# Dodge v. Ford: What Happened and Why?

Law Working Paper N° 619/2021
November 2021

Mark J. Roe
Harvard University and ECGI

ECGI Working Paper Series in Law

# Dodge v. Ford: What Happened and Why?

Working Paper N° 619/2021
November 2021

Mark J. Roe

Thanks for comments go to Margaret Blair, Vince Buccola, Einer Elhauge, Martin Fridson, Victor Goldberg, Jonathan Macey, Daniel Raff, Robert Thompson, and participants in a symposium at Vanderbilt Law School and a workshop at Wharton. Thanks for research assistance go to Raffaele Felicetti, Denise Han, Harold Schaaff, and Tram Tran

## Abstract

Behind Henry Ford's business decisions that led to the widely taught, famous-in-law-school Dodge v. Ford shareholder primacy decision were three industrial organization structures that put Ford in a difficult business position. First, Ford Motor had a highly profitable monopoly and needed much cash for the just-begun construction of the River Rouge factory, which was said to be the world's largest when completed. Second, to stymie union organizers and to motivate his new assembly-line workers, Henry Ford raised worker pay greatly; Ford could not maintain his monopoly without sufficient worker buy-in. And, third, if Ford explicitly justified his acts as in pursuit of the monopoly profit in the litigation, the Ford brand would have been damaged with both his workforce and the car buyers. The transactions underlying Dodge v. Ford and resulting in the court order that a very large dividend be paid should be reconceptualized as Ford Motor Company and its auto workers splitting the "monopoly rectangle" that Ford Motor's assembly line produced, with Ford's business requiring tremendous cash expenditures to keep and expand that monopoly. Hence, a common interpretation of the litigation setting—that Ford let slip his charitable purpose when he could have won with a business judgment defense—should be reconsidered. Ford had a true business purpose to cutting back the dividend—spending on labor and a vertically integrated factory to solidify his monopoly and splitting the monopoly profit with labor—but he would have jeopardized the strategy's effectiveness by boldly articulating it.

The existing main interpretations of the corporate law decision and its realpolitik remain relevant—such as Ford seeking to squeeze out the Dodge brothers by cutting the Ford dividend to deny the Dodge brothers cash for their own car company. But those interpretations must take a back seat, as none fully encompasses the industrial setting—of monopoly, incipient union organizing, and a restless workforce. Without accounting for Ford Motor's monopoly, the River Rouge construction, and the related labor tensions, we cannot fully understand the Dodge v. Ford controversy. Stakeholder pressure can more readily succeed in a firm having significant economic rents, a setting that seems common today and was true for Ford Motor Company in the 1910s.



Keywords: corporate governance, corporate purpose, stakeholders, hedge funds, shareholder activism, rents, agency costs, political economy, corporate interests, ESG, CSR, $5/day

JEL Classifications: G30, G38, G41, J42, J50, K21, K22, L1, L21, M14



Mark J. Roe
David Berg Professor of Law
Harvard University, Harvard Law School
Griswold 502
Cambridge, MA 02318, United States
phone: +1 617 495 8099
e-mail: mroe@law.harvard.edu

# *Dodge v. Ford*: What Happened and Why?

Mark J. Roe

November 12, 2021

# *Dodge v. Ford*: What Happened and Why?

Mark J. Roe*

*Behind Henry Ford's business decisions that led to the widely taught, famous-in-law-school* Dodge v. Ford *shareholder primacy decision were three industrial organization structures that put Ford in a difficult business position. First, Ford Motor had a highly profitable monopoly and needed much cash for the just-begun construction of the River Rouge factory, which was said to be the world's largest when completed. Second, to stymie union organizers and to motivate his new assembly-line workers, Henry Ford raised worker pay greatly; Ford could not maintain his monopoly without sufficient worker buy-in. And, third, if Ford explicitly justified his acts as in pursuit of the monopoly profit in the litigation, the Ford brand would have been damaged with both his workforce and the car buyers. The transactions underlying* Dodge v. Ford *and resulting in the court order that a very large dividend be paid should be reconceptualized as Ford Motor Company and its auto workers splitting the "monopoly rectangle" that Ford Motor's assembly line produced, with Ford's business requiring tremendous cash expenditures to keep and expand that monopoly. Hence, a common interpretation of the litigation setting—that Ford let slip his charitable purpose when he could have won with a business judgment defense—should be reconsidered. Ford had a true business purpose to cutting back the dividend—spending on labor and a vertically integrated factory to solidify his monopoly and splitting the monopoly profit with labor—but he would have jeopardized the strategy's effectiveness by boldly articulating it.*

*The existing main interpretations of the corporate law decision and its realpolitik remain relevant—such as Ford seeking to squeeze out the Dodge brothers by cutting the Ford dividend to deny the Dodge brothers cash for their own car company. But those interpretations must take a back seat, as none fully encompasses the industrial setting—of monopoly, incipient union organizing, and a restless workforce. Without accounting for Ford Motor's monopoly, the River Rouge construction, and the related labor tensions, we cannot fully understand the* Dodge v. Ford *controversy. Stakeholder pressure can more readily succeed in a firm having significant economic rents, a setting that seems common today and was true for Ford Motor Company in the 1910s.*



* David Berg Professor of Law, Harvard Law School. Thanks for comments go to Margaret Blair, Vince Buccola, Einer Elhauge, Martin Fridson, Victor Goldberg, Jonathan Macey, Daniel Raff, Robert Thompson, and participants in a symposium at Vanderbilt Law School and a workshop at Wharton. Thanks for research assistance go to Raffaele Felicetti, Denise Han, Harold Schaaff, and Tram Tran.

# INTRODUCTION

*Dodge v. Ford*[1] is one of the iconic cases of corporate law and is raised to contemporary relevance by current controversy over the large public corporation's proper purpose. A high-profile debate now asks whether the firm should aim to boost shareholder value as its central goal. Or should it also bolster stakeholders and the public good, even if it is unprofitable to do so? Major judicial decisions supporting a stark shareholder-oriented purpose are rare, with one of the major ones, *Dodge v. Ford*, being a century old.

Understanding the full business background to the transactions that led to the dispute, the litigation, and the ruling will facilitate a better classroom interpretation of the case and its business background. Moreover, the underlying transactions and the underlying industrial structure[2] also project forward to today's rising pressure on public corporations to be more socially relevant and more socially responsible.

*Dodge v. Ford*'s business foundations cannot be fully understood without accounting for the industrial structure of the automobile industry at the time and for how that market structure interacted with Ford's labor relations. Monopoly, labor relations, and corporate purpose formed an interactive triangle. Neglecting any one of the three impedes us from understanding what really happened. The Dodge brothers understood well the connection between Ford's monopoly, Ford's massive River Rouge expansion, and the dividend reduction that motivated their lawsuit. They sued to stop Ford Motor's business expansion and got related relief from the lower court but not the appellate court. That—an injunction against Ford's expansion—as their main, or equally important, goal in the litigation fits better with the industrial setting than the generally prominent explanations (of the Dodges seeking financing for their own startup auto company and Ford cutting dividends to shut off one spigot of cash).

The Ford Motor Company of that era has been the subject of three insightful genres of academic analysis. First is the analysis of *Dodge v. Ford* as a

1. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919). "One of the most famous of all corporation-law cases is *Dodge* v. *Ford Motor Co.*," says what was long the leading corporations teaching casebook. MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 134–36 (9th ed. 2005).

2. *See* Mark J. Roe, *Corporate Purpose and Corporate Concentration*, 99 WASH U. L. REV. 203 (2021) (larger and wider rents in the U.S. economy make purpose pressure more likely to succeed than when and where rents are low and classic competition is intense).

shareholder primacy decision. Second is the industrial organization fact that Ford Motor Company had monopoly power at the time of the decision. Ford's successfully built out an assembly line for the Model T in 1913, leading to it capturing ninety percent of the relevant automotive market and making Ford Motor tremendously profitable. But Ford's plans to build the huge River Rouge complex to further solidify its monopoly position needed cash and militated against continued large dividends to stockholders. Ford Motor could not have sustained its 1910–1915 dividend rate, while it expanded, without dangerously pushing its cash position down to near zero. It in fact ran out of cash in 1920. And the third analytic strain is the labor economics of Ford Motor's relationship with its workers during the decade leading up to *Dodge v. Ford*.

I here combine insights from the underlying industrial structure and the labor literature to better explain the core transactions that led to the litigation. Without understanding the near simultaneity of Ford Motor's monopoly starting circa 1913 and Ford's January 1914 disruption of the auto industry's wage structure with the $5/day wage, one cannot fully comprehend either what Ford did to provoke the 1916 litigation, Ford's litigation strategy, or the Michigan Supreme Court's shareholder-focused decision. Union power sought to assert itself at Ford Motor Company, and Henry Ford needed to accommodate labor to maintain the company's monopoly. If he could not induce labor to acquiesce and adapt to the assembly line and River Rouge, he could not keep that monopoly. The resulting labor-friendly strategy and the River Rouge expansion both cost much cash, and redirecting the cash to construction and labor buy-in meant that less, or none, was available for dividends. And that—the expansion and the skipped dividends—induced the Dodge brothers to sue to stop River Rouge and restart the dividends, and plausibly shaped Henry Ford's litigation defense strategy.

Contrary to the common thought, Ford was not simply withholding dividends to squeeze out the Dodges—a standard interpretation of "what really happened." If that was his primary or sole strategy, much of what he did makes no business sense. Ford's famous $5/day wage, extraordinarily high for the time, and his unprecedented industrial expansion—when Ford Motor's River Rouge facility was completed, it was reported to be the largest integrated factory on the planet—were tremendous expenditures that seemed to be much greater than any value Ford obtained for himself by squeezing out the Dodge brothers. Much of the astute analysis of, and in, the case portrays Ford as withholding cash from shareholders and acting charitably to labor and consumers, making the issue in the case whether Ford could as a matter of corporate law properly favor labor and consumers over shareholders. But Ford's $5/day wage, the company's pricing strategy for its automobiles, and the River Rouge construction should be reinterpreted as an uneasy labor-owner coalition that was splitting a monopoly profit and aiming to keep that monopoly, both for Ford Motor's owners and for its employees.

Because the $5/day wage was such a large expense, and with the River Rouge construction so costly, Ford Motor Company by the end of the decade had little left for dividends. Although the analytic literature usually sees Ford as refusing to pay dividends in order to squeeze out the Dodges, the situation is better understood as Ford running down the company's cash, and, hence, being unable to pay dividends because he was spending (most of) it.

