When Dodge v. Ford Meets Ben & Jerry's:
Reconciling 100 Years of Bad Precedent with the Reality of Modern Business

By

Mary Caitlin Unkovic

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Jurisprudence and Social Policy

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Lauren Edelman, Chair
Professor Ian Ayres
Professor Robert Cooter
Professor Sean Farhang

Spring 2020

Abstract

When *Dodge v. Ford* meets Ben & Jerry's:
Reconciling 100 Years of Bad Precedent with the Reality of Modern Business

by

Mary Caitlin Unkovic

Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Lauren Edelman, Chair

The 1919 Michigan Supreme Court case *Dodge v. Ford Motor Company* has come to stand for the common belief that the primary purpose of all corporations is to create shareholder wealth. This unfortunate misinterpretation of the opinion has never fit comfortably with the reality of business practices or academic theories of the corporation and its state-sanctioned role in the marketplace. The tension between caselaw and reality has only increased in the century since *Dodge* was decided, and has ultimately culminated in the first direct challenge to the shareholder primacy norm: public benefit corporations, for-profit firms that are required by charter and law to pursue at least one pro-social goal in addition to monetary gain. I argue that the increasing influence of public benefit corporations represents the first unavoidable crisis facing *Dodge v. Ford* caselaw and its progeny, one that creates increasing risk of deadweight loss and ought to be addressed by both Congress and the courts. This turning point in the demographic composition of business also offers social planners a unique opportunity, however, to address the current defects in the law's approach to the social obligation of incorporated firms without overturning the unfortunate but nevertheless settled precedent. Specifically, this crossroads in the evolution of corporations and their place in modern society provides a chance to: (1) Remedy flaws in the regulation of corporate charity so that good- and bad-faith donations can be distinguished, and (2) Radically improve corporate governance mechanisms to allow social enterprises to thrive.

To Arizona and Raquel, who've put almost as much time and effort into this dissertation as I have.

Table of Contents

Introduction

"*I'll believe corporations are people when Texas executes one.*"

- post-*Citizens United*[1] bumper sticker

The early part of the twenty-first century has turned out to be a critical period for corporations in the United States, challenging the way that policymakers, corporate actors, and the public conceive of these legal entities. Perhaps most famously, we've seen a raging debate on the extent to which corporations enjoy First Amendment rights to free speech and the freedom to participate in elections, culminating in the controversial Supreme Court decision in *Citizens United v. Federal Election Commission*. More recently, corporations have faced scrutiny over how they pay their labor forces, what their nominal income tax rate should be, and how much tax they pay in practice. This dissertation challenges a third, less commonly-argued but no less fundamental assumption about the nature of U.S. corporations and their duties of citizenship: the shareholder primacy norm. A theory derived from case law originating from a famous 20th-century case decided in Michigan,[2] the shareholder primacy norm asserts that a corporation's primary reason for existing is to create shareholder wealth, and that firm executives are acting properly only when they subjugate all other ends to that primary goal. My aim in this dissertation is to demonstrate that the shareholder primacy norm is incorrect on every level.

As a legal doctrine, the shareholder primacy norm is based on faulty case law that has been increasingly misinterpreted over time. The seminal case underlying it, *Dodge v. Ford Motor Company*, was never about the existential purpose of the corporation or its capacity to contribute to the public good. Rather, the factual dispute was about whether a majority shareholder, in this case Henry Ford, could legally use his position of power and influence to seek a monopoly for his company, even at the expense of minority shareholders who had been central to the firm's early success. Far from a reasoned declaration of corporations' proper role in civic society, the opinion is a misguided, if viscerally understandable, reaction by the Michigan State Supreme Court's bench to Henry Ford's woefully overconfident testimony at trial. Since then, its interpretation has been either a self-interested or under-informed elevation of dicta to the status of law. This unfortunate quirk of a legal system based on precedent has created serious, although salvageable, problems in the modern regulation of corporate entities. As corporations have grown in economic and political power in the 100 years since *Dodge v. Ford* was decided, these problems have only been compounded, causing increasing stress on a widening set of systems that regulate U.S. capital markets.

Of the problems created by the shareholder primacy norm, the class most immediately concerning to the government and its treasury is the public subsidy for corporate charity. By

---

1. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). *Citizens United* is a landmark, but controversial, campaign finance case decided at the U.S. Supreme Court in 2010. Overturning precedent and invalidating elements of Congressional statutes (most notably the 2002 Bipartisan Campaign Reform Act), the five-person majority held that prohibitions on speech-related expenditures based on corporate identity violated those entities' First Amendment rights to free speech. In popular discourse, this case has come to stand for the idea that corporations are people, according to the law.

