that Ford broadly shared his view of corporate purpose and industrial policy "in the public press in the city of Detroit and through the United States").

143. *See generally* DRAPER, *supra* note 132.

144. In an interview, the New York Times directly asked Ford, "Are you a Socialist?" *Henry Ford Explains Why He Gives Away $10,000,000*, N.Y. TIMES (Jan. 11, 1914), *reprinted in* Kawaguchi, *supra* note 4, at 511. He answered: "I am not sure that I really know anything about socialism. I understand it as a doctrine which is popular among those who want to share other people's money without doing any work. I don't believe socialism appeals to me; nor, I may say, do I regard our profit-distribution scheme as socialistic." *Id.* Later, he stated that a vision of equitable distribution of wealth: "I believe it is better for the nation, and far better for humanity, that between 20,000 and 30,000 people should be contented and well fed than that a few millionaires should be made." *Id.* at 512.

interest, consider how Ford's corporate policies may have been perceived by business and legal elites. *Dodge* was announced during a prolonged period of clashes between capital and labor. As the industrial revolution took hold in America in the late nineteenth century, so too did progressivism and its labor movement. The clash between capital and labor spilled over into the new century. Labor agitations and strikes also afflicted Ford Motor in the years before 1919.[145] At the time of the litigation, union membership in America was surging.[146] Battles between companies and employees were pitched, and often violent.[147] The labor movement and the violent clashes frightened middle class America.[148] Many unskilled factory laborers at the time were new immigrants from Europe.[149] The rise of organized labor stoked nativist, xenophobic sentiments in America, and labor activism was accused of being infiltrated by foreigners, radicals, and Bolsheviks.[150] The Michigan Supreme Court was aware of labor unrest and violence and their perceived link to socialism,[151] and the public's disquiet over a perceived infiltration of socialism in America.[152]

This context of labor history is important to consider. In 1914, Ford announced an unprecedented "$5 a day offer," which doubled employee pay.[153] This amount

145. *See* Roe, *supra* note 3, at 1764 (describing the efforts of the "Wobblies" to unionize Ford Motor in the 1910s). Ford was anti-union, and years later Ford Motor also instigated violence against employees. *Id. See* Gilbert King, *How the Ford Motor Company Won a Battle and Lost Ground*, SMITHSONIAN MAGAZINE (Apr. 30, 2013) (describing the May 26, 1937, "battle of the overpass").

146. KLINGAMAN, *supra* note 123, at 549-50.

147. *Id.* at 94-95, 552-53. *See* DRAPER, *supra* note 132, at 13 ("The relations between labor and capital were largely undefined and uncontrollable except by sheer force on both sides. Employers fought labor organizations by every possible means. Strikes were ruthlessly crushed by armed guards, policy sheriffs, militia, and federal troops.").

148. *See* KLINGAMAN, *supra* note 123, at 95 ("Middle-class Americans were terrified. Could this be the start of the Bolshevik revolution in the United States?").

149. *See* ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877–1920 at 90, 125, 210 (1967).

150. *See id.* at 290 (noting that employers blamed labor activism to "Bolshevism" and "alien" as new immigrants were a major part of the labor force and the "rising fear of the masses . . . was the vision of danger here that lay behind the Red Scare of 1919 and 1920"); KLINGAMAN, *supra* note 123, at 552 (quoting newspaper statements, including the New York Times and the Chicago Tribune, linking labor unrest to "radicals, social and industrial revolutionaries" and "Bolshevizing American industry" and "a choice between the American system and the Russian—individual liberty or the dictatorship of the proletariat").

151. *See* People v. Johnson, 152 N.W. 1096, 1096-97 (Mich. 1915) (deciding a criminal case in which an employee who was "a scab" killed a union worker who described himself as "a Socialist and a 'Santana Red'"). Seven of the eight members of the *Johnson* court presided in *Dodge* as well.

152. *See* People v. Burman, 117 N.W. 589 (Mich. 1908) (upholding the criminal convictions of defendants who were deemed to be "socialists" for disorderly conduct for carrying "red flags" in a parade in violation of an ordinance against public disturbance).

153. "On January 5, 1914, Henry Ford and his vice president James Couzens stunned the world when they revealed that Ford Motor Company would double its workers' wages to five dollars a day. The announcement generated glowing newspaper headlines and editorials around the world. The notion of a wealthy industrialist sharing profits with workers on such a scale was unprecedented." *Ford's Five-Dollar Day*, HENRY FORD MUSEUM OF AMERICAN INNOVATION (Jan. 3, 2014), https://perma.cc/8MWN-6PB2. *See* Sara Cwiek,

constituted a $10 million per year pay increase to employees,[154] and, of course, labor cost is an expense that reduces net profit to shareholders. The $5/day offer is arguably the most important social engineering innovation in labor economics.[155] Ford's offer attracted national attention.[156] He described it in a New York Times article as "a sort of a dividend" to employees.[157] The offer created pandemonium among business leaders, worried about competition for labor that could bankrupt companies, and workers, 10,000 of whom lined up in 10-degree cold at the Ford factory to find work.[158] The $5/day offer was likely calculated to improve productivity by reducing job turnover and absenteeism in a factory system that depended on the dependability of the assembly line.[159] It may have also quelled union activism by sharing monopoly profit with employees.[160] In the case record, Ford implied that the company's purpose was to pay high wages: "My ambition is to employ still more men . . . to help them build up their lives and their homes."[161]

The *Dodge* court noticed Ford's pay policy. The opinion presented Ford Motor's financial statement for the fiscal year 1916, which had two accounting line items showing the $5/day pay policy.[162] The court did not directly address the $5/day offer because the wage policy was not central to a legal issue in the case. The court implicitly acknowledged the wage policy: "It employs many men, at good pay."[163] But it expressed "no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence" on the company's dividend policy.[164] The court's objection to Ford's vision was that while "incidental humanitarian expenditure of corporate funds *for the benefit of employees*" is permitted, a board may not change corporate purpose resulting in "the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."[165] The court perceived employees as the principal beneficiaries of Ford's supposed philanthropy. During a time of conflict between capital and labor, a perceived giveaway to employees in the form of non-market pay in the Lochner era of laissez-faire could have reinforced the court's

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The Middle Class Took Off 100 Years Ago … Thanks to Henry Ford?, NATIONAL PUBLIC RADIO (NPR Radio Broadcast Jan. 27, 2014), https://perma.cc/9F4V-V7SM ("[Ford's $5 a day pay] was more than double the average factory wage at that time, and for U.S. workers it was one of the defining moments of the 20th century. Five dollars in 1914 translates to roughly $120 in today's money.").

154. Roe, *supra* note 3, at 1769.

155. Weinberger, *supra* note 4, at 1024.

156. Kawaguchi, *supra* note 4, at 509, reprinting *Henry Ford Explains Why He Gives Away $10,000,000*, N.Y. TIMES (Jan. 11, 1914).

157. *Id*.

158. Weinberger, *supra* note 4, at 1026.

159. *See* Roe, *supra* note 3, at 1763-64.

160. *Id.* at 1765.

161. Dodge, 170 N.W. at 683.

162. *Id.* at 670 (financial statement indicating "Total employees in Detroit plant getting $5 a day or more . . . 27,002" and "Total employees getting $5 a day or more . . . 36,626").

163. *Id*. at 683.

164. *Id.* at 684.

165. *Id.* (emphasis added).

gestalt sense that Ford's ideas on an industrialized consumer society, new and bold at the time, were foreign and threatening in the midst of the first Red Scare.[166]

When Ford came before the court, he was an idiosyncratic industrial visionary,[167] and he harbored national political ambitions.[168] He was a populist, portraying himself as a man of the people,[169] and was not shy about media attention.[170] He brought new labor-friendly work policies: above-market wages, an eight-hour limit on the workday,[171] and works shifts in the assembly line.[172] These policies could have been seen as revolutionary (and in fact they *were* revolutionary in terms of industrial process and labor economics). Under the principle of business judgment, the court had to accept these managerial judgments in the corporation's internal affairs.[173] But Ford's philosophy, a vision of a corporation's role in the political economy, from which those judgments were perceived to have arisen, was fair game if the court was willing to make a political statement. For a court with a political concern, Ford's belief system was a bridge too far, perceived to be antithetical to American capitalism and the values of American economic elites.[174] The court's strident assertion of shareholder primacy was a public rebuke of Ford and his strange ideas.

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166. Indeed, other commentators have noted in passing the possibility of the Red Scare affecting the *Dodge* court's thinking. *See* Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1981-1982 (1991) (noting that *Dodge* may be explained by "perhaps even concern about the wisdom of Ford's worker capitalism in the post-Bolshevik world"); Henderson, *supra* note 5, at 63 (noting that "socialism as a political ethos was being seriously considered by many nations" and as such it "is not fantastic considering the prevailing social forces to think that trial court viewed the *Dodge* case as a test case of the foundations on which American capitalism would be built").