That analysis advances our understanding of *Dodge v. Ford* and its business setting: First, Ford needed labor peace to keep his monopoly. The purportedly charitable impulse was a business effort to keep assembly-line labor productive and not unionized. Second, rather than Ford blurting out an underlying charitable motivation (that today could be readily justified in court with the business judgment rule), the setting is consistent with Ford covering up his business calculation, which if stated explicitly could have undermined his business relations, particularly with labor but also with the consuming public. Third, the Michigan court oddly deferred to the Ford Motor board's business judgment in building out River Rouge but not to its judgment as to how best to finance that expansion. The court ordered Ford Motor to pay a dividend so large that, if Ford Motor continued dividends as a portion of profit for the rest of the decade at the same rate, it would have been left with insufficient cash to operate. The lower court orders—enjoining further construction of River Rouge and forcing a dividend—are more coherent than the appellate court's, because if expansion were halted (as the lower court ordered), the company's cash needs would have been less. Fourth, the reigning realpolitik explanation for Ford Motor's actions—to facilitate Ford's squeeze-out of the Dodge brothers at a price favorable to Ford—cannot fully or even largely explain the transactions that led to the litigation. More was going on.

This monopoly and labor configuration is key to understanding the business background of the iconic decision. Ford's monopoly gave him two reasons to spend in the ways that the Dodge brothers challenged. First, the monopoly profit gave him latitude to spend in a way that a competitively structured industry would have precluded—I discuss this below as increasingly part of today's corporate governance landscape. Second, to obtain and maintain that monopoly and keep the assembly line running, he had to calm the workforce to achieve sufficient labor peace. Workers had to show up and work on what many employees could have experienced as a dehumanizing assembly line, and Ford believed he had to thwart the unions from organizing the company's labor force. The labor analysis tells us what Ford believed he had to do to protect and keep his monopoly. *Dodge v. Ford*, the decision in today's corporate law casebooks, is the consequence.

# I. REINTERPRETING *DODGE V. FORD*'S BUSINESS SETTING

*Dodge v. Ford*[3] is one of corporate law's most famous decisions. To fully explain Ford's famous corporate actions, the lawsuit, and Ford's litigation posture, we must understand his relationship with labor, his effort to thwart union organizers, and the underlying market power of Ford Motor Company during the 1910s. Bringing in these analytic literatures of labor and monopoly explains the actions leading up to the litigation better than—or as a needed supplement to—prevailing explanations.

This effort is important not only for understanding one of the most-taught corporate law decisions[4] but also for its contemporary relevance. Today's burgeoning purpose pressure on the corporation more readily has an impact when brought to bear on a firm with substantial market power—like Ford Motor Company had in the 1910s. Competitive firms are often straitjacketed. Ford Motor was not, and there is substantial evidence that the firms most responsive to purpose pressure today have considerable market power.[5]

*The litigation*. The core facts of *Dodge v. Ford* are well known to corporate law academics and students. Ford had set up his famous assembly line in 1913 and

3. 170 N.W. at 668.

4. "*Dodge* is in all corporate law casebooks," states one such casebook. WILLIAM T. ALLEN, REINIER KRAAKMAN & VIKRAMADITYA S. KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 311 (6th ed. 2021) ("the famous case"); *see also* STEPHEN M. BAINBRIDGE, ADVANCED CORPORATION LAW: A PRACTICAL APPROACH TO CORPORATE GOVERNANCE 668–72 (2021); WILLIAM L. CARY, CASES AND MATERIALS ON CORPORATIONS 1580–88 (4th ed. 1969); ROBERT C. CLARK, CORPORATE LAW 602–04 (2d ed. 1986) ("the classic . . . case in which a court did order the payment of dividends"); JESSE H. CHOPER, JOHN C. COFFEE, JR. & RONALD J. GILSON, CASES AND MATERIALS ON CORPORATIONS 35, 203 n.66 (8th ed. 2013) ("The most famous case in which a court actually ordered the payment of a dividend . . . ."); EISENBERG, *supra* note 1, at 134–36 (Eisenberg took over from Cary) ("One of the most famous of all corporation-law cases is *Dodge v. Ford Motor Co.*"); THOMAS LEE HAZEN, JERRY W. MARKHAM & JOHN F. COYLE, CORPORATIONS AND OTHER BUSINESS ENTERPRISES, CASES AND MATERIALS 211 (4th ed. 2016); WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS 220–25 (10th ed. 2018); CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 274–77 (8th ed. 2017).

5. *See* Roe, *supra* note 2, at 244–49. A wide consensus of financial findings associates firms that do well (as shown by their higher-than-normal profits) with more ESG (environmental, stakeholder, and governance) value and CSR (corporate social responsibility). The direction of causation is disputed. *See* Olga Hawn & Hyoung-Goo Kang, *The Effect of Market and Nonmarket Competition on Firm and Industry Corporate Social Responsibility*, *in* 38 SUSTAINABILITY, STAKEHOLDER GOVERNANCE, AND CORPORATE SOCIAL RESPONSIBILITY 313, 327, 330 (Sinziana Dorobantu, Ruth Aguilera, Jiao Luo & Frances Milliken eds., 2018) (finding more CSR in monopolies and less in highly competitive industries); Gunnar Friede, Timo Bush & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210 (2015) (literature review concluding that nine of the ten relevant studies find that companies with strong financial results do more CSR, but not resolving the causal direction). I assess this and related evidence in Roe, *supra* note 2. The evidence is not uniform. Some find more competitive industries do more CSR. *E.g.*, Shuli Du, C.B. Bhattacharya & Sankar Sen, *Corporate Social Responsibility and Competitive Advantage: Overcoming the Trust Barrier*, 57 MGMT. SCI. 1528 (2011).

previously bought auto parts, mostly at first from the Dodge brothers, who as part of their deal with Ford in 1903 acquired ten percent of the Ford company's stock. But by 1913, the Dodge brothers were no longer supplying the bulk of Ford Motor Company's parts, with the Dodges and Ford pursuing new, different business strategies: Ford was seeking to vertically integrate by building rather than buying most of the car's parts. He aimed to build out a good quality, mass-market, inexpensive car that would be accessible to most middle-class Americans, while the Dodge brothers were themselves building and selling upscale cars.

Ford cut back on dividends. When the Dodges sued, seeking dividends and an order that the Ford Motor Company halt its expansion, the Michigan Supreme Court said:

> 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 . . . he and his codirectors owe to . . . minority stockholders. 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. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to . . . devot[ing] them to other purposes.[6]

Rather than argue that high wages and River Rouge were, in his business judgment, means to pursue profitability and maintain the company's monopoly rents, Ford said he wanted to do good for all.[7]

Several prominent theories explain the underlying transaction and Ford's testimony that he was serving the public by expanding his operations. One theory is that the company cut cash dividends to starve the Dodge brothers of the money

6. *Dodge v. Ford*, 170 N.W. at 684. The opinion overall, however, did not endorse primacy as strongly as this passage suggested. *See, e.g.*, E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?* 45 HARV. L. REV. 1145, 1157 n.31 (1932) ("Neither the language of the opinion nor the relief granted necessarily involves an unqualified acceptance of the maximum-profit-for-stockholders formula."); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 772–75 (2005) ("[T]he opinion never stated that directors' exclusive duty is to maximize shareholder profits."). But for most analysts, it is the, or one of the, key shareholder primacy rulings (despite some contrary tendencies in the opinion), and for critics, it is a case that needs to be explained away (as superseded, ambiguous, or not really pro-shareholder after all). *See* Elhauge, *supra*, at 772–73; *cf.* Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285, 294–98 (2021).

The textually quoted passage is regularly invoked to understand the case. *See* CLARK, *supra* note 4, at 603 ("In a famous, oft-quoted passage . . . ."). For later Delaware judicial endorsement of the principle, see *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) ("Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders.").

7. Ford said the objective was to do "as much good as we can, everywhere, for everybody concerned . . . [a]nd incidentally to make money." M. Todd Henderson, *The Story of* Dodge v. Ford Motor Company*: Everything Old is New Again*, *in* CORPORATE LAW STORIES 37, 38 (J. Mark Ramseyer ed., 2009) (setting out an insightful analysis of the business background and strategic setting).

they needed to compete with Ford Motor or just to set up Ford profitably squeezing out the Dodge brothers—by buying them out at a low price.[8] A second explanation is the reverse, that the Dodge brothers wanted the dividend to deny Ford Motor the cash to build out the River Rouge factory.[9] A third explanation is business branding: Ford's public-oriented stance won the "hearts of ordinary American citizens."[10] In this view, the litigation posture was an instance of Henry Ford's intuitive and effective marketing. A fourth explanation is tax: the new income tax taxed dividends unfavorably compared to how it taxed other income.[11]

The prior paragraph sketches the *Dodge v. Ford* realpolitik as it now stands. Each explanation is plausible. Most are not mutually exclusive and, in my view, most must be part of the full story. But they are not more powerful than the explanation I develop next, and the existing accounts cannot, alone or in combination, fully explain the underlying transactions and Ford's litigation strategy.

## II. THE $5/DAY WAGE, THE MODEL T MONOPOLY, AND THE RIVER ROUGE EXPANSION

To understand *Dodge v. Ford*, one must first understand Ford Motor's monopoly and the labor and wage policy Ford pursued to keep it. The company

8. The Dodge brothers so stated: by "increasing . . . capital investments [and] *by withholding the dividends from stockholders to which they are entitled*, the necessary result will be the destruction of competition." *Dodge v. Ford*, 170 N.W. at 673 (emphasis added). Ford Motor's dividends were integral, it is thought, to the Dodge brothers' financing. Alan M. Weinberger, *Henry Ford's Wingman: A Perspective on the Centennial of* Dodge v. Ford, 14 N.Y.U. J.L. & BUS. 1013, 1028 (2018). While surely the Dodges would welcome more cash, their actual financial strength belied their litigation posture. From 1915 to 1919 (when they finally received the bulk of the ordered dividend), their physical volume increased by a factor of eight and their sales volume by a factor of ten. CHARLES K. HYDE, THE DODGE BROTHERS: THE MEN, THE MOTOR CARS, AND THE LEGACY 113 (2005).

9. The first explanation is plausible but its centrality for Ford somewhat muted, since the Dodge brothers were going for a more upscale market and Ford for a mass market. Henderson, *supra* note 7, at 56 (by 1916, the Dodges' auto company was successful and could raise funding externally); Weinberger, *supra* note 8, at 1027 (the Dodge "brothers resigned as directors [of Ford Motor] to manufacture their own car, large and more expensive than the Model T" and called their car, according to VINCENT CURCIO, HENRY FORD 93 (2013), in contrast to the Model T, "a real automobile"). In 1914, Ford's Model T sold for not much more than half of the Dodges' prime auto and the Dodges emphasized their car's steel construction and more powerful engine. *See Dodge Celebrates Century of Automobiles*, COLUMBUS DISPATCH (Dec. 18, 2014), https://www.dispatch.com/article/20141218/news/312189756.