2. Dodge v. Ford Motor Company, 204 Mich. 459 (Michigan 1919).

imposing a narrative in which all corporate actions are justified by the benefits accrued to a firm's shareholders, and yet also allowing outright philanthropic giving, the *Dodge v. Ford* doctrine has created an untenable situation in which policy makers are unable to distinguish between good- and bad-faith charity and self-serving donations by co-opting managers are treated as equal to those that serve the public interest at little cost to the firm. To fix this flaw, policymakers should favor corporate charitable giving that is tied to a firm's core commercial business. In particular, reinstating a modified deduction for inventory donations and instituting a modest deduction for approved corporate services ought to increase average efficiency of corporate gifts, thereby improving the probability that the public is subsidizing philanthropy it finds worthwhile.

Most relevant to modern entrepreneurs, the *Dodge v. Ford* narrative has also made it difficult for managers at social enterprises[3] to ensure that the firm's commitment to a social purpose survives changes in leadership, particularly if it becomes a target for acquisition by a large, purely for-profit conglomerate. While recent developments like constituency statutes have made it clear that pursuing and protecting a public aim is legally defensible, as of yet there is no way to ensure that the public purpose of a firm will be as self-sustaining as its pursuit of profit. Creative innovation in corporate governance can bridge this gap, however. Specifically, by adapting dual class voting stock to separate rather than concentrate ongoing corporate control, entrepreneurs can add institutional weight to the social mission that mirrors and counters the profit-based focus inherent in the markets for stock and capital control.

This dissertation builds on academic literatures in management, law and economics, and the law of corporations. In writing it, I relied heavily on judicial case law, legislative history, and journalists' accounts of corporate business practices. Among the most helpful judicial sources were documents related to *Dodge v. Ford* and its progeny, such as Henry Ford's testimony at trial, opinions issued at the state supreme court level, and guidance issued from federal agencies determining how those cases were implemented over time, including IRS decision letters defining the scope of tax-deductible charity and SEC rules, regulations and guidance governing markets for corporate capital. Much of the legislative history I include is based on transcripts from a variety of hearings, conducted between 1968 and 1974, in front of the House Ways and Means Committee and the Senate Committee on Finance, as well as written testimony submitted to them and reports published by committee staff. Records and reports from these hearings offered a unique window into how the Congress has historically viewed issues of corporate citizenship, as well contemporary reports about how changing the tax code affects those non-profit organizations that rely on corporate charity for the survival of their missions. More recent legislative materials, including announcements and reports on new bills, also provided a helpful counterpoint to those historical sources, and showed the extent to which Congress' views have changed in the context of modern business practices and a changing regulatory environment. News reports and articles written in the few years before *Dodge* was decided provided critical context and a contemporaneous account of how the issues at stake in the case were viewed by the litigants and public in the second half of the 1910s. Of those, articles from the *New York Times* archive, as well as those from the *Detroit News* and *The Dearborn Independent* that Professor Linda Kawaguchi reproduced as part of her scholarship, were among the most helpful. Finally, Brad Edmonson's book, *Ice Cream Social*, informs much of my discussion of Ben & Jerry's. His long-term observations of the company and extensive interviews with its executives

3. That is, businesses that explicitly pursue both profit and a social aim such as environmental sustainability, community building, or combatting poverty.

provided invaluable insight into the start, success, and struggles of the first blockbuster social enterprise to become a household name.

The main text proceeds in three parts. The first section describes the central case, *Dodge v. Ford,* in detail, arguing that it was bad law at the time and has since only created more tension between business practices, legal thought, and doctrine. The second section addresses the greatest *Dodge*-inspired problem facing the government: ensuring that public subsidies of incorporated entities lead to efficient social contributions rather than private cooptation, and suggests changes to the tax code to pursue that goal. Finally, using Ben & Jerry's as a motivating example, the third part addresses the most unique and pressing problem facing committed social entrepreneurs operating in the shadow of *Dodge v. Ford*: how to bind a company to a social mission without unnecessarily restricting its capacity to innovate in the future.

Part One - Dodge v. Ford: The Facts, the Opinion, and the Consequences

In nearly every respect, our current view of *Dodge v. Ford Motor Company* is flawed.

The Facts: *Dodge v. Ford* Was Never About Corporate Charity

Most fundamentally, the facts underlying *Dodge v. Ford* are poorly represented in the opinion, and have been even more poorly understood since. The common narrative arising from the case looks something like this: Henry Ford, having become wealthy beyond his expectations, had decided to cease distributing profits to shareholders as large special dividends. Instead, he would put most of the excess towards the public good, most notably by lowering the price of the cars it sold, and increasing both wages and the number of people employed by the Ford Motor Company. The Dodge brothers, unhappy with the resulting drop in dividends, sued to enforce their rights to those profits; they requested that the court enjoin Ford's planned large investments in manufacturing capacity and compel the distribution of tens of millions by means of special dividend. The court sided with the brothers, requiring Ford to issue special dividends and holding that a corporation's existential purpose is generating shareholder wealth.