167. *See* VINCENT CURCIO, HENRY FORD 270 (2013) (describing Ford as "an enigma machine"); Weinberger, *supra* note 4, at 1015 ("Ford would eventually discover that his outspoken pacifism, combined with his rabid anti-Semitism, rendered him unelectable to public office."); Henderson, *supra* note 5, at 45 (noting "Ford's rabid anti-Semitism").

168. *See* Weinberger, *supra* note 4, at 1046 & n.205 ("He made no secret of his presidential ambitions.").

169. *See generally* STEVEN WATTS, THE PEOPLE'S TYCOON: HENRY FORD AND THE AMERICAN CENTURY (2006).

170. Weinberger, *supra* note 4, at 1034; Henderson, *supra* note 5, at 53-54; Vargas, *supra* note 4, at 2111.

171. *Cf.* Lochner v. New York, 198 U.S. 45 (1905).

172. BHU SRINIVASAN, AMERICANA: A 400-YEAR HISTORY OF AMERICAN CAPITALISM 290 (2017).

173. Worker pay was not a disputed issue in the case, and it would have been startling even in 1919 for a court to impose its own business judgment and strike down worker pay as being "too high." The court acknowledged that per business judgment principle worker policies were a matter of business judgment: "There is committed to the discretion of directors, a discretion to be exercised in good faith, the infinite details of business, *including the wages which shall be paid to employees*, the number of hours they shall work, the conditions under which labor shall be carried on, and the price for which products shall be offered to the public." Dodge, 170 N.W. at 684 (emphasis added).

174. *See* Vargas, *supra* note 4, at 2111-12 ("Henry Ford's public relations campaign, selling himself as a populist battling the financial elite, was so effective that even the credulous justices of the Michigan Supreme Court appear to have bought into Henry Ford's public image. . . . If true, and the Michigan Supreme Court was also under the sway of popular sentiments (or perhaps hostile to them) then that ought to further undermine the court's decisions as they were basing their decision on perception rather [than] fact.").

This historical context explains *Dodge*'s oddities: the opinion's internal incoherence, inartful judicial craft, and lecturing tone. The majority court was not a simpleton that mucked up a straightforward case of facts and law. The court propped up a strawman for the purpose of knocking it down with a political statement. The seemingly odd reasoning and judicial craft deployed in a prosaic case was controversial, reason enough for three judges to dissociate themselves in a cryptic concurrence. But the court's political statement was not out of step with the historical current and the pall over public sentiments at the time. That specific time marked the rise of unregulated industrial capitalism in the Lochner era in the afterglow of the Gilded Age, far reaching changes in the political orders and economic systems in Europe, and a perceived threat of socialism from within.

The argument here is not that Ostrander and the majority court thought Ford was a socialist in the guise of an industrialist bent on eliminating the idea of private property. That would be farfetched, if only because it assumes a cartoonish court swayed by the populist passion of the day against some socialist boogeyman who just happened to be one of the richest, most successful entrepreneurs in America. Rather, the more likely sentiment was a perceived risk of a misguided industrialist who had cultivated populist appeal among the working class. Ford's ideas on industrialization, labor relations, economics of mass consumerism, and the corporation's obligation to society were sufficiently radical for the time, indeed revolutionary, that the majority court felt compelled to admonish Ford against the risk of Ford Motor implementing aberrant, anti-capitalist policies. The iconic statement in *Dodge* was a judicial rebuke of Henry Ford, the person, and a warning. Of course, that stern lecture had nothing to do with the disposition of facts and law to resolve the legal dispute at hand.

This historical context explains not only the majority court's seemingly odd judicial craft, but also the reason why *Dodge* was irrelevant throughout much of the twentieth century in the courtroom and the academy. The iconic commentary in *Dodge* was an overt political statement, forceful and forced in the way indecorous statements of the sort tend to be.

C. Progressivism and the New Deal: 1929–1969

The question of corporate purpose dates back to the dawn of modern corporations. It was famously debated by Berle and Dodd in the early 1930s.[175] But beyond this single important academic debate, shareholder primacy was an idea that did not fit the political order and the economic system of mid-twentieth century America. Consider the large events in American and world history shortly after *Dodge* was decided in 1919: the 1929 stock market crash, the failure of capitalism in its form and the Great Depression (1929–1941), Roosevelt's New Deal (1933–1939), and World War II (1939–1945).[176] If concern for shareholders' interest was an impulse of the *Dodge* court amidst the laissez-faire capitalism of the Lochner era, the Red Scare of 1917–1920, and Ford's newfangled ideas, that impulse was quickly extinguished by the calamities of the first half of the twentieth century. The country jumped from a sinking ship into a burning

175. *See supra* note 111 (discussing the Berle–Dodd debate).

176. *See generally* LEVY, *supra* note 137, at 355-435 (discussing the Great Depression and capitalism under the New Deal).

house only to escape into the path of a runaway freight.

Shareholder primacy was not and could not have been a rule of corporate law or a consensus economic policy. Proponents of such an idea argue so in an ahistorical vacuum.[177] In response to the Great Depression, the New Deal was implementing state capitalism, a middling form of collectivism that preserved individualism in favor of other dominant forms of political orders at the time such as fascism, communism, and socialism.[178] During these periods, capital's maximal interest was relegated to the far dark corner of the crisis room. *Dodge* was irrelevant—not only because the attention of the day had no room to contemplate the question "are shareholder getting maximal profit?" while the nation confronted successive crises,[179] but also because in the New Deal era the idea was antithetical to the political order and the economic system of the time. It is simply implausible that shareholder primacy took root during the New Deal and postwar periods when, faced with calls to institute socialism from the left end of the political spectrum, the government instead chose an economic system based on state capitalism, public welfare programs, and redistributive economic policies.[180] State and society always set policy. Capital and constituents get what they can under that policy.

Shareholder primacy was also irrelevant in the post-1945 midcentury period. The immediate postwar years were occupied by reconstruction of nations and construction of the global liberal order, which sought to spread democracy and capitalism throughout the world, and restarting a peace economy back home where millions of soldiers, sailors, and airmen returning from foreign battlefields had to find work and civilian life. The American economy thrived as the manufacturing and financial centers of the global economy.[181] Ford's vision of industrial manufacturing became a reality, cheaper products and producing a middle class that would also be customers as wealth

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177. *But see supra* note 41.

178. JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 89, 105 (1987).

179. The specter of communism was a continuing motivating influence throughout the New Deal. *See* GERSTLE, *supra* note 14, at 21 ("[During the New Deal era] the communist success in the Soviet Union scared American businessmen as did the influence of communists in the ranks of American labor, inclining them (the businessmen) to compromise with more moderate sectors of the labor movement.").

180. Adolf Berle's reflection on the New Deal is interesting. As he recalled, Roosevelt declined calls from progressives that the Great Depression was "a golden opportunity to force a class revolution, European-style." NAVIGATING THE RAPIDS 1918–1971: FROM THE PAPERS OF ADOLF A. BERLE 112 (Beatrice Bishop Berle & Travis Beal Jacobs, eds., 1973) (reprinting Berle's review of *Rexford Tugwell and the New Deal* by Bernard Sternsher for the *New Republic*, Mar. 7, 1964). Roosevelt and his policymakers rejected "state socialism (let alone Communism)" in favor of a policy "to redistribute the national income, steering more of it toward the least-favored among the population. We hoped for a better distribution of wealth." *Id.* Moreover, Berle's biographer has argued that Berle's purpose in the Berle-Dodd debate on corporate purpose, *supra* note 111, was to espouse "corporate liberalism as an alternative to socialism" where shares were broadly owned in American society in a form of a "people's capitalism." SCHWARZ, *supra* note 178, at 65.

181. *See* Roe, *supra* note 3, at 1780 (noting that immediately following 1945 foreign competition was weak); GREENSPAN & WOOLDRIDGE, *supra* note 133, at 273-98 (describing the period 1945–1970 as "the golden age of growth").

circulated in the economy.[182] Labor and capital were in détente, if not simpatico.[183] Capitalism was managed through the collective interests of business, labor, government, and society.

Leading economic and legal thinkers envisioned the private economic power of corporations to be balanced by "countervailing power."[184] Business leaders embraced managerialism, the business philosophy that corporate managers are not simply the trustees for the pecuniary interest of shareholders but are stewards of all constituents including employees, customers, suppliers, communities, and the nation for the purpose of maximizing social welfare.[185] They viewed corporations as interconnected and intertwined with society. This view is summarized by the statement of Charles Wilson, president of General Motors, to Congress in 1953 that "what was good for our country was good for General Motors, and vice versa."[186]

There was a broadly shared idea that corporations and the public good were strongly linked, suggesting a role of social obligation in corporate purpose. A good example of judicial embrace of this idea is seen in *A.P. Smith Mfg. Co. v. Barlow* decided in 1953.[187] Although *Barlow* is discussed less today and is not a canonical case, it is well known and has been discussed in earlier casebooks.[188] The New Jersey Supreme Court upheld a corporation's donation of the modest sum of $1,500 to Princeton University. It commented on a corporation's broad power to donate to charity:

It seems to us that just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern

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182 *See generally* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003).