Still, once both companies were in the car business, either could have shifted its target market into the other's. For some car buyers, price traded off against quality such that the buyer could have bought either car. And a basic squeeze-out explanation could still have been in play. That is, Ford had the incentive to pay the Dodges as little as possible even if the Dodges were not otherwise in the car business. See below for the limits of even the basic squeeze-out explanation.

10. "This enhanced the Ford legend and . . . expanded the market for 'Ford' cars." Henderson, *supra* note 7, at 69 (quoting STEVEN WATTS, THE PEOPLE'S TYCOON 258 (2006)).

11. Weinberger, *supra* note 8, at 1036.

had a monopoly, and it had a dire labor problem. If the company did not solve its labor problem, it is unclear whether its monopoly could continue.

On the basic monopoly: the company's 1912 profits were an astounding 132 percent of tangible assets.[12] Ford Motor "had emerged as a near monopoly in the production of . . . relatively inexpensive cars . . . ."[13] It had a ninety-six percent market share of the popular car market and half of the total unit production of cars in the United States; the Model T had no direct competition.[14]

At the same time, Ford Motor Company faced powerful labor pressure—many workers would not show up every day at regular hours, with the no-shows thereby disrupting the assembly line—and, perhaps the gravest threat to Ford Motor and its assembly line, the company faced incipient efforts of a radical union to organize and unionize the autoworkers. To deal with these two pressures, Ford Motor boosted the wage rate for its assembly-line workers to $5/day wage—a tremendous salary then for a worker.[15] More than ten thousand applicants lined up to apply day after day for the $5 wage.[16]

These business aspects of Ford Motor and Ford's dispute with the Dodges seem unconnected to one another, but they are not. In the next paragraphs, I braid together (1) Ford's stated motivation in *Dodge v. Ford* to do good for his workers and the public and (2) the $5/day wage with (3) Ford Motor's profitability and monopoly power—all of which arose around the same time. Ford Motor cut back its dividend in 1916, and the Dodge brothers sued soon thereafter; the big wage was first announced in January 1914. And "[i]n 1913, [the year just prior,] Ford began . . . construction of the world's largest factory . . . near the Rouge River . . . ."[17] A company with a factory of such scope would need good labor

12. Daniel M. G. Raff & Lawrence H. Summers, *Did Henry Ford Pay Efficiency Wages?* 5 J. LAB. ECON. S57, S64 (1987). Interest rates today have investors needing only a two or three percent return. With riskier assets like those in the auto industry back then, the expected return was more than two or three percent, but 132 percent was still exceptionally high—more than doubling the money invested in a single year. And 1912 results were before the assembly line further boosted profit.

13. *Id.*

14. *Id*. at S64. The Michigan court opined that Ford Motor's action did not make it an actionable monopoly under the antitrust laws. *Dodge v. Ford*, 170 N.W. at 681. To the extent Ford Motor had, or with the expansion would be, a monopoly, it was one that "accrue[d] to a concern which makes what the public demands." *Id.* The more modern phraseology would be that its market power arose from Ford Motor's "skill, foresight, and industry."

15. LAWRENCE H. SELTZER, A FINANCIAL HISTORY OF THE AMERICAN AUTOMOBILE INDUSTRY 387–88 (1928).

16. Daniel M. G. Raff, *Wage Determination Theory and the Five-Dollar Day at Ford*, 48 J. ECON. HIST. 387, 389 (1988); *Henry Ford Explains Why He Gives Away $10,000,000*, N.Y. TIMES, Jan. 11, 1914 (§ Mag.), at 1, 3. The $5/day went to workers who displayed lifestyle characteristics that Ford preferred. MAX KOCH, CAPITALISM AND CLIMATE CHANGE 54 (2012).

17. Andrew E. Kersten, *Book Note*, 30 MICH. HIST. REV. 213 (2004) (reviewing FORD R. BRYAN, ROUGE: PICTURED IN ITS PRIME, COVERING THE YEARS 1917-1940 (2003)). Bryan describes an ongoing process of Henry Ford and the company's senior managers from 1913 to 1916 of investigation, planning, and land acquisition,

relations. When the River Rouge factory was completed, "[t]he 68,000-strong River Rouge workforce was the largest at any industrial facility in the United States (and quite possibly the world)."[18]

Multiple explanations for the $5/day wage have been offered. Proponents of economic efficiency say it could have made workers more productive because they would fear losing their jobs, which at $5/day were largely irreplaceable.[19] Or the high wage made them more productive because workers with a generous wage gave back that value to the company by being more energized and motivated on the assembly line.[20] Given the history of high job turnover at Ford, a productivity theory is plausible,[21] although respected accounts conclude that Ford Motor had substantially resolved its turnover and absenteeism problem before it launched the $5/day.[22]

A darker explanation could be in play. It is that Ford paid the $5/day wages to buy the company's workers away from the Wobblies, a radical labor union seeking to organize Ford's assembly line workers,[23] which had organized "spectacular strikes" elsewhere in the Midwest in 1913, including strikes, sometimes violent, at Ford suppliers like the Firestone tire company,[24] and which espoused for workers a "conscientious withdrawal of efficiency" and "striking on the job."[25] Henry Ford was anti-union and Ford Motor later had a reputation for meeting unionization efforts with company-initiated violence.[26] The $5/day arose after decades of labor strife in the United States and, an associate of Ford at the

---

culminating in a November 1916 board resolution on the River Rouge facility—just about when the Dodge brothers sued. BRYAN, *supra*, at 16–20.

18. Joshua B. Freeman, *Giant Factories*, 72 LABOUR / LE TRAVAIL 177, 188–89 (2013) (Can.).

19. *Id.*; Jason E. Taylor, *Did Henry Ford Mean to Pay Efficiency Wages?* 24 J. LAB. RSCH. 683, 685 (2003).

20. *See, e.g.*, George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543 (1982) (theorizing how above-market wages act as a gift in exchange for workers doing more than the minimum work); Janet L. Yellen, *Efficiency Wage Models of Unemployment*, 74 AM. ECON. REV. 200 (1984) (describing models of wages and productivity during periods of unemployment).

21. Raff & Summers, *supra* note 12, at S65, S67; M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 588 (2009).

22. ALLAN NEVINS, FORD: THE TIMES, THE MAN, THE COMPANY 37, 50 (1954). Even if resolved, Ford could have wanted to make sure the resolution did not unravel.

23. Raff, *supra* note 16, at 397 ("Ford paid the five-dollar day, [an executive aide] reported being told by Henry, to beat the Wobblies."); N.Y. TIMES, *supra* note 16 (the unions, Ford said, "have never succeeded in organizing our factory. We pay better than anybody else"). *But see* Taylor, *supra* note 19, at 690–91 (the Wobblies were already in decline when Ford announced the $5 per day wage).

24. STEPHEN MEYER, THE FIVE DOLLAR DAY: LABOR MANAGEMENT AND SOCIAL CONTROL IN THE FORD MOTOR COMPANY 1908-1921, at 93 (1981).

25. *Id.* at 92.

26. COLLEEN BURCAR, IT HAPPENED IN MICHIGAN: REMARKABLE EVENTS THAT SHAPED HISTORY 91–92 (2010). The "battle of the overpass" is well known to labor historians and organizers. Ford Motor's security people attacked union organizers, including famed Walter Reuther, on the footbridge to the River Rouge plant. *Id.*

company, stated that "Mr. Ford said he would lick the I. W. W. by paying the men $5 a day."[27]

The Wobblies ultimately failed to organize the Ford workers in the 1910s, but Henry Ford could not have known when the effort started that unionization would not succeed. Whether the $5/day wage rate was the reason they failed is hard to determine.[28] "Ford's wage-setting policies probably involved a substantial component of rent sharing" of Ford Motor's monopoly profits, two economists tell us.[29] A Wobblies-led strike at Studebaker's auto company in 1913 ended after a week. It brought shorter working hours, and was associated with unionization fears among the Detroit industrialists[30]—was it the beginning of union success, as it could have seemed, or the end of it?

Keep in mind here that there are two ways to interpret Ford's charitable expressions. If the rent sharing was optional on Ford's part, a charitable Henry Ford was being generous, in line with his *Dodge v. Ford* testimony; but if the rent sharing was necessary for Ford to keep the monopoly—because, say, cars could not be produced if labor was restless and $5/day was needed to keep the workers working well and to buy them away from the union—then the monopoly and the concomitant monopoly profit were jointly produced by labor and Ford, each with significant bargaining power over how to divide it.

The next step in laying down our foundation for fully understanding *Dodge v. Ford* is to connect Ford's labor problem to the shareholder primacy lawsuit, and to view the two groups, stakeholders and shareholders, as grappling with one another to capture a share of Ford's monopoly profits.[31] Ford could have taken a property perspective in the corporate lawsuit—an early but now weakened justification for shareholder primacy: "It's my company and I'll do with it what I want," he could have argued, potentially convincingly in the 1910s. He could have invoked the business judgment rule—strong today, maybe less powerful back

27. Nevins, *supra* note 22, at 537. The American Federation of Labor then sought to organize Ford in 1914 and attributed their failure to the $5/day, which was announced in January 1914. *See* MEYER, *supra* note 24, at 93.

The Wobblies' official name was the Industrial Workers of the World.

28. Raff, *supra* note 16, at 396–98. That is, the $5/day could have told Ford workers that the company would come through for them and they had no need of a union for a good wage. And it's possible that the symbolism of a successful manufacturer paying well made more industrial workers in the Midwest amenable to the idea that raw capitalism would come through for them. In the technical vocabulary, the failure first of radical unionization at Ford Motor, and perhaps more widely, could have partly been endogenous to Ford's $5/day.

29. Raff & Summers, *supra* note 12, at S60. The "rent" in econ-speak is from Ford's high profits. It is the excess profit beyond what the company needed to stay in business. An economic "rent" can come from market power, from greater efficiency, or from an inexpensive resource that others lack.