In reality, neither the facts underlying the case nor the opinion deciding it resemble that common narrative. First, the facts: The dispute between Ford and the Dodge brothers was not about corporate philanthropy or a shareholder's right to excess profits. It was about competition, monopoly, and the limits of the relationship between majority and minority shareholders.[4]

It is true that the Ford Motor Company, under heavy influence from Henry Ford and having issued a total of $41 million in special dividends between 1911 and 1915, announced in 1916 that special dividends would be suspended for the indefinite future, with profits instead going towards expanding the company's manufacturing capacity and investing in its labor force. It is also true that

---

4. More precisely, the relevant business relationship between Henry Ford and brothers John and Horace Dodge began in 1903, when the Ford Motor Company's articles of association were executed in mid-June and shares issued to early investors. At the time, capital stock was fixed at US $150,000, with 1500 shares issued at a par value of $100, though only 1000 shares with a total value of $100,000 were subscribed (the 500 remaining shares were subsumed into the next round of capital in 1908). Five years later, the Ford Motor Company amended its articles to increase the total number of shares to 20,000, which were fully subscribed and represented an amount paid in of US $2 million. When they filed their suit, the Dodge brothers owned 2,000 shares, or one-tenth of the company's capital, while Henry Ford owned roughly 58% of outstanding shares. *Dodge v. Ford*, 463–466 (synopsis).

The relationship was far more complicated than either party would have an arbiter know, however. When Ford Motor Company first began manufacturing cars for commercial sale, the motors and frames were built in a plant owned by the Dodge brothers, which were then sent to the Ford plant where the body and tires were added. As the Ford Motor Company grew, less production occurred at third-party facilities, and soon the Dodge brothers' participation in the manufacturing process was limited to supplying parts. Their parts contract ended in 1914 when they refused to license their plant to Ford and instead founded their own auto-manufacturing company in direct competition with the Ford Motor Company. Geoffrey Miller, "Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases," *Michigan State Law Review* 2009, no. 4 (Winter 2009): 831–847.

Henry Ford was a surprisingly progressive entrepreneur for his time.[5] He had a well-known policy of paying noticeably above market-rate wages, with the expectation that the company would benefit from above average talent and employee dedication as a result. He similarly employed in-house medical staff under the assumption that a healthier labor force was a more productive one.[6] And perhaps most broadly, he believed that a healthy balance between corporate profit-seeking and public welfare was good for everyone.[7] It is exactly his more progressive beliefs that modern observers wish were more prevalent among corporate executives.

Despite his belief in the value of balancing public and private needs, Henry Ford was by no means a philanthropist and, just like his decision to employ doctors at his factory, the move to limit special dividends was done with one primary goal in mind: gaining a competitive advantage. In this case, he was seeking an advantage by putting fiscal pressure on a new market rival, his minority shareholders, the Dodge Brothers.[8&9]

One can understand why the common narrative would take hold, however; because, as the Dodges' complaint and Ford's testimony at trial indicates, both he and the Dodge brothers had reason to hide their genuine motives at trial.[10] The Dodge brothers sought to conceal the fact that their overarching motive, to compete more aggressively with the Ford Motor Company, was at odds with their claim of suing for the good of the company they partially owned.[11] Ford similarly wanted

---

5. Though, as is often the case, also a flawed one. In particular his views on some ethnic and religious groups were anathema to public values, and many would say un-American. He was most vocal about his views on people of Jewish heritage, and more than once peddled global conspiracy theories about the influence of Jewish business people in the publication he'd purchased, *The Dearborn Independent.* Leo P. Ribuffo, "Henry Ford and "The International Jew," *American Jewish History* 69, no. 4 (1980): 437–477.

6. "Henry Ford Explains Why He Gives Away $10,000,000 Declares That He Is Dividing Profits with His Employe[e]s, Not Paying Them Higher Wages, and That Workers as Partners Will Give Increased Efficiency." *New York Times*, Jan. 11, 1914, M1. Made available by Linda Kawaguchi in her *Chapman Law Review* article, "Introduction to Dodge v. Ford Motor Co.: Primary Source and Commentary Material," *Chapman Law Review* 17, no. 2 (2013): 493–578.