183. The so-called "Treaty of Detroit", the 5-year agreement signed in 1950 between the UAW and the Big Three automakers, exemplified the *détente* between management and labor. *See* Daniel Bell, *Treaty of Detroit*, FORTUNE, July 1950, at 53.

184. *See* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 111, 114 (1956 Sentry ed.) (1952) (arguing that constraints on private economic power of corporations were customers, suppliers, and employees); ADOLPH A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 53, 66 (1954) (citing Galbraith's idea of "countervailing power" and noting that "the principal power institutions will be, respectively, the great corporations operating industrial oligopoly on the one hand and the great industrial labor unions on the other"); SCHWARZ, *supra* note 178, at 105 (noting that Berle envisioned "new individualism" (organizations of individuals) would act as "countervailing forces" against "tyrannies of corporate empires in the marketplace").

185. *See* Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U.L. REV. 1169, 1171 (2013); William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1403 (1993) ("[Managerialism] has, in fact, dominated the real world of business and politics since the great depression."). *See generally* Alfred D. Chandler, *The Emergence of Managerial Capitalism*, 59 BUS. HIS. REV. 473 (1984).

186. Megan McArdle, Opinion, *What's Good for GM Isn't Necessarily Good for America*, WASH. POST. (Nov. 27, 2018), https://perma.cc/S5E5-2SEA (quoting Wilson's comment).

187. A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

188. *E.g.*, JEFFREY D. BAUMAN, ALAN R. PALMITER & FRANK PARTNOY, CORPORATIONS: LAW AND POLICY 88 (6th ed. 2007) (discussing *Barlow* in the context of a discussion of *Dodge* and the Berle-Dodd debate). One of the few pre-1980 law review articles citing *Dodge* discussed *Dodge* and *Barlow* together as cases dealing with corporate philanthropy. *See* Walden, *supra* note 108, at 623-24 & n.47.

conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate.[189]

The court added a historical context of the role of corporations in the twentieth century:

During the first world war corporations loaned their personnel and contributed substantial corporate funds in order to insure survival; during the depression of the '30s they made contributions to alleviate the desperate hardships of the millions of unemployed; and during the second world war they again contributed to insure survival. They now recognize that we are faced with other, though nonetheless vicious, threats from abroad which must be withstood without impairing the vigor of our democratic institutions at home and that otherwise victory will be pyrrhic indeed.[190]

The "vicious threats from abroad" is certainly a reference to communism and the Eastern Bloc of the Soviet Union and communist China.[191] Again, the nation faced an existential threat in the form of the Cold War.

Barlow envisioned the corporation as embedded in the broader society, a part of the mission of the nation, thus a part of the web of responsibilities, norms, and expectations connecting all people with a shared commitment to society and nation.[192] The case invoked patriotism, the idea that corporations had obligations to the national interest, including the corporation's role in upholding democratic institutions.[193] This required a stakeholder view and enlightened managerialism that supported public interests. In midcentury American economy, a period dominated by modern liberalism and the New Deal,[194] *Barlow* reflected the prevailing belief of the purpose of the

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189. Barlow, 98 A.2d at 586.

190. *Id.*

191. "Vicious threat" was most likely a reference to the Korean War. *Barlow* was decided on June 25, 1953. In 1953, the Korean War, a fierce proxy war between the West and the East, was still raging. The shooting war ended in armistice on July 27, 1953. The Korean war was one of the bloodiest wars in the twentieth century. American miliary casualties over three years were very high. *Korean War Memorial*, AMERICAN BATTLE MONUMENTS COMMISSION, https://perma.cc/YC95-GHGH (54,246 American military killed and 103,284 wounded). Korean casualties including civilians were in the millions.

192. "A very different consensus about the social obligations of large economic institutions underpins *A.P. Smith Mfg. Co. v. Barlow*, a 1953 case which permitted directors to make corporate contributions for general social welfare purposes." Gordon, *supra* note 166, at 1982.

193. The invocation of patriotism and national interest as a part of corporate obligation is not anachronistic to the time. Today's statutes grant corporations the power to consider the national interest. *See* DEL. CODE ANN. tit. 8, § 122(12) (granting corporate power to aid the government and its policies); MOD. BUS. CORP. ACT § 3.02(n) (2020) (same). Recently, scholars have discussed the issue of sacrificing shareholder profit in consideration of compelling national interest, the most recent instances having occurred during the financial crisis of 2008-09. *See* Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice during a National Crisis,* 17 GEO. MASON L. REV. 661 (2010) (discussing statutory power to "aid" government and the conflict between this power and shareholder primacy in times of national crises). Other scholars have discussed the role of patriotism in corporate purpose. *See* David G. Yosifon, *Is Corporate Patriotism a Virtue?*, 14 SANTA CLARA J. INT'L L. 265 (2016).

194. Modern liberalism traces its tradition to John Stuart Mill with John Rawls being the most eminent proponent: "it is exemplified by the assault on freedom of contract and on the

corporation among business elites.[195] Courts did not embrace shareholder primacy because such a rule would have been antagonistic to the shared belief and value.

Courts had no reason by way of legal disputes to resolve the question of corporate purpose. Midcentury America was not marked by leveraged buyouts and reconfiguration of American industries, outsourcing global supply chains to source the cheapest labor, and a ruthless focus on stock market performance to the exclusion of other interests.[196] This phenomenon would come in the 1980s. The midcentury economy operated under a system of managed capitalism in an economic system where many constituents (*e.g.*, management, labor, capital, community, and nation) represented countervailing forces to concentrated private economic power.[197] The cooperation between capital and labor, epitomized in Fordism, was necessary in the war enterprise, and it expanded to include the nation and its economic system as ultimate stakeholders. All stakeholders coexisted, even if in some tension.[198] The political order was oriented toward America's fight against malignant dictatorships and threats to democracy and capitalism, against first fascism and then communism.[199] A well-functioning economic model—in which capitalism created national wealth and increased the standard of living, and the riches of production were more equitably shared—was an exemplar that served America's geopolitical leadership. It was an exhibit for the rest of the world to contemplate when considering which political and economic system was better in a global competition for grand ideas. Corporations were also vital to maintaining military capacity, which relied ever increasingly on technological advances and mass industrial production capabilities, a necessity in total war that was seen in World War II.[200] The economic system led the postwar economic development

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sanctity of property rights represented . . . by Franklin Roosevelt's New Deal between the wars, and by the explosion of welfare-state activity after World War II." ALAN RYAN, THE MAKING OF MODERN LIBERALISM 25 (2012).

195. In 1954, Adolf Berle, who in 1931 argued that directors must act "only for the ratable benefit of all the shareholders" (*supra* note 111), cited and discussed approvingly *Barlow* while nowhere mentioning *Dodge* in his book *The 20th Century Capitalist Revolution*. BERLE, *supra* note 184, at 68-69.

196. *See infra* Section III.D.

197. *See supra* note 184 and accompanying text. The period was marked by concentrated industries and corporate conglomerates. *See* ROBERT SOBEL, THE AGE OF GIANT CORPORATIONS: A MICROECONOMIC HISTORY OF AMERICAN BUSINESS 1914–1992, 179-209 (3d ed. 1993); GALBRAITH, *supra* note 184, at 40-47.

198. *See* William T. Allen, *Our Schizophrenic Conception of the Corporation*, 14 CARDOZO L. REV. 261, 265-66 (1992) ("These two, apparently inconsistent, conceptions have coexisted in our thinking over the last century. For most of the century the lack of agreement on the ultimate nature and purpose of the business corporation has not generated intense conflict. A host of macro-economic factors—secularly rising prosperity, a lack of global competition, and the absence of powerful shareholders—probably account for this placid status quo.").

199. *See* GERSTLE, *supra* note 14, at 11 ("The fear of communism made possible the class compromise between capital and labor that underwrote the New Deal order."). *See also* FAWCETT, *supra* note 135, at 2, 20-21 (describing the conflict between democracy and fascism and communism for much of the twentieth century).

200. Because World War II depended so heavily on industrial production, corporations played a vital role in winning the war. *See generally* ARTHUR HERMAN, FREEDOM'S FORGE: HOW AMERICAN BUSINESS PRODUCED VICTORY IN WORLD WAR II (2012). Central to this effort were

of the global economies of the West. Corporations were a part of this enterprise in multiple ways.

Managed capitalism ensured that various interests were at least not directly antagonistic. Shareholder primacy did not take root. It could not have taken root because there was no need for such a rule,[201] and such a rule would have run counter to prevailing ideas about the role of corporations in society. Indeed, returning to the Berle–Dodd debate that took place in the early 1930s, Berle conceded in 1954 that the "argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention [that managerial powers were held in trust for the entire community],"[202] a concession that he would repeat again in 1962.[203] From 1919 up to the 1960s, shareholder primacy did not take root because there was no policy space for the idea in the prevailing political order and economic system. Thus, the suggestion that shareholder primacy was always the rule throughout the twentieth century by simply pointing to several sentences in *Dodge* is ahistorical and without actual evidence.