30. Nevins, *supra* note 22, at 379, 522 ("The I.W.W. for a time alarmed Detroit employers").

31. Some of that wrestling could well have occurred in Henry Ford's mind as he considered how to weaken unionization and assure that workers kept up the pace as cogs on his assembly line.

then—to justify withholding dividends to build the unprecedented River Rouge factory, which he expected to be profitable. He instead took a broad corporate purpose perspective, saying that he sought both to keep Ford Motor's workers employed and well paid, while providing the broad citizenry with access to a good, basic, mass-produced, and affordably-priced car.[32]

This monopoly-with-a-purpose perspective helps to explain two key elements of the *Dodge v. Ford* transactional foundation. First, it explains why Henry Ford spoke not of pro-stockholder business judgment but of benefiting stakeholders. He said he was sharing profit with his $5/day employees—dividing up Ford Motor's monopoly profits with his workforce.[33] Second, the stakeholder focus justified Ford Motor's decision to slash dividends and instead pay to keep employment up[34] and produce attractively priced cars for the American masses. For a business owner with a profitable monopoly facing powerful union organization pressures (and facing the new Washington-based antitrust machinery), justifying himself with a broad corporate purpose was better than talking about corporate profits, shareholder dividends, and business judgment. Ford was allocating to his employees and away from his shareholders a slice of his monopoly rectangle (to refer to the shape from the economist's diagram of what a monopolist takes from consumers in a monopolized market[35]). And perhaps equally realistically, Ford could not have built and kept that monopoly unless he had sufficient labor peace, with the $5/day wage being his main way to achieve it.

And besides, a public-regarding litigation stance could have been needed to put him in good stead with newly active antitrust forces. The Clayton Act, the Federal Trade Commission ("FTC"), and the Supreme Court had recently entered the antitrust picture, with the Court having ordered the breakup of Standard Oil earlier in that decade[36] and with the Clayton Act and the founding of the FTC having just passed into law. In New Jersey, Woodrow Wilson had pushed corporate reforms through the legislature that were aimed to impede corporate monopoly. The Dodge brothers' complaint asserted that a "necessary result [of the capital investment] will be the destruction of competition on the sale of [low-priced

32. N.Y. TIMES, *supra* note 16 ("We are trying to do something that we consider for the good of a lot of people . . . . [B]etween 20,000 and 30,000 [workers] should be contented and well fed . . . . We shall continue to make our cars better and cheaper . . . .") (internal quotation marks omitted).

33. Raff, *supra* note 16, at 387.

34. *Cf.* Taylor, *supra* note 19, at 684 (Ford subscribed to the "high wage doctrine"—that high wages "increase[d] aggregate demand, production, and employment"); HENRY FORD, MY LIFE AND WORK 126–30 (1922) ("It was . . . an act of social justice . . . . [P]aying good wages is the most profitable way of doing business.").

35. For those unfamiliar with the term, at its core, it is just the monopoly profit. The "rectangle" indication comes from the economist's supply and demand graphic. The monopolist raises its price above its costs, and, graphically, this forms a rectangle (of excess profit on the y-axis times the quantity sold on the x-axis).

36. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

cars and] . . . a complete monopoly in the manufacture and sale of such cars."[37] The trial court then enjoined further construction of the River Rouge facility[38] (but was reversed on appeal). Half of the original complaint and half of the lower court's relief depended on the monopoly channel.

Today, Ford could have readily justified his action as his business judgment as to how best to pursue corporate profit—and plausibly could have done so then. Multiple explanations could have buttressed that business judgment: employee motivation; compromising with a shadow unionization effort; or buying a beneficial public image—branding. But articulating a broad purpose—as Ford did—rather than a calculated business judgment would have been more effective back then if Ford's overarching goals were to keep employees loyal, motivated, and not unionized, and to impress buyers of the Model T with a vision of Ford Motor as a servant of the car-buying public and the company's employees, and not as a grim profit machine. That is, for Henry Ford to articulate what might well have been a main but cynical aspect of his business purpose—"I sought to beat back the Wobblies so that I could keep the assembly line, my great and hugely profitable monopolistic innovation, running"—would have been a poor way to maintain labor peace and keep the car-buying public grateful, and not have been well designed to keep the antitrust authorities away.[39]

Henry Ford's trial testimony presages modern rhetoric about corporate purpose and the reality that firms in uncompetitive markets are better able to facilitate broad purpose. After all, Ford was reaping monopoly profits, but continued monopoly profit for Ford Motor was not assured, and his best strategic choice was to share some of these monopoly profits with his employees. The situation in a sense evinces a coalition—a team—because Ford, under labor pressure, likely *had* to split his monopoly profits with his workers.[40] While team

37. *Dodge v. Ford*, 170 N.W. at 673 ("in violation of the State, Federal and common law"); Henderson, *supra* note 7, at 60.

38. "The owning, holding or operating by . . . Ford Motor Company . . . and the using or appropriating [of] any funds . . . of said defendant . . . for a smelting plant or blast furnace . . . now in course of construction on or near the River Rouge . . . is without authority of law and is permanently and absolutely restrained and enjoined." *Dodge v. Ford*, 170 N.W. at 487.

39. Thus, astute analysis of how *Dodge v. Ford* would play out *today* shows that a modern CEO would be counseled on the business judgment rule and the CEO would emphasize the pro-profit basis for the decisions—possibly even to the point of dissembling, although it should be easy for a CEO to believe that pro-social branding and motivated employees make for a better company. *Cf.* Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 180 (2008) ("CEOs who testify in depositions and trials [on such issues today] are better coached and more willing to dissemble than Henry Ford was.").

40. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). Blair and Stout's team production theory is more attractive normatively than the coalition-for-monopoly outlined in the text. In Blair and Stout's original team production conceptualization, more value is being created for society by the team. In the interpretation here of *Dodge v. Ford*, the value is being created for the team, partly at the expense of the outsiders. The positive connotation could be recaptured if we thought that the assembly line itself needed team-type compromises and governance to succeed.

production[41] can be, and is, seen as a principled way to foster a more effective organization, there is no good reason why the concept could not also be adapted to a labor-owner coalition to facilitate a monopoly's success. The Ford team was not an independent board allocating profit (which is the approximate team production conceptualization[42]), but an entrepreneur understanding that if labor was not with him, the assembly line would stop dead.[43]

## III. THE SQUEEZE-OUT

But can the underlying *Dodge v. Ford* transaction be explained otherwise? In part, yes. In full, no. The usual realpolitik explanation is that Henry Ford tried to squeeze out the Dodge brothers by withholding dividends—and the dividend reduction is seen as the gravamen of the lawsuit. The Dodge brothers, denied cash from the car company, would then sell their stock back to Ford at a below-true-value price.[44]

Squeezing out the Dodges surely pleased Ford. But a full transactional perspective must explain three elements: (1) why Ford Motor Company was so low on cash by the end of the decade, (2) why Ford pushed the public purpose explanation for his actions instead of a business judgment rationale, and (3) the

41. *Id.* at 265–319.

42. *Id.*

43. While the team was splitting profits, it was not splitting governance. As Henry Hansmann showed, organizations can easily suffer dysfunction when the governing entity is riven by sharply different interests. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 288–91 (1996). In Ford Motor, labor shared the profits (in Henry Ford's formulation of what he was doing) but not formal governance rights. Roughly contemporaneous German post–World War I turmoil led to precursor institutions to modern codetermination, with formal labor representation in the corporate boardroom—a sharing of governance rights.

44. Marc Hodak, *The Ford Squeeze-Out*, N.Y.U. LEONARD N. STERN SCH. OF BUS. (2007), www.ssrn.com/abstract=1011924 [https://perma.cc/E8YR-T7NY]; Henderson, *supra* note 7 (discussing without endorsing the squeeze-out interpretation); CLARK, *supra* note 4, at 604 ("Ford may simply have wanted, by turning off the faucet of financial return, to weaken the position of the Dodge brothers so that he could later get them to sell their stock to him more cheaply. . . . [T]he decision to suspend dividends could have been one step in a . . . squeezeout plan."); Geoffrey Miller, *Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases*, 2009 MICH. ST. L. REV. 831, 835–37; James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 499 (2015); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 315 (1998) ("[The] refusal by Henry Ford to pay dividends . . . is the quintessential squeeze-out technique . . . . *Dodge v. Ford Motor Co.* is best viewed as a minority oppression case."); Weinberger, *supra* note 8, at 1014 n.6. Ford Motor was not a public company then. Hence, the Dodge brothers could not simply sell their shares on a stock exchange to investors who could wait for dividends later.

The Dodge brothers asserted that Ford Motor's expansion and $5/day were setting up the conditions to disturb the value of the Dodges' stock in Ford Motor: "The whole scheme is to bring about such a relation of wages, revenue and cash requirement of the business as to preclude dividends of a reasonable return upon the fair value of the capital stock." *Dodge v. Ford*, 170 N.W. at 679.

particulars of the ultimate, post-litigation transaction in which Ford bought out the Dodges.

*Ford Motor's dwindling cash*. The squeeze-out explanation cannot explain all three foundational elements of the *Dodge v. Ford* dispute. On (1), Ford did not stop paying dividends because he was squirreling away the cash in, say, Cayman Islands accounts. The company was low on cash because of the two linked business decisions: first to pay the $5/day wage and, second, to build the River Rouge factory—reported to be the world's largest when completed.[45] These were huge expenses, and the squeeze-out explanation cannot account for Ford's decision to incur them.

Here's what I mean: the $5/day wage was costing Ford about $10 million per year.[46] If one thinks of this as Ford Motor committing to pay an above-market wage rate, then that commitment could be conceptualized as a large investment by Ford into its labor force, to be paid for (and its value realized) over the years to come. The present value of this added expense stream of $10 million annually, capitalized at five percent or ten percent, made it at its inception a commitment by Ford to invest up to $100 or $200 million in autoworkers' human capital (or in their loyalty to Ford Motor or in their willingness to come to work day after day to monotonously turn the bolts at their stations on the assembly line). And the River Rouge facility cost hundreds of millions of dollars as well.[47] If Ford Motor continued to pay dividends at its 1915 rate, it would have run out of cash. Figure 1 illustrates.