7. "So, would I be serving the interest of our firm best by holding up the price because the manufacturer of another automobile wants us to or by reducing the price in the interest of our own customers, our own employe[e]s and our own business standing and profit? I think I am right in my policy...The policy I hold is good business policy because it works, because with each succeeding year we have been able to put our car within the reach of greater and greater numbers, give employment to more and more men, and at the same time through the volume of business increase our own profits beyond anything we had hoped for or even dreamed of when we started." Quotation from "Ford Makes Reply to Suit Brought by Dodge Brothers Says Present Plans of Expansion Are Only in Line With Past History of Company. Declares That on Investment of $10,000 Dodges Have Drawn Out $5,571,500 in Dividends, and Still Have Holdings That They Value at $50,000,000. Attorney Alfred Lucking Says the Suit Against the Ford Company Has Political Motives Back of It," *Detroit News*, Nov. 4, 1916, 1. Made available by Linda Kawaguchi in the *Chapman Law Review*.

8. Miller, "Narrative and Truth," 833–837.

9. Ford's strategy was threefold: Ceasing special dividends deprived the Dodge brothers of capital in an industry with high start-up costs, while lowering the price of cars sold would put pricing pressure on the brothers and further saturate the market. Ibid., 836–837.

10. Ibid., 836.

11. From the Dodge brothers' complaint (called a bill at the time), "In the face of the increased labor and material cost and the uncertain conditions that will prevail in the business world at the termination of the present would war, the policy of said Henry Ford, in continuing the expansion of the business of said

to avoid the question of whether he was abusing his power as majority shareholder to unfairly suppress competition from those to whom he owed a fiduciary duty of loyalty. And so, both sides seized on Henry Ford's reputation for progressivism and his altruistic public image, and from that kernel of truth developed the wildly inaccurate narrative that we know today.

The portion of the opinion discussing the Dodge brothers' claim that Ford's decision would lead to a monopoly in the market best demonstrates the difference between the facts in reality and how they were presented to the court.[12] As minority shareholders, the Dodge brothers had no reason to be concerned that Ford Motor Company would gain an unfair share of the consumer market. In fact, the potential for profit and thus dividends would be significantly higher if Ford Motor Company were to achieve a monopoly. As emerging competitors facing steep early investments for scale, however, the brothers had every reason to oppose a move that would put negative pressure on their market access and retail price. At the same time, when Henry Ford claimed that there was no way for him to abuse his position as majority shareholder to harm the Dodges because "he'd have to harm himself at least five times as much", he was willfully blind to the fact that he very well could hurt them as competitors.[13] His true motivations very well could have been to limit the Dodge brothers' access to capital as much as possible, and thereby gain financial advantage at their expense; and a bolder lawyer may have admitted as much.

A subtler but far more legally sound argument would have addressed the facts as they were, making the distinction between the company as a legal entity and the shareholders as individuals. Had he admitted anti-competitive motives, Ford could have demonstrated to the court that the Dodge brothers' suit was more of a threat to the company than a benefit to it. As the court's reaction to his testimony below suggests, Ford's argument would probably have been better received if he'd framed his decision as an effort to protect the company's market share. Instead, by participating in the fiction that this case was about the validity of corporate altruism, he unknowingly made it much harder for entrepreneurs to follow his example, and nearly guaranteed that for decades he would be the last well-known founder to openly incorporate the public good into his strategy for expanding a company.

---

corporation, is reckless in the extreme and seriously jeopardizes the interest of your orators as stockholders in said corporation." *Dodge v. Ford*, 473.

12. From the synopsis, quoting the Dodge brothers' bill:

> "(28) That there are many other corporations engaged in the business of manufacturing cars in competition with the only car manufactured by the Ford Motor Company, to wit, the class recognized in the trade as 'low-priced cars.' That the annual production of such other companies of such class of cars runs into the hundreds of thousands of cars per annum. That if the said Henry Ford is permitted to continue the policy that he has inaugurated and announced he is determined to carry out, of increasing production, reducing the price of cars, and increasing the capital investments in the conduct of such business by withholding the dividends from stockholders to which they are entitled, the necessary result will be the destruction of competition on the sale of the class of ears manufactured by such corporation and the creation of a complete monopoly in the manufacture and sale of such cars in violation of the state, federal and common law." Ibid.

13. "[The Dodge brothers] say my course is likely to injure them. They own 10 per cent of the stock and I own 58 per cent. I can't injure them $10 without at the same time injuring myself $58, and I don't think any one can reasonably accuse me of pursuing such a course." *Detroit News*, "Ford Makes Reply."

The Opinion: Bad Law Piled On Top of Bad Facts

It is unfortunate[14] that the Michigan State Supreme Court accepted the litigants' cover story regarding the purposes of the suit; what's worse, the court compounded that error by relying on several key misconceptions about economic theory and how markets operate. Because the court piled bad law onto unclear facts, and because both the theory and the practice of business law has only muddied the issue further, I believe a guided tour of the opinion is useful in understanding the current issues facing corporate law.