D. Decline and Transition: 1970–1979

The 1960s marked the height of American industry in terms of dominance.[204] Apogee is followed by decline.[205] By this time, global economic competition was increasing.[206] A relative decline in proportional share of global commerce was inevitable as other nations rebuilt their economies following the war. The 1970s was an acceleration

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auto executives with roots in the Ford Motor and auto manufactuers such as Ford Motor and General Motors. *Id.* at 18-25, 219-41.

201. Some commentators have argued that weaker competitive markets, such as those seen in concentrated markets, *supra* note 197, tend to constrain strong shareholder primacy because managers can achieve national wealth maximization by cutting production and raising prices. *See* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2062 (2001).

202. BERLE, *supra* note 184, at 169. *See supra* note 111 (discussing the Berle-Dodd debate). Bratton and Wachter argue that Berle's conversion away from shareholder primacy and toward a stakeholder model was a much shorter period. In 1931, Berle published his article in the Harvard Law Review, and by September 1932 he had joined Roosevelt's administration and came to be believe that corporate manager must act in the public interest. Bratton and Wachter, *supra* note 111, at 109, 118. Moreover, Berle's biographer argues that Berle's original position in the Harvard Law Review was to advocate a "people's capitalism" in which American society broadly owned corporate shares and that this form of capitalism was a better alternative than the choice of socialism seen elsewhere in the world. SCHWARZ, *supra* note 178. *See supra* note 180.

203. "Events and the corporate world pragmatically settled the argument in favor of Professor Dodd." Adolf A. Berle, *Modern Functions of the Corporate* System, 62 COLUM. L. REV. 433, 443 (1962).

204. *See* SOBEL, *supra* note 197, at 235 (noting "the mid-1960s [as] in retrospect the high noon of America's power and reputation").

205. *See* GERSTLE, *supra* note 14, at 48 ("These three forces—race, Vietnam, and economic decline—battered the New Deal order in the 1960s and 1970s beyond a point where it could repair itself.").

206. *See id.* at 214 (discussing German and Japanese competition in the auto industry in the late 1960s); Roe, *supra* note 3, at 1781 (noting significant global competition from European and Asian companies).

of decline. It was a period of stagnation, inflation, and trauma.[207] In 1971, Richard Nixon declared the United States to be de facto insolvent under the gold-dollar standard of the 1944 Bretton Woods Agreement,[208] and terminated the convertibility of the dollar to gold, which started today's era of fiat currency.[209] The Vietnam War came to its ignominious end. The economy suffered from high inflation and unemployment, dubbed stagflation, which was made worse by a severe energy crisis. The 1970s was a period of "malaise," to borrow a term attributed to Jimmy Carter.[210]

Like the rest of America, corporations and shareholders were hit by high labor and energy costs. Companies were also undercut by global competition. The world war was a distant memory, and countries like Japan and Germany had fast rebuilt their economies under American sponsorship. Among other effects of stagflation of the time, high inflation cut real returns on corporate profit.[211] Corporations did not provide adequate returns on capital for shareholders. This period was capital's discontent. The country was ripe for a new political order and economic system.

Reassessment of the political order and the economic system took place. An example of this rethinking at work is Lewis Powell's 1971 memorandum written for the U.S. Chamber of Commerce. Powell opened the memo dramatically: "the American economic system is under broad attack."[212] Setting aside the tone of an over-the-top manifesto, the memo was intended to be a broad blueprint for action. Powell identified three fronts of the attack on the American economic system: ideological attack, inequitable taxation, and uncontrollable inflation.[213] Among many other prescriptions, Powell, who would shortly join the Supreme Court, identified education and shareholder power. He focused a substantial part of the memo on education and the intellectual institution. The proper education of the mass public and intelligentsia was important. His prescription was broad, covering college campuses, scholars, textbooks, faculties,

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207. *See generally* GREENSPAN & WOOLDRIDGE, *supra* note 133, at 299-325 (describing the period of stagflation); LEVY, *supra* note 137, at 544-83 (describing the late 1960s and 1970 as a period of stagflation and low economic returns).

208. The Bretton Woods Agreement, established in 1944, fixed the American dollar as the global reserve currency, thus establishing the United States as the global financial center, and it linked the dollar to convertibility into gold. *See generally* BENN STEIL, THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER (2014).

209. Sandra Ghizoni, *Nixon Ends Convertibility of U.S. Dollars to Gold and Announces Wage/Price Controls: August 1971*, FEDERAL RESERVE HISTORY (Nov. 23, 2013), https://perma.cc/2WHE-KF4K.

210. The attribution comes from Jimmy Carter's "malaise" speech, delivered on July 15, 1979. Although he never used the word "malaise," Carter said that the country was suffering "a crisis of confidence" and that the "erosion of our confidence in the future is threatening to destroy the social and the political fabric of America." Jimmy Carter, *Crisis of Confidence* (July 15, 1979) (transcript available at PBS, https://perma.cc/C3A8-HVPF).

211. *See* RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, PRINCIPLES OF CORPORATE FINANCE 168 fig. 7.2 (13th ed. 2020) (indicating approximately flat real returns on stocks and bonds during the approximate period between 1965 to 1985).

212. Lewis F. Powell, Jr., *Attack on American Free Enterprise System*, Addressed to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce, at 1 (Aug. 23, 1971), https://perma.cc/4A8E-Q249.

213. *Id.* at 33.

business schools, and secondary education.[214] He was clearly concerned about establishing an intellectual framework for the defense and advancement of the corporate economic system. On shareholder power, he wrote: "But the 20 million stockholders—most of whom are of modest means—are the real owners, the real entrepreneurs, the real capitalists under our system. They provide the capital which fuels the economic system which has produced the highest standard of living in all history."[215] Powell called for the exercise of private economic power in public policy. The Powell memorandum was "a neoliberal call to arms" for the defense of free market capitalism.[216]

Academics started to construct the intellectual framework of a new economic system. The opening argument for consumption by the public masses may have been Milton Friedman's 1970 popular opinion editorial in the New York Times. Friedman, a renowned economist at the time, argued that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits," which was an argument that he had made in an earlier manifesto.[217] According to Friedman, corporate managers have a duty "to make as much money as possible while conforming to the basic rules of society."[218] He rejected the idea of balanced interests and argued that businesses have no social obligations and that corporations are not accountable to interests other than those of shareholders. At the time of its publication, Friedman's editorial was highly controversial,[219] not only because the idea of shareholder primacy was an unorthodox view, but because it was antithetical to shared belief.

In the academy, there was important work on conceptualizing a new framework for a new economic system that would transition American capitalism from industrialization to financialization. In 1976, Michael Jensen and William Meckling published the most famous and influential paper on the theory of the firm,[220] in which they disregarded the institutional entity theory of the firm as "simply legal fictions" and instead viewed the firm "as a nexus for a set of contracting relationships among

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214. *Id.* at 12-20.

215. *Id.* at 27-28. Among the most prescient parts of the memo is "a more aggressive attitude" toward "political action." *Id.* at 29. Shortly thereafter, the Supreme Court, which included Powell, decided *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), which reasoned that expenditure of money in campaign finance is not conduct and that "[s]ome forms of communication made possible by the giving and spending of money involve speech alone." *Id.* at 16. Of course, a cursive line can be trace from *Buckley* to *Citizens United v. FEC*, 558 U.S. 310 (2010), in which corporations secured the first amendment right to free speech. *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 324-76 (2018) (discussing the evolution from *Buckley* to *Citizens United*).

216. GERSTLE, *supra* note 14, at 108-09.

217. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM, 133 (1962) (40th ann. ed. 2002)).

218. *Id*. *See also* FRIEDMAN, *supra* note 217, at 133-34.

219. 2 EDWARD NELSON, MILTON FRIEDMAN & ECONOMIC DEBATE IN THE UNITED STATES,: 1932–1972, at VOLUME 2 1932–1972 185 (2020) (noting that the "article provoked something of a firestorm" and "was perceived by critics as reflecting extremely ideological polemics").

220. Jensen and Meckling's article has been cited over 100,000 times. Brian Cheffins, *The Most Famous Article on the Theory of the Firm is Widely Misunderstood*, PROMARKET (Apr. 4, 2021), https://perma.cc/Z2WB-BTDX.

individuals."[221] Because the firm is not an independent entity or institution, asking questions like "'does the firm have a social responsibility' is seriously misleading."[222] The function of corporate finance should be to mitigate agency costs, which are the costs associated with the separation of ownership and control and the deviation of the interests of principals and agents.[223] In a situation where there are outside equity investors, agency cost arises because a manager can pursue "any non-pecuniary benefits he takes out in maximizing his own utility."[224] In other words, any action taken by a manager for non-pecuniary gain or consideration constitutes agency cost. The idea of agency cost measured from deviation from the principal's maximal pecuniary gain provides the intellectual foundation of the rule of profit maximization.[225]

By conceiving the corporation not as a social and political entity but as merely a "nexus for a set of contracting relationships,"[226] Jensen and Meckling and a generation of economists and corporate law academics disappeared the corporation as a social and political institution.[227] By disappearing the corporate entity, the "nexus of contracts" idea squeezes out any role of the social obligation of the corporation as a distinct social, political, and economic institution, and the entire corporation is simply seen as a set of private contracts. The disappearing of the corporation as an institution is a part of conceptualizing the new rules in service of the policy preference for capital. Before this new intellectualization of the theory of the corporate firm, the corporation as an institution was the prevailing idea in early and midcentury.[228]

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221. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976). The idea of a "nexus of contracts" can be traced to R.H. Coase's *The Nature of the Firm*, 4 ECONOMICA 386 (1937). *Id.*

222. Jensen & Meckling, *supra* note 221, at 311.

223. *Id.* at 308-09, 312.