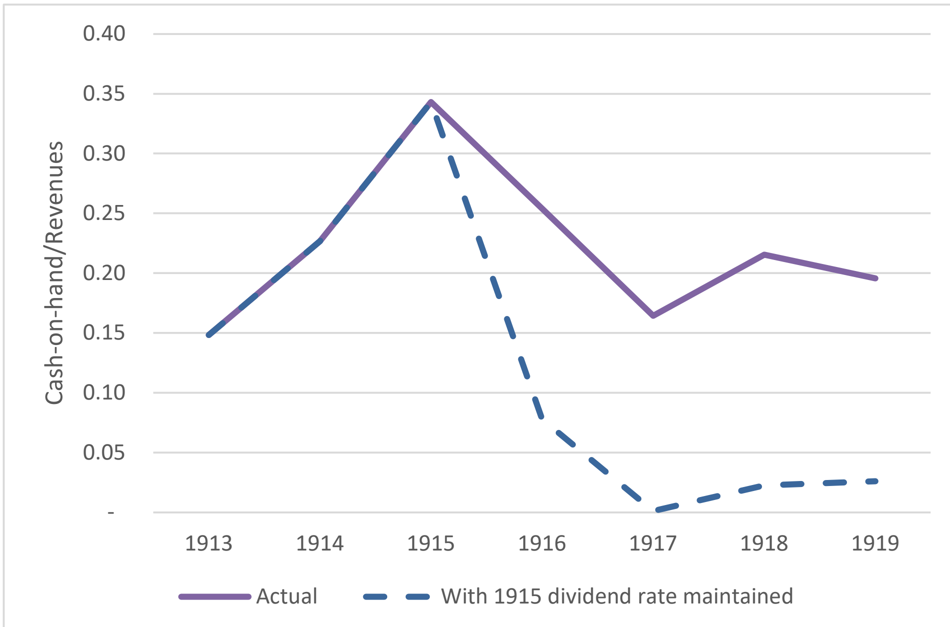
45. GREG GRANDIN, FORDLANDIA 43 (2009) (the facility had "sixteen million square feet of floor space, ninety-three buildings, close to a hundred thousand workers, a dredged deepwater port, and the world's largest steel foundry"). Ford Motor had cash in 1916 when the suit was filed; but with the River Rouge spending plans, it would use that cash. *Id.* And transactionally, Ford Motor could have borrowed or raised new equity to obtain the cash; Ford's aversion to outside financing and financial influence could have played a role here.

46. MEYER, *supra* note 24, at 109 (estimating that the $5/day cost Ford Motor about $10 million annually).

Ford Motor employed fifteen thousand workers when it doubled wages from $2.50 per day to $5.00 per day, and it planned to hire four thousand new workers. *Id.* At three hundred workdays annually (from a fifty-week year of six-day workweeks), that wage rate raise amounted to 19,000 x 300 x $2.50, or $14,250,000 annually.

47. *See* SELTZER, *supra* note 15, at 114 (from 1918–1920, Ford invested $66,453,345; $79,188,320; and $127,210,862). Surprisingly, the literature does not reveal a precise cost, with the Michigan and Ford archives saying that none has been successfully calculated. (Ford Motor was a private company then.) In 1916, just before the River Rouge massive construction began, Ford had plant, machinery, and equipment of $65 million and cash of $52 million. By 1927, Ford had plant, machinery, equipment, and other tangible assets exceeding $300 million. ANNUAL REPORTS OF FORD MOTOR COMPANY (1916, 1927).

FIGURE 1: FORD MOTOR'S DIMINISHED CASH IF IT MAINTAINED ITS 1915 DIVIDEND RATE




The above Figure shows in the solid line Ford Motor's evolving cash position as it grew, began to build out the River Rouge facility, and raised its wage rate. Its actual cash position as a percentage of revenues declined from its 1915 high. And had it continued its 1915 dividend rate as a percentage of profits, it would have declined more precipitously to a near-zero cash balance by 1917, as the dashed line shows. The Dodges asked that "at least 75 per cent. of the . . . cash surplus [be dividended] and for the future that [Ford Motor] be required to distribute all of the earnings of the company except as may be reasonably required for emergency purposes." *Dodge v. Ford*, at 474. The appellate court ordered Ford Motor to pay out half of its $50+ million cash position in 1916. Had Ford Motor continued paying dividends at that rate, Ford Motor's cash level would have declined almost as severely as the dashed line. True, the lower court presumably would have stopped ordering dividends when the cash position declined, so the bottoming out of the cash in 1917–1918 exaggerates the impact. The year-to-year data (and underlying sources) are specified in Table 1.

But the ultimate buyout of the Dodge brothers cost Ford $25 million (with the total payout to all minority stockholders being $106 million).[48] Yet the Dodges early on offered to sell their stock to Ford for $35 million: that should be seen as an opening offer that was only $10 million more than the ultimate purchase price.

48. CURCIO, *supra* note 9, at 106, 120.

While it is hard to ascertain how much benefit Ford obtained for himself in buying out the Dodge brothers by his deploying (nearly) all his cash into assembly-line human capital and the physical capital of the River Rouge plant, it is also hard to imagine that the squeeze-out benefit to Ford of the *Dodge v. Ford* decision was close to the hundreds of millions of dollars Ford Motor was spending on labor and expansion. Henry Ford had many negative characteristics. Wasting money was not one of them. For Ford to spend so much in an unheard-of capital expansion and human capital investment in order to save \$10 million in a better squeeze-out price from Dodges (and maybe five times as much from buying out the other minority stockholders) would seem to have been unwise.

It is at least plausible and, when we just consider the numbers, even likely that Ford had a business plan that involved high pay to employees and steep vertical integration. The skipped dividend was a *consequence* of the business strategy, with the buyout not itself the primary strategic aim. That is, the strategy was not centrally aimed at squeezing out the Dodges by withholding dividends but to spend the cash on labor and the River Rouge facility. That strategy then constricted Ford's cash and his capacity to pay generous dividends.[49] I calculate in Table 1 Ford Motor's cash position if it had kept up its 1915 dividend rate as a portion of profits for 1916–1919. The company's cash position would have been dangerously depleted—nearly zero in 1917 and not much more subsequently.

Ford Motor could not have sustained both its prior dividend rate and its business plan. While the Michigan Supreme Court *said* it was not interfering with Ford Motor's baseline business strategy (of expanding production, vertically integrating, and lowering car prices), that strategy, the Ford board could have concluded, was best implemented by keeping Ford Motor's cash-to-revenue ratio steady.[50] In effect, the court did not question Ford's business judgment on

49. A modern finance perspective—from the Modigliani-Miller hypotheses—would note that if transaction costs were low enough, skipping the dividend was only one way to finance River Rouge and the \$5/day. Borrowing the money—which Henry Ford, scornful of bankers, only did reluctantly—was one possibility. Another Modigliani-Miller transactional channel could have been for Ford Motor to sell new equity—which Henry Ford, entangled with minority shareholders, presumably would not favor. *See generally* Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958).

50. "Defendants say, and it is true, that a considerable cash balance must be at all times carried by such a concern." *Dodge v. Ford*, 170 N.W. at 685. And Ford asserted "that personally he has always been in favor of maintaining very large cash balances; that he has always been opposed to borrowing money and that he has urged the policy of paying cash for . . . expenses." *Id*. at 676 (internal quotation marks omitted). Ford further testified

> that the expenditures of the Ford Motor Company from day to day are very great and its requirements of cash are enormous. He shows that if . . . there should be a sudden falling off of business . . . that it would require great sums of money to carry on the business of the company, and his idea is to be well fortified against emergencies.

*Id*. (internal quotation marks omitted).

And, related to the bilateral quality of the monopoly:

operations but, when ordering the dividend, it *did* question and reverse the Ford board's judgment as to the right financial strategy needed to support the board's operational decision.

One might think Ford Motor could still have paid out a smaller dividend—and indeed the Michigan Supreme Court so ordered, with the dividend scaled to be half of the company's cash-on-hand. However, Ford Motor's cash as a percentage of revenue was not rising across the relevant years—because it was sinking the cash into the River Rouge facility and its $5/day employees. Ford Motor's business judgment—to switch to a no- or low-dividend strategy—could well have been tied to its operational judgment, in that it needed to stop dividends to prevent a further erosion of cash-to-revenue unless substitute financing was readily available. (It's common even today, with stronger financial markets than Ford faced, for companies to favor financing new investment by retaining earnings by keeping dividends low over financing it by borrowing or selling new equity.[51]) Nevertheless, the Michigan Supreme Court affirmed the lower court's order of a dividend, which amounted to nearly half of Ford Motor's 1916 profit. Again, the effect was that the Michigan court would not disrupt Ford Motor's operational judgment but did overturn the company's business judgment as to how much cash the company needed.[52]

To see this more precisely, examine the 1916 numbers in Table 1. Ford Motor's cash position was at $52.55 million in 1916, well above its 1913 to 1915 average of $27 million. The court-ordered dividend of roughly $25 million would not have left the company with grossly less cash than its historical average. (The average was about $27 million, and if the ordered dividend had been paid in 1916, Ford Motor would have had about $25 million in cash.) But Ford Motor was twice the size in 1916 that it had been, as the $206.9 revenue number (about twice that of its 1913 to 1915 $110 average) indicates. A company twice the size could plausibly need twice the cash, which the court would not let Ford Motor retain (if its order had been effectuated in real time).

> This defendant is opposed to any policy which would necessitate the discharge of large numbers of employees in case there should be a sudden depression of business . . . and this defendant believes that the latter methods and policies [on cash balances] ultimately redound to the best financial interests of the company and its stockholders.

*Id*. at 676–77 (internal quotation marks omitted).

51. Stewart C. Myers, *Determinants of Corporate Borrowing*, 5 J. FIN. ECON. 147 (1977).

52. Henry Ford was not silent on this issue, as we've seen: "Defendants say, and it is true, that a considerable cash balance must be at all times carried by such a concern." *Dodge v. Ford*, 170 N.W. at 685.

TABLE 1: ANALYSIS OF FORD MOTOR COMPANY'S DIVIDEND PAYOUTS[53]

| | 1913 | 1914 | 1915 | 1916 | 1917 | 1918 | 1919 |
|---|---|---|---|---|---|---|---|
| **Revenue ($ MM)** | 89.10 | 119.50 | 121.20 | 206.90 | 274.60 | 308.70 | 305.60 |
| **Cash-on-hand** | 13.23 | 27.09 | 41.57 | 52.55 | 45.13 | 66.55 | 59.83 |
| **Cash/Revenue** | 0.15 | 0.23 | 0.34 | 0.25 | 0.16 | 0.22 | 0.20 |
| **Profit ($ MM)** | 25.00 | 30.30 | 24.60 | 60.00 | 26.70 | 30.30 | 24.90 |
| **Cash/Profit** | 0.53 | 0.89 | 1.69 | 0.88 | 1.69 | 2.20 | 2.40 |
| **Dividends ($ MM)** | 11.20 | 12.20 | 16.20 | 3.20 | 9.20 | 5.20 | 24.20 |
| **Profit portion distributed** | 0.45 | 0.40 | 0.66 | 0.05 | 0.34 | 0.17 | 0.97 |
| **If 1915 dividend of 66% of profit were maintained in 1917, 1918, and 1919, dividend payouts would have been ($ MM):** | | | | **39.60** | **17.62** | **2.00** | **16.43** |
| **If 1915 dividend rate of 66% of profit were maintained, then all else unchanged, cash-on-hand would have been ($ MM):** | | | | **16.15** | **.31** | **6.93** | **7.98** |
| **If 66% payout persisted, cash/revenue would have been:** | | | | **.08** | **.00** | **.02** | **.03** |

This Table displays on the second line Ford Motor Company's cash during the critical period. The Dodge brothers sued in 1916, when the prior year's dividend payout was sixty-six percent of profits. Had Ford Motor kept up that dividend rate as a portion of profit through 1919, the year of the appellate decision, the company's cash would have been nearly depleted by 1917, not the healthy actual $45 million.