A Guided Tour of the *Dodge v. Ford* Opinion

The first point addressed by the court is a technical one of statute-mandated caps on capital stock and finds that the company has not exceeded those caps.[15] Next, it turns to the question of whether ore smelting is considered *ultra vires* to (or, outside the permissible scope of) an automobile manufacturing company; the court finds that the Dodge brothers object to the overall plan of expansion, not the process of smelting itself, and that the smelting plans under consideration would not be *ultra vires* if limited to the steel required for use in its own cars.

The third and most peculiar issue addressed in the opinion is the Dodge brothers' claim that Ford's expansion plans would lead to a monopoly. The Dodge brothers were the first to raise this issue, as their bill of complaint (reproduced in the case synopsis) argues:

> "(28) That there are many other corporations engaged in the business of manufacturing cars in competition with the only car manufactured by the Ford Motor Company, to wit, the class recognized in the trade as 'low-priced cars.' That the annual production of such other companies of such class of cars runs into the hundreds of thousands of cars per annum. That **if the said Henry Ford is permitted to continue the policy that he has inaugurated and announced he is determined to carry out, of increasing production, reducing the price of cars,** and increasing the capital investments in the conduct of such business by withholding the dividends from stockholders to which they are entitled, **the necessary result will be the destruction of competition on the sale of the class of ears manufactured by such corporation and the creation of a complete monopoly in the manufacture and sale of such cars in violation of the state, federal and common law.'**[16]

14. Unfortunate but understandable, as Henry Ford's trial testimony indicates. He was all too willing to confirm the Dodge brothers' eleemosynary description of his motives. Excerpts of his testimony, made available by Linda Kawaguchi's *Chapman Law Review* article, and with bold type added for emphasis, are available in Appendix A.

15. Excluded here for clarity. The full opinion including omitted sections is in Appendix B.

16. Bold added for emphasis throughout the excerpted opinion.

The court is not persuaded by the anticompetitive argument, and spends very little time addressing it. The court does point, however, to the fact that a valid complaint normally rests on harm done to a company, not by it. A stronger opinion creating better law would have examined this issue more thoroughly, and perhaps even addressed the question of whether the brothers had standing to sue on behalf of the Ford Motor Company and its shareholders. After all, the law prohibits monopolies for the public benefit, not because they are harmful to the monopolist; as a result, anti-trust law is a very strange basis for a suit that purports to advance the company's best interests.

> As we regard the testimony as **failing to prove any violation of anti-trust laws or that the alleged policy of the company, if successfully carried out, will involve a monopoly other than such as accrues to a concern which makes what the public demands** and sells it at a price which the public regards as cheap or reasonable, **the case for plaintiffs must rest upon the claim, and the proof in support of it, that the proposed expansion of the business of the corporation, involving the further use of profits as capital, ought to be enjoined because inimical to the best interests of the company and its shareholders**, and upon the further claim that in any event the withholding of the special dividend asked for by plaintiffs is arbitrary action of the directors requiring judicial interference.

Of historical note, *Dodge v. Ford* and the cases it cites were decided in Michigan, rather than Delaware, where most leading corporate cases are decided. Here the court makes the case that the directors have sole discretion over dividends, and that courts will intervene only in cases of fraud or a breach of good faith.

> The rule which will govern courts in deciding these questions is not in dispute. It is, of course, differently phrased by judges and by authors, and, as the phrasing in a particular instance may seem to lean for or against the exercise of the right of judicial interference with the actions of corporate directors, the context, or the facts before the court, must be considered. **This court, in Hunter v. Roberts, Throp & Co., 83 Mich. 63, 71, 47 N. W. 131, 134,** recognized the rule in the following language:
>
> > 'It is a **well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation, and to determine its amount**. 5 Amer. & Eng. Enc. Law, 725. **Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds**, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and **when a refusal to [issue a dividend] so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith** which they are bound to exercise towards the stockholders.'
>
> In Cook on Corporations (7th Ed.) § 545, it is expressed as follows:

'The board of directors declare the dividends, and it is for the directors, and not the stockholders, to determine whether or not a dividend shall be declared.

'When, therefore, the directors have exercised this discretion and refused to declare a dividend, there will be no interference by the courts with their decision, unless they are guilty of a willful abuse of their discretionary powers, or of bad faith or of a neglect of duty. It requires a very strong case to induce a court of equity to order the directors to declare a dividend, inasmuch as equity has no jurisdiction, unless fraud or a breach of trust is involved. There have been many attempts to sustain such a suit, yet, although the courts do not disclaim jurisdiction, they have quite uniformly refused to interfere. The discretion of the directors will not be interfered with by the courts, unless there has been bad faith, willful neglect, or abuse of discretion.