224. *Id.* at 312.

225. *See* Bratton & Wachter, *supra* note 111, at 145 ("The leading school is shareholder primacy, which descends from the Jensen and Meckling model.").

226. Shortly after the Jensen and Meckling paper, the concept of a "nexus of contracts" entered the lexicon in the legal academy. *See* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 918 (1982) ("When the firm is viewed in this 'nexus of contracts' perspective, it becomes clear that the separation of ownership of capital from control of management decisions is actually laudable as an efficient form of economic organization."); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, STAN. L. REV. 819, 837 n.69 (1981) ("[I]n the team or nexus of contracts view of the firm, each manager is concerned with the performance of managers above and below him since his marginal product is likely to be a positive function of theirs.").

227. *See* Allen, *supra* note 198, at 265 & n.7 ("This model might almost as easily be called a contract model, because in its most radical form, the corporation tends to disappear, transformed from a substantial institution into just a relatively stable corner of the market in which autonomous property owners freely contract.") (citing Jensen & Meckling, *supra* note 221 and Coase, *supra* note 221).

228. *See* BERLE, *supra* note 184, at 18 ("Legalistics aside, any large corporation is first and foremost an institution."); Dodd, *supra* note 111, at 1163 (considering the corporation as "a business institution").

E. Rise and Decline of Neoliberalism: 1980–2019

The 1970s was an accelerating descendancy of the old political order and a transition into a new one. The election of Ronald Reagan in 1980 was the hinge of the neoliberal turn toward a new political order and economic system.[229] When the Soviet Union dissolved and the Eastern Bloc collapsed in 1989–1991,[230] neoliberalism under Bill Clinton established itself as the new political order.[231] With the existential threat to the West's liberal order gone, corporations did not have any pressure, neither from the state nor the society, to assume shared responsibility in the defense of the nation and the social obligations under the political order and the economic system.[232]

Neoliberalism became the new political order for the economy, society, and politics. It espouses an ideology of individual liberty, individualism, privateness of economic activities, and market orientation, and the government's role is to advance policies supporting this ideology.[233] This philosophy connects to the embrace of a new legal theory of the corporation in a direct way. It is not surprising that the rise of neoliberalism coincides with the development of the legal economic theory of the corporation as a "nexus of contracts" and the focus on "agency cost." These ideas caught fire in academic thinking because they perfectly intellectualized the firm in the ideals of

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229. *See* GERSTLE, *supra* note 14, at 107-40 (ascribing the Reagan era as the ascent of the neoliberal order).

230. *See id.* at 11 ("After 1991, the pressure on capitalist elites and their supporters to compromise with the working class vanished. . . . This was the moment when neoliberalism transitioned from a political movement to a political order. The fall of communism, in short, forms a central part of the story of neoliberalism's triumph.").

231. *See id.* at 11, 187 ("Bill Clinton's role in securing neoliberalism's triumph was in some ways more important than that of Reagan himself.").

232. *See id.* at 59 (noting that in the 1970s corporations were seeing themselves as "multinational entities rather than national ones" and "[t]heir loyalty to the American nation and people began to ebb"). *See also* FAWCETT, *supra* note 135, at 21 (noting that the defeat of fascism in 1945 and Soviet communism in 1989 "left liberalism, as it seemed, without a global rival").

233. The definitions of neoliberalism vary. But they share common elements. *See, e.g., id.* at 5 ("Neoliberalism is a creed that prizes free trade and the free movement of capital, goods, and people. It celebrates deregulation as an economic good that results when governments can no longer interfere with the operation of markets."); GANESH SITARAMAN, THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY & UNITE AMERICA 11 (2019) ("Neoliberalism is an approach to public policy that relies on individuals operating through private markets as much as possible."); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1 (2014) ("'Neoliberalism' refers to the revival of the doctrines of classical economic liberalism, also called laissez-faire, in politics, ideas, and law. . . [It is] the assertion and defense of particular market imperatives and unequal economic power against political intervention."); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) ("Neoliberalism is the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices."); ADAM KOTSKO, NEOLIBERALISM'S DEMONS: ON POLITICAL THEOLOGY OF LATE CAPITAL 5 (2018) ("Rather than simply getting the state 'out of the way,' [neoliberals] both deployed and transformed state power, including the institutions of the welfare state, to reshape society in accordance with market models.").

the particular time. They atomized the relationships of individuals and embraced the stylized metaphor of individuals contracting in a private market.[234] Law professors understand contracts and agency law, and it was synergistic that economists thought of the firm in this way.

Neoliberal policies deemphasize publicness and reliance on government, and emphasize deregulation, the primacy of privateness (of property, contract, and transaction), financial liberalization, and reliance on market transactions for price signals and ordering social goods. The outcomes of neoliberal policies include: financial deregulation, relaxation of capital controls, enlargement of capital markets, privatization of state-owned assets, corporate and industrial transformation and reconfiguration, market for corporate control, free trade and globalization of supply chain for cheaper labor and materials, deindustrialization, financialization of all things possible, diminishment of institutional labor power, corporate acquisition of greater political power, expansion of global consumer markets, and focus on financial returns and profit maximization for corporations.[235] These sweeping changes of a more financialized capitalism have had profound legal, social, economic, and political effects on the economic system and American society. Thus, there was much to consider and debate, which explains the explosive attention and citations to *Dodge* in the legal academy post-1980.[236]

After some of the preliminary intellectual foundations had been laid in the 1960s and 1970s,[237] shareholder primacy ascended in the 1980s.[238] Its rise was a response to capital's discontent in the late twentieth century: in the 1960s and 1970s, growth had slowed, global competition had increased, and inflation and labor costs had diminished real profit margins. Capital had good reason to be discontented. For neoliberalism to become the new operating principle in the sphere of corporate law and governance, it required a new rule of corporate purpose. The centrism of midcentury *détente* could not hold. Neoliberalism's first rule of corporate law had to be profit maximization as the sole corporate purpose. Shareholder primacy, largely having been ignored in the twentieth century, rose to become the most important rule and governing principle.

In the several decades of the neoliberal turn, the prevailing orthodoxy became that the purpose of the corporation is to maximize shareholder wealth.[239] Shareholder

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234. *See supra* notes 220-228 and accompanying text.

235. *See* Allen, *supra* note 198, at 266 ("By the 1980s however, emerging global competition, capital market innovation, and the growth and evolution of institutional investors, among other factors, made possible the takeover movement, which glaringly exposed our inconsistent thinking about the nature of the business corporation.").

236. *See supra* Section II.B.

237. For example, scholars envisioned a market for corporate control that could incentivize more efficient management of companies. *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

238. *See supra* Section II.B. *See also* LEVY, *supra* note 137, at 611-22 (describing the rise of "shareholder value" thinking during the 1980s).

239. Echoing Milton Friedman's manifesto on shareholder primacy (*supra* notes 217-218 and accompanying text), Leo Strine, a Delaware jurist at the time, stated that "corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders." Leo E. Strine, Jr., *Our Continuing Struggle with the*

primacy so pervaded the corporate system that it was soon seen as axiomatic. At the sharp ascendancy of neoliberalism in 1989, Francis Fukuyama declared that the evolution of political order had come to an end of history.[240] As American political and economic power solidified in the 1990s, things looked good and his declaration seemed right. The legal academy soon came to a general consensus as well. Parroting Fukuyama's triumphalism, legal scholars in 2001 also declared an end of history in corporate law and governance: "There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[241] Shareholder primacy had come to some sort of a fundamental truth, a final end point.

Although a general consensus was achieved (notwithstanding the continued vigilant dissent from those who still advocate stakeholderism or managerialism[242]), that consensus would later erode when the policy effects of neoliberalism came into sharper focus. Neoliberalism has been criticized for negative social effects seen of late.

Declarations of anything as the end of history make great headlines but are ultimately, inevitably parochial to the time. History does not stop for man. The financial crisis of 2008–2009 was the greatest economic crisis since the stock market crash of 1929 and the Great Depression. It marked the end of the end of history.[243] Richard Posner, among others, called this event a failure of capitalism.[244] It was certainly a failure of capitalism in the form of neoliberal ideology. Financial capitalism emphasized a greater prominence of the financial markets in the economy, leading to deregulation of the financial markets, free flow of capital, easy monetary and interest rate policies, greater financialization of assets and transactions, and reliance on market transactions to mediate risk and price.[245] The result in the financial market was a catastrophe that afflicted the global economy for years after the immediate crisis during 2008–2009 passed.