53. Sources: for cash-on-hand, the sources were Ford Motor Company's annual reports for the relevant years (which are quite abbreviated, often only a single page), available from the Ford library and D'Arcy Becker, Marcy Orwig & Aimee Pernsteiner, *Symbolic Versus Substantive Regulatory Requirements: The Case of Ford Motor Company in the Early 1900s*, 42 ACC'T HISTORIANS J. 35, 46 (2015); for revenues, profit, and dividends paid, Henderson, *supra* note 7; for the remainder, calculated. The 1919 payout was less than the original amount ordered—half of Ford Motor's 1916 cash—because the Michigan Supreme Court allowed that amount to be reduced by the small dividends paid during the interim from the lawsuit's 1916 filing.

The second to last row shows how Ford Motor's cash would have deteriorated had it kept up its 1915 dividend rate as a portion of profit. In 1915 Ford Motor paid sixty-six percent of its profits out in dividends (from $16.20/$24.60), and if it continued that rate in 1916, it would have paid a dividend of $39.6 million (from .66*$60 million), instead of the $3.2 million dividend that it paid. That larger dividend would have left Ford Motor with cash of only $16.15 million, less than half of its balance in 1915, although the company had nearly doubled its sales from 1915 to 1916. Had Ford Motor continued to pay sixty-six percent of profits as dividends in 1917, 1918, and 1919, then (unless it obtained other financing) its cash position would have approached zero in 1917 and been much less than it had been in the early 1910s, when it was a much smaller company. It had to change its 1915 financial strategy—it needed cash from new equity, from new borrowing, or from retained earnings—if it was going to expand.

This need to change its 1915 dividend strategy can be seen in the last row, which shows the cash/revenue ratio if the sixty-six percent of profit dividend rate persisted. That ratio would have been eight percent in 1916, near zero in 1917, and two or three percent in the two years thereafter. In 1915 that ratio was thirty-four percent, and in 1916 it was twenty-five percent. (The order was that Ford Motor pay half of its cash in 1916 as a dividend; if that policy—half of cash paid as dividend—persisted, then Ford Motor's cash/revenue would have been almost as low in 1919 as the amounts calculated above. Of course, if the dividend size were revisited annually from 1917 to 1919, Ford Motor would presumably have been able to show the court a need to retain more of the profits, given its expenses and growth. The table exaggerates to show a maximum impact.)

That is, Ford Motor was expanding faster than its cash position, even after it cut back its dividend. And the dividend ordered by the trial court would, if implemented in real time, have left Ford Motor with somewhat more than about $25 million in cash, a position not grossly different from its level in the prior three years. But Ford Motor was nearly *twice* the size in 1916 (as measured by revenues), which plausibly would have demanded a near-doubling of its cash, not a halving.

To see the same issue otherwise, if the ordered dividend had been paid in 1916, Ford Motor's cash level would have been about $25 million, but as a proportion of revenue that year, its cash would only have been about ten percent, when its cash as a percentage of revenue had been at thirty-four percent in 1915. Ford Motor's breakneck expansion can also be perceived via the physical increase in production. Since Ford Motor was lowering unit prices sharply, its physical production was growing even more rapidly than its revenues: In 1911–1912, just before the assembly line was implemented, Ford Motor sold 78,000 cars. Five years later, in 1916–1917, just after the dividend was cut and litigation started, Ford Motor sold 730,000, a nearly ten-fold increase, with eight times as many employees.[54]

The Michigan Supreme Court cut back on the lower court's operational order, which had enjoined Ford's River Rouge expansion and forced cash out, as we've seen. While the lower court's order was the more intrusive—because it would have affected both operations and finance—it was more coherent than the appellate court's splitting of the baby (which affirmed the financial order and

54. ALLAN L. BENSON, THE NEW HENRY FORD 140–41, 169–70 (1923). Once the Dodges were gone, Ford raised the annual dividend from about $1,200,000 to about $9 million, still less than half the size of the original court-ordered dividend. *Id.* at 67, 70.

reversed the operational one). That's because the lower court's ordered operational cutback would have meant that Ford Motor would not need as much cash for building and wages. The appellate order is less coherent because it let Ford Motor expand as it wished, but stymied Ford Motor's preferred financing—retained earnings—for the expansion.

*Justifying expansion with public purpose*. So, Ford Motor was skipping a large dividend not simply because it was hoarding cash (and seeking to squeeze out the Dodges) but because it was expanding and needed to keep labor onboard. If Henry Ford's only goal was to squeeze out the Dodges, he could have tried harder to win the lawsuit, as the Michigan court's *Dodge v. Ford* decision *hurt* his ability to pressure the Dodge brothers to sell out. Ford *lost* the litigation, and the court ordered that Ford Motor pay dividends to the Dodges and the other shareholders. Having won the litigation, the Dodge brothers presumably could have returned to the Michigan courts to seek further dividend payment orders if Ford's dividend stinginess persisted and if the Dodges did not strike a deal with Ford to sell out.

That is, if Ford's main goal was to squeeze out the Dodge brothers, then his litigation strategy was bizarre. He refused to take what today would be the easy path—pleading business judgment as supporting the expansion in pursuit of shareholder profit[55]—and instead pushed forward his charitable explanation of sharing profits with his workers and providing services to the public:

> The record, and especially the testimony of Mr. Ford, convinces that [his] attitude towards shareholders [is that he had] dispensed and distributed to them large gains and that they should be content to take what he chooses to give. . . . [H]e 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. . . . [These] philanthropic and altruistic [sentiments] had large influence in determining the policy to be pursued by the Ford Motor Company. . . .[56]

55. "Mr. Ford declined the [court's] invitation to offer a business justification for his action." CHOPER, GILSON & COFFEE, *supra* note 4, at 210 n.60; *cf.* Macey, *supra* note 39, at 180. Modern CEOs thus could overemphasize the pro-profit reasons for their public-regarding actions—if they did in fact prefer charity to profit. I emphasize the opposite for Henry Ford: he had many profit bases for paying the $5/day wage, for investing in the River Rouge mega-factory, and for adopting the high-volume/low-price strategy. But for business reasons he overemphasized—dissembled?—the public-regarding justifications and downplayed the profit-based propellants.

56. *Dodge v. Ford*, 170 N.W. at 683–84. The judicial decision has Ford as the active party, not labor. Another way to see the background setting is that labor was making demands (under the shadow of potential unionization or the potential for poor productivity) and Ford was acceding, while giving his action a public-regarding patina.

If Ford wanted only to squeeze out the Dodge brothers at a price favorable to Ford, it would have been easier to bring forward the business judgment explanation. While the business judgment rule probably had not sunk into the corporate fabric back then as deeply as it has today, the Michigan Supreme Court judges were sympathetic to a business judgment justification,[57] but Ford would not give it to them.

*The source of the squeeze-out pressures on the Dodges*. In the end, the shareholder primacy aspect of the decision in *Dodge v. Ford* was *not* the vise with which Ford squeezed out the Dodge brothers. The Dodge brothers *won*, and the company had to pay the court-ordered dividend. Ford applied the most powerful squeeze-out pressure he had, but did so outside of the litigation channel. Annoyed that he lost the case and that, in his view, neither the courts nor the shareholders would let him run his company as he wished, Ford threatened to quit running Ford Motor Company. He resigned from the relevant positions.[58] Fear that Henry Ford, the gifted manager and herald of the assembly line, would disappear from Ford Motor Company (and possibly start up a wholly-owned rival automaker) seems to have been the central squeeze-out pressure on the Dodge brothers.[59]

Worse yet for the pure squeeze-out explanation for cutting the dividend, if Ford had been planning to squeeze out the minority stockholders all along, he planned for it poorly. By the time of the buyout in 1920, the money he paid to the $5/day employees and for starting the River Rouge build-out had left Ford Motor Company with a woefully low cash balance—a balance so low that he lacked the cash to buy out the minority stockholders. Ford Motor had to borrow big from

---

57. *Id.* at 684–85:

> We are not, however, persuaded that we should interfere with the proposed expansion of the business of the Ford Motor Company. . . . The judges are not business experts. It is recognized that plans must often be made for a long future, for expected competition, for a continuing as well as an immediately profitable venture. The experience of the Ford Motor Company is evidence of capable management of its [operational] affairs.

As I indicate in the text, the judges said they were not business experts but then became financial experts, ordering the dividend.

A modern court could scrutinize the entire fairness of a dividend that, even though facially affecting all shareholders proportionately, possibly affected shareholders differently if some had strong cash needs (i.e., the Dodge brothers, if they needed the cash to compete with Ford). If Ford Motor's dividend policy was designed to support Ford Motor's operating policies (the wage rate and River Rouge), then a modern court would ask whether the operating policy, if it survived an entire fairness review (as it did in *Dodge v. Ford*, although without the entire fairness vocabulary), would also justify the dividend policy—as keeping cash needed for operations handy—as well.

58. HODAK, *supra* note 44, at 22–23; CURCIO, *supra* note 9, at 105–06.

59. And perhaps had Ford persisted with the parallel company, he would have set up the Michigan courts for a different classic corporate decision, but this time on whether the mass production assembly line idea belonged to Ford Motor Company or to Henry Ford and whether his planned new car company would have been taking corporate opportunities that properly belonged to Ford Motor Company.

bankers far from Detroit,[60] a borrowing transaction that Ford had sought to avoid.[61] The resulting balance sheet instability almost knocked Ford Motor Company over during the unexpected recession of 1920 and 1921. Only through financial wizardry—essentially a forced borrowing from the company's dealers—was Ford Motor able to stabilize itself and move forward.

The pure squeeze-out explanation is thus inconsistent with too much of the transactional background to be Ford's primary motivation in the run-up to *Dodge v. Ford*. Without understanding Ford's $5/day wage rate, without highlighting his splitting of Ford Motor's monopoly profit with the company's employees, and without accounting for his pursuit of full vertical integration by spending cash to build out the River Rouge facility to further that monopoly, our conventional understanding of *Dodge v. Ford* and its transactional foundations is somewhere between incomplete and incorrect.[62]

---

60. SELTZER, *supra* note 15, at 111. Ford paid back the loan within a year. That is, he lacked the cash for the buyout but earned it subsequently. I do not want to push the textual point in this paragraph too hard, however. Being able to "plead poverty"—or at least a lack of cash—is a good negotiating tactic to justify a low payment, after all.