> 'Accordingly, the directors may, in the fair exercise of their discretion, invest profits to extend and develop the business, and a reasonable use of the profits to provide additional facilities for the business cannot be objected to or enjoined by the stockholders.'

In Morawetz on Corporations (2d Ed.) § 447, it is stated:

> 'Profits earned by a corporation may be divided among its shareholders, but it is not a violation of the charter if they are allowed to accumulate and remain invested in the company's business. **The managing agents of a corporation are impliedly invested with a discretionary power with regard to the time and manner of distributing its profits**. They may apply profits in payment of floating or funded debts, or in development of the company's business; and so long as they do not abuse their discretionary powers, or violate the company's charter, the courts cannot interfere.'

Expressing the question as a general matter of law, the court makes it clear that directors enjoy wide latitude in deciding how to conduct a company's day-to-day business, and that a decision to withhold dividends must rise to the level of abuse or fraud before a court will intervene. At the same time, however, the court indicates that such a threshold can be met. If there is no reasonable business purpose for accruing excess capital, dividends must be paid.[17] Directors enjoy significant discretion in determining reasonable business purposes, however—a principle that reflects what would become known as the Business Judgment Rule, by which courts express reluctance to intervene on the day-to-day running of a corporation.

17. For example, the decision to invest in something that is outside the scope of the company's charter would not be a valid reason to withhold dividends. Similarly, a company cannot accumulate cash purely for the purpose of developing stockpiles of liquid assets.

'But it is clear that the agents of a corporation, and **even the majority, cannot arbitrarily withhold profits earned by the company, or apply them to any use which is not authorized by the company's charter**. The nominal capital of a company does not necessarily limit the scope of its operations; a corporation may borrow money for the purpose of enlarging its business, and in many instances it may use profits for the same purpose. But the amount of the capital contributed by the shareholders is an important element in determining the limit beyond which the company's business cannot be extended by the investment of profits. If a corporation is formed with a capital of $100,000 in order to carry on a certain business, no one would hesitate to say that it would be a departure from the intention of the founders to withhold profits, in order to develop the company's business, until the sum of $500,000 had been amassed, unless the company was formed mainly for the purpose of accumulating the profits from year to year. The question in each case depends upon the use to which the capital is put and the meaning of the company's charter. If a majority of the shareholders or the directors of a corporation wrongfully refuse to declare a dividend and distribute profits earned by the company, any shareholder feeling aggrieved may obtain relief in a court of equity.

'It may often be reasonable to withhold part of the earnings of a corporation in order to increase its surplus fund, when it would not be reasonable to withhold all the earnings for that purpose. The shareholders forming an ordinary business corporation expect to obtain the profits of their investment in the form of regular dividends. To withhold the entire profits merely to enlarge the capacity of the company's business would defeat their just expectations. **After the business of a corporation has been brought to a prosperous condition, and necessary provision has been made for future prosperity, a reasonable share of the profits should be applied in the payment of regular dividends, though a part may be reserved to increase the surplus and enlarge the business itself**.'

One other statement may be given from Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162 (45 N. J. Eq. 244, 19 Atl. 621):

'In cases where the power of the directors of a corporation is without limitation, and free from restraint, **they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute so long as they act in the exercise of their honest judgment**. They may reserve of them whatever their judgment approves as necessary or judicious for repairs or improvements, and to meet contingencies, both present and prospective. And their determination in respect of these matters, if made in good faith and for honest ends, though the result may show that it was injudicious, is final, and not subject to judicial revision.'

It is not necessary to multiply statements of the rule.

The court next addresses the facts of the case as it sees them. Noting that the company had significant cash on hand and a past history of issuing special dividends that would dwarf regular dividends in size, the court requires Ford to demonstrate a reasonable business purpose for changing that practice.

> To develop the points now discussed, and to a considerable extent they may be developed together as a single point, it is necessary to refer with some particularity to the facts.
>
> When plaintiffs made their complaint and demand for further dividends, the Ford Motor Company had concluded its most prosperous year of business. The demand for its cars at the price of the preceding year continued. **It could make and could market in the year beginning August 1, 1916, more than 500,000 cars.** Sales of parts and repairs would necessarily increase. The cost of materials was likely to advance, and perhaps the price of labor; **but it reasonably might have expected a profit for the year of upwards of $60,000,000. It had assets of more than $132,000,000, a surplus of almost $112,000,000, and its cash on hand and municipal bonds were nearly $54,000,000. Its total liabilities, including capital stock, was a little over $20,000,000**. **It had declared no special dividend during the business year except the October, 1915, dividend**. It had been the practice, under similar circumstances, to declare larger dividends. Considering only these facts, a refusal to declare and pay further dividends appears to be not an exercise of discretion on the part of the directors, but an arbitrary refusal to do what the circumstances required to be done. **These facts and others call upon the directors to justify their action, or failure or refusal to act.**

The court then summarizes the Ford Motor Company's argument about the business purposes underlying the decision to cease dividends, as well as the Dodge brothers' charges against it. The influence of Henry Ford's testimony is clear, and his portrayal in the opinion is not always kind.