Idea that For-Profit Corporations Seek Profit, 47 WAKE FOREST L. REV. 135, 155, 171 (2012). Strine further echoed Friedman when he linked profit maximization to "the public interest" thus suggesting an ethical dimension. *Id*. at 135-36.

240. Francis Fukuyama, *The End of History?*, 16 THE NATIONAL INTEREST 3, 3 (Summer 1989). *See also* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

241. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001). However, objections to shareholder primacy or aspects thereof have never ceased. *E.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); Rhee, *supra* note 193.

242. *E.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (advocating a form of managerialism in furtherance of stakeholderism in which directors are "mediating hierarchs" who should balance the interests of shareholders and other other stakeholders).

243. On the geopolitical front, the rise of China and a revanchist Russia, powers of illiberalism and authoritarianism in Asia and Europe today, show that Fukuyama's end of history idea is far from certain.

244. *See* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009). *See also* GERSTLE, *supra* note 14, at 218-22 (stating that the financial crisis was a key event in the decline of neoliberalism).

245. *See* Robert J. Rhee, *The Decline of Investment Banking: Preliminary Thoughts on the Evolution of the Industry 1996-2008*, 5 J. BUS. & TECH. L. 75 (2010) (arguing that a failure to regulate the capital structures of investment banks led to the collapse of investment banks during the financial crisis).

The financial crisis marked the evident decline of neoliberalism. But decline did not mean that the system did not work for all. Under its economic system, wealth and income inequity grew wider.[246] The ideology of shareholder primacy played a substantial role in this problem. The discontent with shareholder primacy is easy to understand because externalities is not a difficult concept. Shareholder primacy is first and foremost a rule of distribution. It is as pervasive as the corporate system in a modern economy. The distributive order has had pervasive social effects.

Consider these examples. Worker wages and benefits are expenses that deduct from potential profit. Globalization of supply chain and the search for the cheapest sources of labor reduce worker expenses, thus increasing profit. This reduction in expense hollowed out the industrial and manufacturing base, leaving behind a generation of workers who have lived in economic precarity. All relationships between business and state are governed by laws. The increased acquisition of political power permits influence over cost-imposing rules and regulations, which reduce profit.[247] Environmental protection may require costs and sacrifices, which reduce profit. Taxes are a cost, which reduces profit. Examples are myriad. The discontent with the primary rule of the preference for capital is evident.

Of course, no person questions that corporations in a capitalist system should seek to generate profit through their activities, and shareholders, having claims to profit and net assets (the residuals on the income statement and the balance sheet), have most to gain and risk from a firm's activity in terms of financial capital at risk. If *Dodge* is a reminder that the interests of shareholders are important, it is a trivial point, hardly meriting canonical status. All informed persons would accept, one conjectures, as a starting point a recognition of the shareholder's interest, perhaps something along the lines of "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[248] From this modest agreeable premise, the discontent arises from the "ruthlessly narrow focus"[249] of shareholder primacy—the argument that corporations should do or consider no other thing than to "make as much money as possible while conforming to the basic rules of the

246. With respect to income inequity, the Rand Corporation recently conducted a longterm study of income trends. *See* Carter C. Price & Kathryn A. Edwards, *Trends in Income from 1975 to 2018*, Working Paper, RAND CORPORATION (Sept. 2020), https://perma.cc/A2AY-HQFG. It concluded that in the three decades following World War II, 1945–1975, rapid economic growth was broadly shared across all income distributions. *Id.* at 1. However, during the next four decades 1975–2018, the period of neoliberalism, aggregate income was not distributed equitably. In a counterfactual model that links economic growth with income growth, the bottom 90% of Americans lost out on $47 trillion of aggregate income over the period. *Id.* In other words, if the income of the bottom 90% had kept fairly with economic growth as it had done in the previous decades of midcentury America, most Americans would have earned an aggregate $47 trillion more over this time period.

247. *See supra* note 215; Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Citizens United v. FEC, 558 U.S. 310 (2010).

248. AMERICAN LAW INSTITUTE PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, *The Objective and Conduct of the Corporation*, § 2.1(a) (1994). The A.L.I. "makes clear that certain kinds of conduct must or may be pursued . . . even if the conduct either yields no economic return or entails a net economic loss." *Id.* at cmt. f.

249. William T. Allen, Jack B. Jacobs & Leo E. Strine, *The Great Takeover Debate: A Mediation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1083 (2002).

society."[250] Shareholder primacy is a rule of law, behind which is an all-encompassing ideology most succinctly explained by Friedman that all legal means ought to be deployed to maximize shareholder profit irrespective of effects on the greater society.[251]

Over the past forty years, the policy preference for capital has worked well.[252] But profit maximization poses a perplexing problem, one that has become more evident in the twenty-first century. Much has been said about wealth inequity of late.[253] Only a brief sketch is necessary. America today is the most unequal since the Gilded Age.[254] According to recent data from the Federal Reserve, American households held a total of $141.72 trillion of wealth.[255] The United States is still the wealthiest country in the world.[256] The wealth allocation among the top 1%, top 2%-10%, top 11%-50%, and bottom 50% are these amounts and percentages of total wealth, respectively: $45.32 trillion (32.0%), $52.29 trillion (36.9%), $40.20 trillion (28.4%), and $3.91 trillion (2.8%).[257] The top 10% of American society owns 69% of total wealth, and the bottom 50% owns 3%. Stock ownership constitutes a substantial portion of total wealth for wealthier Americans. Total corporate equities owned by Americans were $39.52 trillion.[258] The top 1%, top 2%-10%, 11%-50%, and bottom 50% held these amounts and percentages of total equity value, respectively: $21.19 trillion (53.6%), $13.87 trillion (35.1%), $4.21 trillion (10.6%), $0.25 trillion (0.6%).[259] Stock as a percentages of each stratum's total wealth are the following: 46.8% (top 1%), 26.5% (top 2%-10%), 10.5% (top 11%-50%), 6.4% (bottom 50%). The top 10% of American society owns 89% of total corporate equities, and the bottom 50% own virtually nothing.[260]

Wealth inequity in America is sharp. The top 10% own 64% of wealth and about 89% of corporate equities, the bottom 50% own 3% of wealth, and the bottom 90% own 11% of stocks.[261] The engine of this wealth disparity has been income inequity over a

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250. *Supra* note 218 and accompanying text.

251. *See supra* notes 217-218 and accompanying text.

252. In the forty-two years since 1980, a broad basket of stocks returned approximately 9.5% per year, despite at least three stock market crashes (1987, 2000, 2008), with inflation having been tamed in the 1980s by Paul Volcker. On January 3, 2022, the S&P 500 index closed at 4,796.56. On January 2, 1980, it closed at 105.76.

253. *E.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2017).

254. *See* Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. (May 8, 2014), https://perma.cc/A8P9-TVQY; Kevin Kelleher, *Gilded Age 2.0: U.S. Income Inequity Increases to Pre-Great Depression Levels*, FORTUNE (Feb. 13, 2019), https://perma.cc/MC2Q-H7MF.

255. *DFA: Distributional Financial Accounts: Distribution of Household Wealth in the U.S. Since 1989*, https://perma.cc/G9AC-FF7A (data from Q1 2022).

256. *Global Wealth Databook 2021*, Credit Suisse Research Institute, 21-24 tbl. 2-1, 105-108 tbl. 2-2 (June 2021), https://perma.cc/9LV5-SFZJ.

257. *See supra* note 255 and accompanying text.

258. *Id.* (including mutual funds but not pension entitlements). This is 28% of the total wealth held by all Americans.

259. *Id.*

260. *See* Patricia Cohen, *We All Have a Stake in the Stock Market, Right? Guess Again*, N.Y. TIMES (Feb. 8, 2018), https://perma.cc/BN82-ASM2 ("A whopping 84 percent of all stocks owned by Americans belong to the wealthiest 10 percent of households.").

261. Ironically, when Berle made the first important academic advocacy of shareholder

longterm period[262] and ownership of corporate equities, the values of which are directly connected to the idea of shareholder primacy. Shareholder primacy, the first rule of corporate law and forged from the neoliberal political order of post-1980, played a major role in the current wealth inequity in our society. It does not work for 90% of American society. The acquisition of political powers, a specific strategy identified in the 1971 Powell memorandum, enables the manipulation of legal rules and public policies in furtherance of profit maximization, an expected behavioral outcome given that managers are required to pursue maximal profit through all legal means.[263] Investments in the political process are made with the expectation of suitable returns from favorable rules and policies, irrespective of the externalities on the rest of society.[264]

Profit maximization is not a zero-cost policy, else the idea cannot be contested on any other ground than the envy of a Ford driver toward a neighbor with a Ferrari. A legion of legal academic scholarship over a generation has not been written on the sentiment of human envy.[265] Someone's ox is usually gored whenever a new rule of distribution is implemented. Shareholder primacy, as a consumptive ideology, is a factor in today's wealth inequity in American society. It results in high firm values of corporate equities. It is corporate law's implementation of the policy of a preference for capital. But shareholder primacy has imposed costs, which do not flow into market valuations of stock the way that the costs of wages, regulatory compliance and burdens, and taxes do through the income statement. In other words, the efficiency arguments for shareholder primacy, which focus on market valuations, internalize all fiscal costs that negatively affect a firm's cash flow but not the economic costs imposed on the greater society because these things are externalities. The price mechanism of the market, a foundation of neoliberal thought, is flawed because the price of the activity does not fairly reflect its true costs and benefits. In an analogous way, the flaw in the price mechanism is like the problem of pollution in which the cost of the externalities may not be internalized in the accounting for the profit and loss of the activity.