61. Ford Motor's stock buyback was indirect. Henry Ford formed a Delaware shell company, which borrowed to buy the Dodges' and other minority stockholders' stock. The Delaware company then merged with both the Michigan operating company and the company that held the Ford family's stock in the Michigan company. SELTZER, *supra* note 15, at 110–13. The indirect effect though was to use up company cash for the buyback.

The dividend and the buyback can be seen as a continuous M-M transaction. *See supra* note 49. In principle, the dividend should have lowered the value the Michigan company, but put into its shareholders' hands cash equivalent to the lowered value.

62. Other theoretical aspects of *Dodge v. Ford* need further exploration. The Dodge brothers had been Ford Motors' parts suppliers. As Ford sought vertical integration, their contribution declined, and it was more important to the organization that labor be loyal and productive—and be paid more. In effect, the composition of the Ford team was changing, with outside parts suppliers becoming less important and inside labor more important.

Tax developments in the 1910s are relevant. The Revenue Act of 1918 taxed dividends to the wealthy at a seventy-seven percent rate. That alone could explain Ford Motor's cutback in dividends by 1919, when *Dodge v. Ford* was decided. But alone it cannot explain what happened and why: first, the key transactions began in 1913, when Ford introduced the $5/day wage and began planning the River Rouge facility, whose construction broke ground in 1917. The 1913 tax rate was only a few percent.

Second, Ford Motor dropped its dividend payout in 1916, well before the tax rate rose so high. Ford Motor's last special dividend payment (the company then generally paid large special, and minor regular, dividends) was on October 13, 1915, when the highest tax rate on dividends was seven percent; the Dodge brothers sued on November 2, 1916, when the highest dividend tax rate was thirty-five percent. Revenue Act of 1916, ch. 463, 39 Stat. 756. In late 1917, the War Revenue Act raised the highest dividend rate to seventy-seven percent, and in 1919 the rate was pushed higher. War Revenue Act of 1917, ch. 63, 40 Stat. 300; Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919). The tax law's relevance then would just be that it impeded a rise in the payout rate. The most plausible anticipation date for the jump in the tax rate was well after the underlying 1913 and 1914 transactional events, in April 1917, when war was declared and the possibility of a tax rate increase publicly discussed. For the discussion of a war tax, see John W. Hillje, *New York Progressives and the War Revenue Act of 1917*, 53 N.Y. HIST. 437 (1972).

Third, the high tax rate on dividends can explain why Ford Motor retained its earnings, but cannot explain what it did with the retained cash—spending it on River Rouge and the $5/day. For the 1910s tax developments, see Steven Bank, *A Capital Lock-In Theory of the Corporate Income Tax*, 94 GEO. L.J. 889, 917–27 (2006). The transaction dates for Ford Motor are as reported in *Dodge v. Ford*, 170 N.W. at 668; s*ee also* Linda Kawaguchi,

# IV. WHY *DODGE V. FORD* RESONATES TODAY

Henry Ford did not keep his monopoly. Overextended financially by (1) the $5/day wage, (2) the River Rouge expenses, (3) the buyback of the Dodges and other minority stockholders, and (4) the court-ordered dividend, Ford Motor and Henry Ford were poorly positioned to weather the sharp recession of 1920–1921. Perhaps worse, Ford's marketing vision was of a single affordably priced car model for a broad segment of car buyers, made in a single vertically integrated facility along the River Rouge by well-paid, well-motivated, and non-unionized assembly-line workers.

That strategy and vision proved inapt and unsustainable.

*The twenties*. General Motors, a weak competitor in the 1910s, when it was just getting its manufacturing bearings, had a different marketing vision than Ford had in the 1920s. It differentiated its models, their status, and the auto finishes to suit different economic levels, selling premium cars to the well-to-do and ordinary cars to the less well-off.[63]

Not burdened by Ford Motor's financial commitments, General Motors weathered the 1920–1921 recession better than did Ford Motor and, by the end of the twenties, replaced Ford as the country's major auto manufacturer. The auto market began to take its modern oligopolistic shape. By the 1940s, Ford Motor was unionized and faced one of the country's most aggressive unions, the United Automotive Workers.[64]

*Post–World War II and the fifties*. The concept of monopoly providing the umbrella to share profits with employees persisted. After World War II, GM was de facto the automaker with significant market power that made it a near monopoly. The 1950s Justice Department was said to want General Motors, which had about half of the U.S. market, broken up.[65]

---

*Introduction to* Dodge v. Ford Motor Co.*: Primary Source and Commentary Material*, 17 CHAPMAN L. REV. 493 (2014).

63. Steve Blank, *Apple's Marketing Playbook Was Written in the 1920s*, ATLANTIC (Oct. 26, 2011), https://www.theatlantic.com/business/archive/2011/10/apples-marketing-playbook-was-written-in-the-1920s/247417 [https://perma.cc/9589-ZS2Q] (in the 1920s, "[w]ith the rallying cry 'a car for every purse and purpose,' GM positioned its car divisions . . . so they would cover five price segments — from low-price to luxury . . . [and] targeted each of its brands . . . to a distinct economic segment of the population").

64. *See, e.g.*, *The United Automobile Workers (UAW) and Ford Motor Company: Working Together*, FORD, http://ophelia.sdsu.edu:8080/ford/03-15-2014/our-company/heritage/company-milestones-news-detail/685-uaw.html (last visited Sept. 23, 2021) [https://perma.cc/2R94-5GZZ]; *Ford Signs First Contract with UAW on June 20, 1941*, UNITED AUTO WORKERS, https://uaw.org/ford-signs-first-contract-uaw-june-20-1941/ (last visited Sept. 23, 2021) [https://perma.cc/TW8C-8LF2].

65. *Anti-Trust Study of Auto Industry Is Started by U.S.—[Attorney-General] Brownell Tells Economic Club Explanation Is Sought for Growing Concentration*, N.Y. TIMES, Apr. 29, 1954, at 1; Harlan Fisk, *The Senate Report on General Motors*, NEW LEADER, Nov. 24, 1958, at 5 (Senate committee recommends "that the Justice Department investigate . . . whether to try to break up the GM empire"); ALEX TAYLOR III, SIXTY TO ZERO 15–16 (2010). At the time, GM had half of the U.S. auto market. TAYLOR, *supra*, at 15.

During this era, General Motors' labor strategy paralleled Ford's in the 1910s. GM's senior executives understood that with monopoly power, the critical issue for GM after World War II was to produce cars. Cost structure was important but secondary. So, GM was more willing than it otherwise would have been to settle labor disputes and strikes in ways favorable to labor. GM shared its monopoly profit with labor so as to assure that the company could sell cars. Consumers paid for GM's generosity to its labor stakeholders. (Or, looking to labor as the active actor, consumers paid for the fact that GM could not produce cars without a labor agreement and labor would not agree unless its pay and working conditions were better than GM would otherwise have provided. GM's monopoly profits were split with labor.)

This dynamic scaled up from a single (although large) firm and became an economy-wide phenomenon in the 1950s. It was American manufacturing's heyday, with other industries also characterized by oligopolistic structures like the "Big Three" or "Big Four" in auto manufacturing, steel, and other industries. In that kind of economy, large firms could act similarly to Ford in the 1910s by sharing profits with employees because, with competition weak in their industry, the firm that paid well would not be run out of business.

In the antitrust world, the 1950s American economy was thought to be beset by oligopolistic weak competition[66] and limited international competition in manufacturing. Antitrust academics sought to build out better practical ways to deal with oligopolistic pricing,[67] which was seen as the signature antitrust problem of the postwar decades.[68] In the corporate world, the statesman-like corporation—i.e., one that took care of its workers—was the concept that prevailed. Oligopolistic profits paid for that statesmanship.

In academic work, the quintessential 1950s view of the large corporation came in *The Corporation in Modern Society*, a volume edited by Harvard economist Edward Mason,[69] with contributions from the antitrust and corporate academic leaders of the time. "The proposition that a group of giant business

66. JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (1967); Carl Kaysen, *The Corporation: How Much Power? What Scope? in* THE CORPORATION IN MODERN SOCIETY 85, 89–90, (Edward S. Mason ed., 1959) (classifying the manufacturing, transportation, and finance sectors as oligopolistic, and public utilities and telephone communications as often monopolistic).

67. *See* Kaysen, *supra* note 66, at 98; Louis B. Schwartz, *Administered Prices, Oligopoly and the Sherman Act*, 12 SECTION ANTITRUST L. 17 (1958); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 58 (1964).

68. CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 110–11 (1959) (the "inability to cope with market power created by jointly acting oligopolists" is "[t]he principal defect of present antitrust law").

69. THE CORPORATION IN MODERN SOCIETY, *supra* note 66; *see also* Mark J. Roe, *From Antitrust to Corporate Governance? The Corporation and the Law: 1959–1994*, *in* THE AMERICAN CORPORATION TODAY 102, 102–27 (Carl Kaysen ed., 1996).

corporations . . . embodies a significant and troublesome concentration of power," wrote Carl Kaysen, one of the era's antitrust luminaries, "is the cliché which serves this [1950s] volume as a foundation stone."[70] Mason put his finger on the problem: The large American corporation was undoubtedly financially successful, but were workers, suppliers, and customers being treated well and getting their fair share? he asked.[71] Post–World War II, foreign competition was weak. Domestic manufacturing was concentrated and more core to the American economy then than it is today. And oligopolistic industry structure was pervasive.[72]

Unpack Mason's and Kaysen's thinking. The large firm—the Big Threes and the Big Fours in autos, steel, and elsewhere—had to pay their employees enough to be productive and effective. Kaysen and Mason must then have been thinking that a fair society should benefit those workers and other stakeholders more and that concentrated industry (1) was powerful and (2) had the wherewithal—oligopolistic profit—to distribute the bounty more widely. This was in large measure the Ford Motor setting that led to *Dodge v. Ford.*

When competitive forces only weakly constrained the big firms, corporations could better care for stakeholders (or at least not damage them) than when competitive forces tightly constrained firms from considering stakeholders unless doing so was profitable (or at least not costly). With Europe and Japan in the 1950s still recovering from their World War II destruction, international competitors did not constrain the domestic oligopolistic competitors.