> In justification, the defendants have offered testimony tending to prove, and which does prove, the following facts: **It had been the policy of the corporation for a considerable time to annually reduce the selling price of cars, while keeping up, or improving, their quality**. As early as in June, 1915, **a general plan for the expansion of the productive capacity of the concern by a practical duplication of its plant** had been talked over by the executive officers and directors and agreed upon; not all of the details having been settled, and no formal action of directors having been taken. The erection of a smelter was considered, and engineering and other data in connection therewith secured. In consequence, it was determined not to reduce the selling price of cars for the year beginning August 1, 1915, but to maintain the price and to accumulate a large surplus to pay for the proposed expansion of plant and equipment, and perhaps to build a plant for smelting ore. It is hoped, by Mr. Ford, that eventually 1,000,000 cars will be annually produced. The contemplated changes will permit the increased output.

> **The plan, as affecting the profits of the business for the year beginning August 1, 1916, and thereafter, calls for a reduction in the selling price of the cars**. It is true that this price might be at any time increased, but the plan called for the reduction in price of $80 a car. The capacity of the plant, without the additions thereto voted to be made (without a part of them at least), would produce more than 600,000 cars annually. **This number, and more, could have been sold for $440 instead of $360, a difference in the return for capital, labor, and materials employed of at least $48,000,000**. In short, the plan does not call for and is not intended to produce immediately a more profitable business, but a less profitable one; not only less profitable than formerly, but less profitable than it is admitted it might be made. The apparent immediate effect will be to diminish the value of shares and the returns to shareholders.

Here the court makes a major mistake of economic theory by accepting the Dodge brothers' claim that the Ford Motor Company could increase the number of cars it sells from 500,000 to 600,000 without lowering the retail price it demands.[18] While Henry Ford does not make this point very clearly at trial, he recognizes the economic reality that consumer demand will increase only if price decreases. This misunderstanding of markets in equilibrium is one reason the court sees only altruistic motives in what was ultimately a competitive decision, as $48 million significantly overestimates the amount of profit the company could earn on 600,000 cars. This error shifts the court's view of the facts even further from reality, and turns what was actually an effort to stifle competition into an arbitrary, if well-intentioned, infringement on the rights of the company's shareholders.

---

18. For more context, see Henry Ford's testimony in Appendix A, beginning on page 94.

Mr. Stevenson: Do you call that the 1916 business?

Mr. Ford: Yes.

Mr. Stevenson: We will call it the 1916 business; then, for the year of 1916, you produced 500,000 cars, and you sold them?

Mr. Ford: Yes, sir.

Mr. Stevenson: And you said that didn't meet the demand, those 500,00[0] cars?

Mr. Ford: Not quite.

Mr. Stevenson: Not quite; so that you had no reason to believe, from the experience of 1916, that you could not sell 500,000 more cars in 1917?

Mr. Ford: No.

Mr. Stevenson: At the same price, had you?

Mr. Ford: Yes, sir, we did.

Mr. Stevenson: What reason did you have?

Mr. Ford: The price was too high.

The court then accepts the Dodge brothers' presentation of Henry Ford's motives as almost entirely altruistic rather than strategic.[19] It is clear that the court was not impressed by Henry Ford's testimony, which it addresses directly and even quotes.[20]

> **It is the contention of plaintiffs that the apparent effect of the plan is intended** to be the continued and continuing effect of it, and that it is deliberately proposed, not of record and not by official corporate declaration, but nevertheless proposed, **to continue the corporation henceforth as a semi-eleemosynary institution and not as a business institution.** In support of this contention, they point to the attitude and to the expressions of Mr. Henry Ford.
>
> Mr. Henry Ford is the dominant force in the business of the Ford Motor Company. No plan of operations could be adopted unless he consented, and no board of directors can be elected whom he does not favor. One of the directors of the company has no stock. One share was assigned to him to qualify him for the position, but it is not claimed that he owns it. A business, one of the largest in the world, and one of the most profitable, has been built up. It employs many men, at good pay.
>
> **'My ambition,' said Mr. Ford, 'is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business.**'
>
> '**With regard to dividends, the company paid sixty per cent. on its capitalization of two million dollars, or $1,200,000, leaving $58,000,000 to reinvest for the growth of the company**. This is Mr. Ford's policy at present, and it is understood that the other stockholders cheerfully accede to this plan.'
>
> **He had made up his mind in the summer of 1916 that no dividends other than the regular dividends should be paid, 'for the present.'**