Shareholder primacy reflects a more direct conflict between shareholders and the rest of society, where issues like wages, globalization, dismantling of institutional labor power, financialization of corporate governance, acquisition of direct corporate political powers and resulting crowding out of public interests in policy deliberations have had substantial distributive effects. Thus, as there is growing discontent with the

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primacy in the Harvard Law Review in the Berle-Dodd debate, *supra* note 111, he defended shareholder primacy on the premise of a "people's capitalism" based on broad ownership of corporate equities across American society, which he believed was better than the alternative choice of socialism, which was debated in the 1930s during the Great Depression. SCHWARZ, *supra* note 178, at 65. *See supra* note 180.

262. *See supra* note 246.

263. *See supra* note 215.

264. Political scientists have documented the general idea of making investments in the political process with the expectation of pecuniary return in the form of policy preferences. *See generally* THOMAS FERGUSON, GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS (1995); BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT (2017).

265. *See supra* Section II.B. (showing the proliferation of scholarly discussion of *Dodge* from the 1980s).

neoliberal political order and its economic system, it is not surprising that there would be growing discontent with shareholder primacy as a rule of law.

IV. What Dodge Actually Teaches

A. The Lessons of Dodge and Shareholder Primacy

Dodge teaches a couple of lessons. A history-based legal analysis shows that shareholder primacy was not established until the neoliberal turn of the 1980s Reagan era. This is an easy one—just follow the citations. The assertion that shareholder primacy has always been a constant in modern corporation law is a myth, and it has no basis in evidence beyond *Dodge*'s two sentences. The more interesting lesson is the reason. *Dodge* teaches that not all legal rules are the same. Some are just more important than others. *Dodge* attempted to bite off more than it could chew. There is a difference between holding that a controlling shareholder inequitably oppressed minority shareholders and stating that all corporate enterprises must maximize shareholder profit. The court's attempt to do the latter was not only inartful as judicial craft, but was essentially a political statement that was always legally inert. In terms of law, political statements do not mean much because courts work at the instrumental level of laws and facts. State and society set policy, and the law reflects that policy. In terms of influence, political statements go so far as the political order of the day. The statement in *Dodge* did not mean much for sixty years until the 1980s. This is the historical lesson of *Dodge*.

There is a larger, more important lesson of *Dodge*. We are susceptible to temporal myopia (or temporal triumphalism)—the reference point is the current time and history is just the past. With any prevailing orthodoxy, there is the temptation to believe that the prevailing idea system, which by definition triumphed over something else, represents the end of a process of discovery. There is the temptation to put shareholder primacy in that category; to quote Margaret Thatcher, it could be said that "there is no alternative."[266] But shareholder primacy is not some intrinsic truth finally uncovered by great economists (Friedman, Jensen and Meckling, *et al*.) in the late twentieth century after 250 years of modern economic science.[267] Friedman is not Einstein; economics is not physics. Shareholder primacy is like any other law in the sense that the rule of law fits the changing policy preference. New rules are more acceptable when they are conceptualized to fit coherently with a new political order and economic system.

Broadening our vision, we see that shareholder primacy could not have worked in America in large parts of the twentieth century. Imagine the ideology of maximal profit for shareholders without consideration of other constituents and the country during the Great Depression, New Deal, or World War II. Or imagine Milton Friedman publishing his New York Times editorial during these times. He likely would have been written off as a crank.[268] In 1919, perhaps he would have been seen as less a crank

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266. CLAIRE BERLINSKI, "THERE IS NO ALTERNATIVE": WHY MARGARET THATCHER MATTERS (2008).

267. ADAM SMITH, THE WEALTH OF NATIONS (1776) (Modern Library ed., 1994).

268. Friedman won the Nobel Prize in 1976. Had he been a Nobel winner in 1942 (the Nobel in economics was first awarded in 1969) advocating for maximum shareholder profit

than a conventional shill for robber barons and industrial capitalists. In 1970 when Friedman published the editorial, it was considered controversial.[269] By 2000, it was orthodox doctrine and an end of corporate history.[270] Imagining the Friedman editorial traveling through history gives us a sense for the status of shareholder primacy through time. His idea of a manager's obligation to maximize profit was an assertion of a policy preference that society would receive differently depending on the time period. Timing was everything. It is why a discussion of shareholder primacy generally acknowledges the contribution of Friedman's editorial.[271] Friedman's insight as a great economist was calling a trend at its inception. He foresaw an inflection in the conditions of the time, which made possible the idea of shareholder primacy to take hold a short time later.

If shareholder primacy is not some fundamental end of law and economics, but instead depends on the prevailing policy preferences, the future of *Dodge*'s tremendous influence in intellectualization today may be uncertain. The political order and economic system of neoliberalism reached its apogee and is in descendancy. It is uncertain whether a new political order and economic system will replace it in some intermediate transition period like the 1970s, or whether it will morph into some altered version of itself, one that makes concessions to soften the discontent with capital while maintaining the basic system. A key difference between the 1970s and now is the acquisition of formal constitutionalized power over the political process through the avenue of corporate free speech rights,[272] which was a specific strategy identified in the Powell memorandum. This political power may make any sort of a transition longer and more contentious, despite deteriorating consensus, than the era of countervailing power and détente among interest groups.

In 1992, William Allen, then the Chancellor of the Delaware Chancery Court and one of the most influential Delaware jurists, wrote: "Basic questions excited argument, and the most basic questions—What *is* a corporation? What purpose does it serve?—became the stuff of wide discussion and of statutory activity. Everything old became new again."[273] He was reflecting on the past decade and was specifically thinking in the context of the large economic forces unleashed in the 1980s at the neoliberal turn compared to the quietude of the 1960s.[274] A changing political order and the economic forces it unleashed resurrected old questions. Thirty years after Allen's observation, the same thought can be said again as the political order ushered in the 1980s may be transitioning to something else.[275]

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while the country was fighting an existential war against fascism, he might have been called something more polite than a crank in light of his eminent status, but would have been dismissed as such nevertheless.

269. *See supra* note 219 and accompanying text.

270. *See supra* note 241 and accompanying text.

271. *E.g.*, STOUT, *supra* note 241, at 18.

272. *See supra* notes 215 and 247 and accompanying text.

273. Allen, *supra* note 198, at 264.

274. *Id.* at 263-64.

275. *See* GERSTLE, *supra* note 14, at 267 ("A new politics was emerging; perhaps a new political order was being born."). Gerstle continues: "A reigning political order does not release its grip easily, however; its decline is marked by contradictions, contestation, and even

Everything old is new again. There is stirring of a reassessment in corporate law of shareholder primacy.[276] The rule of shareholder primacy was a response to a changing political order and economic system. Legal and economic scholarship supported shareholder primacy as a new rule implementing a policy preference for shareholder profit maximization. A reassessment of shareholder primacy is not done in the vacuum of an ivory tower and Platonic abstractions, but is a response to larger historical currents that may change political orders and economic systems in the way that the New Deal and neoliberalism did. It is not surprising that Milton Friedman published his New York Times editorial for the public masses in 1970 during the initial stirrings of intellectual foment and capital's discontent with the existing political order and economic system.

Consider then these recent events. The crisis of financial capitalism brought on by the financial crisis of 2008 and subsequent Great Recession. Discontent with capitalism ensued. In 2016, Bernie Sanders, a self-professed "socialist" with populist appeal, nearly won the Democratic Party's nomination against Hillary Clinton, a stalwart of the neoliberal political order.[277] Donald Trump defeated Clinton through demagoguery and a wave of right-wing populism that are antithetical to the rules-based liberal order and certain ideas of neoliberalism.[278] Populism, with resulting social pathologies, is still a current phenomenon, and greater unpredictability in the political process is seen. In 2018, Elizabeth Warren sponsored a bill that would imbue companies with "the [corporate] purpose of creating a general public benefit" defined as "a material positive impact on society."[279] In 2019, the Business Roundtable made much publicity by announcing that the idea of "an economy that serves all Americans" is a call for a return to traditional stakeholderism.[280] This is a fundamental reversal from its position in 1997 at the height of the neoliberal order: "the paramount duty of management and of boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders."[281] Despite the long declaration of the end of history of corporate law, legal scholars are continuing to discuss the issue of corporate purpose.[282] Academics and commentators in various fields are writing a spate of thoughts on reassessment of the specific form of capitalism and

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chaos. And in its chaos, the Trump presidency would have few rivals." *Id.*

276. "The long-standing debate on stakeholderism is now at a critical juncture, and its influence and acceptance could well grow in the coming years." Bebchuk & Tallarita, *supra* note 41, at 97.