*The sixties and seventies*. In the 1960s, competition increased. The domestic economy itself became more competitive and international manufacturers, primarily from western Europe and east Asia, vigorously competed with American manufacturing. From the 1950s to the 1970s, the HHI index—a common measure of industrial concentration—declined sharply, by one-half or more for eight major industries.[73] By the end of the 1970s, Chrysler Corporation, one of the "Big Three" automakers, which were facing relentless and effective German and Japanese auto competition, needed an unprecedented billion-dollar government bailout to survive. It is no coincidence, in my view, that Milton Friedman wrote his famous essay on the social responsibility of American business

70. Kaysen, *supra* note 66, at 85.

71. Edward S. Mason, *Introduction* to THE CORPORATION IN MODERN SOCIETY, *supra* note 66, at 11.

72. *Id.* at 20; Kaysen, *supra* note 66, at 85; *see also* Marshall Hall & Leonard Weiss, *Firm Size and Profitability*, 49 REV. ECON. & STAT. 319 (1967); William G. Shepherd, *The Elements of Market Structure*, 54 REV. ECON. & STAT. 25 (1972).

73. RAYMOND VERNON, STORM OVER THE MULTINATIONALS 81 (1977). To be sure here, modern academic thinking has it that the HHI level is not a strong indicator of competition vs. monopoly.

to produce profits for shareholders in 1970,[74] when competition was more substantial, or perceived to be more substantial, than it had been in prior decades.

*Today*. The *Dodge v. Ford* background anticipates modern corporate issues. Purpose pressure, corporate social responsibility, and attention to environmental, social, and governance concerns have grown greatly in the past decade. Purpose pressure is so substantial that the Business Roundtable—the elite organization of CEOs of the country's two hundred largest corporations—demoted shareholder value from their primary stated goal to fifth on a list topped by stakeholders and consumers.[75]

One strain of academic and popular thinking has it that competition has declined in the United States in the past two or three decades. Some academic analysts blame lax antitrust enforcement, while others look to concentration in stock ownership that weakens competition. Others analyze the situation as resulting from intense competition in markets with steep economies of scale or with network externalities, each of which impel larger firms with significant market share, and those firms enjoy monopoly rents until displaced by a new technology or a new competitor that is able to win and take (most of) the market away. Think of Blockbuster VCR rentals being displaced by Netflix-mailed DVDs. Whatever the source of the new market power, the point is that there are substantial concerns (which are, yes, disputed) that competition has declined or that economic rents are up because of more and larger skill, foresight, and industry monopolies (like Ford achieved with the assembly line). Whether due to competitive decline or perspicacity, today more firms are positioned like Ford Motor Company in the 1910s—with high rents and supracompetitive profits. Those extra profits give firms more leeway to accommodate stakeholder and purpose pressures than if those firms competed in hyper-competitive product markets where a small deviation from profit maximization would put the firm's existence at risk. I analyze the contemporary impact elsewhere.[76]

For American industry today, it might just be *Dodge v. Ford* all over again.

* * *

True, this better analysis of the background business situation here need not completely change the decision's legal implications. *Dodge v. Ford*'s meaning

74. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Sun. Mag.), at 17.

75. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans*,*'* BUS. ROUNDTABLE (Aug. 19, 2019), www.businessroundtable.org/ business-roundtable-redefines-the-purpose-of-a-corporation-topromote-an-economy-that-serves-all-americans [https://perma.cc/PW4R-XXRE].

76. Roe, *supra* note 2, at 236. For the possibility that this rent-splitting dynamic was particularly important in post–World War II Western Europe, see Mark J. Roe, *Rents and Their Corporate Consequences*, 53 STAN. L. REV. 1463 (2001); MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 125–49 (2003).

comes from what the courts did with the facts as they understood them. At the simplest level, the Michigan court thought Ford Motor had too much cash, without a convincing purpose for that cash, and ordered a dividend. But a better understanding of what happened can lead other courts, policymakers, classrooms, and analysts to see the situation more accurately and, hence, better understand what was at stake socially and economically. And for big-picture social scientists, the court decision is just one part of a transactional sequence and industrial and labor structure.

Here's what I mean. What the court saw as Ford Motor's charitable impulse was really Ford and labor dividing up a monopoly profit, with Ford seeking to bring labor onboard (by sidelining the unions and keeping labor loyal enough for the assembly-line and River Rouge to succeed). This conceptualization leads to two analytic strands of the monopoly profit's division. In one, the rent is sustained only because it is shared. In a second, the portion of the rent paid to workers exceeded what needed sharing and Ford had discretion on how to allocate it. I have put forward here the case for the first channel being real and substantial, with the second not being the only one, and maybe not even the central one for Ford Motor circa 1913–1919. The court was conceptualizing the labor share as solely, or primarily, being Ford's to bestow.

While I am confident that this better explains the underlying transactions that led to the litigation, we should be wary that Henry Ford could have used the modern business judgment rule well in the litigation. Although a modern corporate court would quite likely have left the monopoly issues to the antitrust authorities, or readily viewed Ford's assembly as bestowing a "skill, foresight, and industry" monopoly, monopolization concepts back then were less well clear in antitrust terms, and corporate law mixed readily with antitrust considerations. For example, in Standard Oil of Ohio, the 1880s foundational antitrust lawsuit, the Ohio Supreme Court ordered Standard Oil of Ohio to drop out of the Standard Oil Trust. Why? Because joining it to constrict trade was ultra vires, as a matter of state corporate law—not within the power of the Ohio corporation.[77] Similarly, New Jersey went through a two-decade cycle of permissive corporate law (that facilitated the trusts) at the end of the 1880s, until the reformer Woodrow Wilson in 1912 and 1913, on the eve of his presidency, restricted corporate law in an effort to curb monopoly power. It was plausible for Ford, or his counsel, to think that an

77. State *ex rel.* Att'y Gen. v. Standard Oil Co., 30 N.E. 279, 291 (Ohio 1892). On the mixing of corporate and antitrust considerations in corporate law at the end of the nineteenth and beginning of the twentieth centuries, from Ohio's corporate law attack on the Standard Oil Trust as ultra vires the Ohio firm's corporate power to Woodrow Wilson's repeal of the New Jersey "mother of trusts" corporate laws, see Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 607–09 (2003).

aggressive business judgment strategy—"I sought a monopoly and I had to buy off labor"—would have been unwise. The Dodge Brothers had sued to bar Ford Motor from building River Rouge because it would cement the Ford monopoly, and they won in the lower court; while the appellate court rejected the monopoly claim in the end, Ford had reason not to argue that Ford Motor had a monopoly, albeit a protectable, "skill, foresight, and industry" one.

And Ford had even less public branding reason to do so: his popularly-priced cars were selling to a market of average earners who were not, Ford could have judged, anti-union or anti-labor. Announcing his effort to manipulate labor and to extend the monopoly was unlikely to increase Ford's existing popularity with the average Americans who made up his market. Better, both for marketing and maybe even litigation purposes, to announce a pro-worker, pro-consumer policy. A better strategy in 1919, yes, but still one that lost in the Michigan Supreme Court.

* * *

I close this Part out with two thoughts—one that these analyses of a squeeze-out and a splitting of the monopoly rectangle could be overthinking the business transaction and the other again on how this reinterpretation of *Dodge v. Ford* resonates today.

Ford was by the time of the litigation very rich. He could readily have preferred adulation to another dollar. Thinking of Ford's testimony as branding makes business sense but it could also have been a successful, wealthy executive looking for respect. Of all the possible defenses, the one he chose was the one most likely to lead to a heroic Henry Ford, a titan of Detroit, being seen as bestowing value on his loyal workers and equipping average Americans with the revolutionary, inexpensive basic transportation of the twentieth century. And, for a man who was about to run for the United States Senate in 1918, a pro-labor, pro-consumer explanation was more likely to resonate with Michigan voters than calculated anti-union, efficiency-wage thinking.

The splitting-the-rectangle explanation for the *Dodge v. Ford* transactions resonates with today's corporate social responsibility movement. Rising rents in America's largest firms have given their executives and boards more discretion on how to allocate those rents.[78] At the same time, powerful and effective shareholder activism pushes that those rents go primarily or solely to shareholders.[79] Pro-

78. Roe, *supra* note 2, at 240–44, 250–56.

79. *Id*. at 263–65; *cf.* Mark R. Desjardine, Emilio Marti & Rodolphe Durand, *Why Activist Hedge Funds Target Socially Responsible Firms: The Reaction Costs of Signaling Corporate Social Responsibility*, 64 ACAD. MGMT. J. 851 (2020).

shareholder forces now have two channels for pushing for shareholder profit—a longstanding one that, as idealized, has long pushed executives and boards to be operationally efficient, which thereby usually increases the size of the economic pie, and a newer one of getting those newer rents primarily allocated to shareholders, which in itself usually affects not the pie's size but how it is divided.[80]

## CONCLUSION

To understand why Henry Ford ran his car company in a way that led to the litigation resulting in the 1919 *Dodge v. Ford* Michigan Supreme Court decision, one must understand how Ford's monopoly both gave Ford cash-spending capacity and created a valuable but vulnerable market position that needed protection—by building bigger and keeping labor loyal. The Dodge brothers sued Ford because Ford Motor stopped paying high dividends and because Ford Motor was building out a huge, vertically integrated car factory along the River Rouge. The standard squeeze-out explanation for the dividend stoppage—that Ford could then buy the Dodge brothers out at a low price—cannot account for much of the transactional structure in the run-up to the litigation, as Ford Motor's spending that denied it the cash for continuing high dividend payouts was much larger than the amount he paid when ultimately buying out the Dodge brothers.

Instead, or at least in addition, two channels were in play. Ford was experiencing an early twentieth-century form of pressure to pursue a better corporate purpose in a company with significant rents. This early twentieth-century version of corporate purpose pressure had him paying his workers far above the market rate for labor and had his company building and selling a mass-manufactured car for the popular consumer masses. The monopoly could neither have been built nor maintained without labor's cooperation. Regardless of whether Ford was bestowing the $5/day wage or labor was taking it from him, the monopoly had a joint quality to it. Underlying the *Dodge v. Ford* decision was Ford Motor's monopoly and the splitting of the resultant monopoly profits between the company and the auto workers. A powerful shareholder split the rents with latently powerful labor; analogues to such stakeholder pressure in firms with high rents can be discerned today. The monopoly gave Ford the wherewithal to share profits with stakeholders, the purpose pressure gave him a reason to do so, and

80. Roe, *supra* note 2, at 263–65.

accommodating the purpose pressure facilitated his capacity to retain the monopoly—for a while.

# about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

## Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

| | |
|---|---|
| **Finance Paper Series** | http://www.ssrn.com/link/ECGI-Fin.html |
| **Law Paper Series** | http://www.ssrn.com/link/ECGI-Law.html |