277. *See* GERSTLE, *supra* note 14, at 255-62 (discussing the Sanders and Clinton campaigns and arguing that a Clinton restoration of neoliberal policy was perceived negatively by voters).

278. *See supra* note 233 (defining neoliberalism).

279. Accountable Capitalism Act, S. 3348, 115th Cong. § 5(a)(1), (b)(2) (2018).

280. Business Roundtable Statement, *supra* note 65. Important business leaders like Larry Fink of BlackRock have also called for "stakeholder capitalism." *The Power of Capitalism: Larry Fink's 2022 Letter to CEOs*, BLACKROCK, available at https://perma.cc/NBM9-C6FX.

281. *Statement on Corporate Governance*, THE BUSINESS ROUNDTABLE 3 (Sept. 1997), https://perma.cc/93Q4-L3HW.

282. *E.g.*, Roe, *supra* note 3; Bebchuk & Tallarita, *supra* note 41. *See* Elhauge, *supra* note 241; STOUT, *supra* note 241; Rhee, *supra* note 193.

its relationship with the political order.[283]

These are surely stirrings of an uncertain period, evidence of a declining consensus on the current political order and economic system. If there is continued deterioration of the neoliberal consensus, we should expect a reassessment of our understanding of corporations and their role in society in the legal academy where everything old is new again.[284]

B. The Potential Future of Dodge

The future of *Dodge* may be an exit stage left after a long run under bright lights of the legal academy. The rule of profit maximization may give way to some form of a stakeholderism. Such a change would require an architectural change of the corporate law and governance system. Not even a powerful consortium of corporate leaders can, by itself, implement a change so fundamental.[285] Absent federal preemption of state corporate law with respect to the rules of corporate purpose and fiduciary duties, a rule of shareholder primacy cannot be instituted through a single-loci judicial prescription.[286] The same is true for a rule of stakeholderism, the general idea that managers are trustees for the collective interests of stakeholders constituting the nexus of relationships in a corporation. An architecture is required to provide a set of incentives to achieve the outcome of shareholder primacy or stakeholderism. A change in that architecture is more difficult if accumulated political power is used for entrenchment, which may result in a lag on policy changes.[287]

With that said, America is a land of second acts. Even with a possible decline of

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283. *E.g.*, JOHN L. CAMPBELL & JOHN A. HALL, WHAT CAPITALISM NEEDS: FORGOTTEN LESSONS OF GREAT ECONOMISTS (2021); ROBERT B. REICH, THE SYSTEM: WHO RIGGED IT, HOW TO FIX IT (2020); REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD ON FIRE (2021); COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (2021); FRANCESCO BOLDIZZONI, FORETELLING THE END OF CAPITALISM: INTELLECTUAL MISADVENTURES SINCE KARL MARX (2020); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019); STEVEN PEARLSTEIN, CAN AMERICAN CAPITALISM SURVIVE? (2018).

284. *See* Robert J. Rhee, *The Political Economy of Corporate Law and Governance: American and Korean Rules Under Different Endogenous Conditions and Forms of Capitalism*, 55 WAKE FOREST L. REV. 649, 715-716 (2020) ("If the United States continues down an uncertain path in history, culture, economy, and politics, and as the pressures of the time build, it is not hard to imagine among the possibilities an incremental move toward . . . conceptualizing corporate law and governance as grounded in the public and national interest."); Isabel V. Sawhill, *Capitalism and the Future of Democracy*, ECONOMIC STUDIES AT BROOKINGS (July 2019), https://perma.cc/5HB7-P7B8 (arguing that an earlier mixed economy model in the U.S. was replaced post-1980 with an ideology of market fundamentalism and that this economic system has created serious problems such as wealth inequity and threatens the survival of capitalism and democracy).

285. *See* Bebchuk & Tallarita, *supra* note 41, at 139-55 (arguing that despite the Business Roundtable's recent embrace of stakeholder capitalism, the incentive structures in corporate law and governance make it difficult to implement). *See also* Rhee, *supra* note 10, at 2010-16 (arguing that shareholder primacy as a rule is implemented through a complex architecture of incentives rather than through a legal command).

286. *See* Rhee, *supra* note 10, at 1960-63 (arguing that a rule mandating director action toward profit maximization would conflict with the primacy of managerial authority).

287. *See supra* notes 215, 247, and 264 and accompanying text.

neoliberalism, *Dodge* may not fade into irrelevance. Another possible future is that *Dodge* may have continuing relevance as an exemplar of stakeholderism. The Ford Motor saga and *Dodge* present an early example of a court that balanced the interests of multiple constituents. The Ford Motor saga is an example of stakeholderism at work. Specifically, Ford's wage policy ($5 a day offer) was arguably rent sharing of monopoly profit between Ford as majority shareholder and employees.[288] The *Dodge* court did not disturb this basic arrangement of sharing profits between employees and shareholders.

When thinking of *Dodge* as the iconic case of shareholder primacy, we should not forget that the ultimate decision there was Solomonic. Ford's ultimate goal was business expansion, necessitating capital expenditure. He withheld dividends in part at least because he may have needed the cash for capital expenditures and his commitment to a $5/day pay policy.[289] Ford said he wanted "to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes" and this required "putting the greatest share of our profits back in the business."[290] These ambitions required expansion of Ford Motor, and this required capital expenditures. By permitting them, the court's decision advanced the end of a Solomonic negotiation.

The court's action was outcome-driven. It mischaracterized Ford's statements and unnaturally contorted through a thicket of internal incoherence and contradictions to achieve an outcome that epitomizes stakeholderism at work. The court gave minority shareholders, corporate managers, and employees equitable cuts of the most successful corporate enterprise of its day.[291] *Dodge* became iconic for its pithy two-sentence dictum on shareholder primacy, but the court's judicial action was more judicious and less political. Thus, the reinterpretation of *Dodge* may require no more interpretative technique than to understand the difference between a court's holding and its commentary, between what the court did and what it said—a legal lesson that most 2L law students understand.

The Ford Motor saga, culminating in *Dodge*, was one of the earliest examples of stakeholderism at work in the corporate system. A second act for *Dodge* is in keeping with its odd, Forrest Gump-like history. Along with the first crystalline statement of shareholder primacy that made *Dodge* a canonical case, it was the first prominent legal case where a court approved a scheme of corporate stakeholderism. This second act makes *Dodge* not only iconic, but also ironic.

Conclusion

There is no debate that shareholders, as capital with entitlement to the financial residuals, always desire maximum profit. This motive force is a constant. However, the narrative that shareholder primacy as a social policy has always been a rule of corporate law since the turn of the twentieth century is an inaccurate mythology. It

288. Roe, *supra* note 3, at 1764-65, 1782.

289. *Id.* at 1775.

290. Dodge, 170 N.W. at 683.

291. *See* Weinberger, *supra* note 4, at 1045 ("There were no losers in *Dodge v. Ford*.").

stands on the thinnest branch. The narrative of a constant shareholder primacy is ahistorical and wrong. The iconic two-sentence statement of shareholder primacy in *Dodge* was a stray, inartful political statement that split the court, and American courts never embraced *Dodge* as a useful legal instrument. The conception of corporate purpose is a policy function of the political order and economic system of the day. Shareholder primacy came to be during the neoliberal turn of the American political order and economic system. The predominant view, even today, is that shareholder primacy has long traveled from its birth in the *Dodge* era and has come to a final end of history. This belief fails to consider the reality that political orders and economic systems change.

There is every reason to believe that future events will necessitate a change in the political order and economic system. It is possible that such changes are occurring now. We are at a point in our history where, among most well-informed people in the streets as well as in the ivory towers, the current challenges are obvious and severe: *e.g.*, great wealth inequity, crisis of climate change, multidirectional threats to liberal democratic order and commitment to democratic principles, geopolitical challenges from illiberal states and sustainability of the rule-based postwar liberal order, potential stagnation or even decline in economic growth over the longterm, and longterm public fiscal challenges, just to name a few of today's concerns. What does any of this have to do with corporate law? With respect to technical rules dealing with such and such, this and that, and affecting intermural concerns that constitute most study of corporate law and governance, nothing much at all. With respect to the first rule of the neoliberal era, the mandatory rule of distributive order in corporate law, and the longstanding question of the purpose of corporations—all of which are wrapped up in the debate over shareholder primacy—perhaps everything.

All this means is that there is much on the horizon, yet unseen, just over the hill. Corporations and corporate law are not immune from the currents of history and potential changes in the political order and the economic system. Throughout its history, corporations have evolved from special sovereign-chartered extensions of political economic power to pure private ventures resembling partnerships with limited liability, to large public firms separating ownership and control, to institutions broadly serving the economy and national interest, to companies serving only shareholders' pecuniary interests. Corporate law and governance continuing as business-as-usual under a steady state end of history while a political order and an economic system change under its feet is a harder prediction, certainly. The more likely prediction is a concomitant change bent to policy preferences of the time, which is actually what we see in the lifecycle of *Dodge*. Given their institutional importance in society and economy, corporations and corporate law will likely be in the thick of things. Since there is no end of history, the future of shareholder primacy and its basis in financial capitalism of the current American model remain in question.