19. To be clear, the court's description of Ford's views on how much profit a corporation should make is inaccurate. While Henry Ford did express some progressive values at trial, with respect to corporate profits, he was clear that he viewed sharing with the public as necessary for a healthy economy and thereby profitable firm. His view was not, as the court implies, that above some threshold Ford felt a moral obligation to transfer wealth away from investors and to the public. *New York Times*, "Henry Ford Explains."

20. At least to a modern ear, Henry Ford's testimony is jarring, and he comes across and combative and superior. Or, in other words, he displays all of the qualities most likely to irk a panel of three state supreme court judges. M. Todd Henderson calls it "among the worst testimony given by any corporate defendant in any trial at any time." "The Story of Dodge v. Ford Motor Company: Everything Old Is New Again" in *Corporate Law Stories*, ed. J,. Mark Ramseyer, (New York: Thompson Reuters / Foundation Press, 2009), 37–76. As the portions of his testimony reproduced in Appendix A illustrate, Ford could have made his points far more effectively, but his underlying arguments were nevertheless sound.

'Q. For how long? Had you fixed in your mind any time in the future, when you were going to pay—— A. No.

'Q. That was indefinite in the future? A. That was indefinite; yes, sir.'

The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give. His testimony creates the impression, also, that **he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken**. We have no doubt that certain sentiments, **philanthropic and altruistic**, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company—the policy which has been herein referred to.

It is said by his counsel that——

> 'Although a manufacturing corporation cannot engage in humanitarian works as its principal business, **the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation**.'

And again:

> 'As the expenditures complained of are being made in an expansion of the business which the company is organized to carry on, and for purposes within the powers of the corporation as hereinbefore shown, the question is as to whether such expenditures are rendered illegal because influenced to some extent by humanitarian motives and purposes on the part of the members of the board of directors.'

In discussing this proposition, counsel have referred [precedent on director discretion], **turn[s] finally upon the point, the question, whether it appears that the directors were not acting for the best interests of the corporation**. We do not draw in question, nor do counsel for the plaintiffs do so, the validity of the general proposition stated by counsel nor the soundness of the opinions delivered in the cases cited. The case presented here is not like any of them. **The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employés, like the building of a hospital for their use** and the employment of agencies for the betterment of their condition, **and a general purpose and plan to benefit mankind at the expense of others, is obvious**.

It is in the midst of refuting the underlying altruism that the court sees as Mr. Ford's motivation that it issues its view on the existential purpose of a corporation. And, while this is dicta, it is this section of the opinion that forms the basis of the so-called shareholder primacy doctrine.

> **There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives** that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority 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 the nondistribution of profits among stockholders in order to devote them to other purposes.
>
> **There is committed to the discretion of directors, a discretion to be exercised in good faith**, the infinite details of business, including the wages which shall be paid to employés, the number of hours they shall work, the conditions under which labor shall be carried on, and **the price for which products shall be offered to the public**.

After reacting to Ford's testimony and including dicta that would eventually become law, the court issues a far narrower holding: A court will intervene when, at the expense of shareholders, directors seek to change the fundamental nature of the business. Or, put another way, the board cannot choose policies that pursue "merely incidental benefit of shareholders and for the primary purpose of benefitting others."

> It is said by appellants that the motives of the board members are not material and will not be inquired into by the court so long as their acts are within their lawful powers. As we have pointed out, and the proposition does not require argument to sustain it, **it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others**, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.

Having established the bounds for proper conduct, the court then asks whether the expansion Henry Ford proposes exceeds those bounds. Noting that expansion has been a long and profitable policy at Ford Motor Company, the court finds no indication that the board has been acting in bad faith or against the best interests of shareholders.

> **We are not, however, persuaded that we should interfere with the proposed expansion of the business of the Ford Motor Company**. In view of the fact that the selling price of products may be increased at any time, the ultimate results

of the larger business cannot be certainly estimated. 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 affairs. It may be noticed, incidentally, that it took from the public the money required for the execution of its plan, and that the very considerable salaries paid to Mr. Ford and to certain executive officers and employés were not diminished**. We are not satisfied that the alleged motives of the directors, in so far as they are reflected in the conduct of the business, menace the interests of shareholders**. It is enough to say, perhaps, that the court of equity is at all times open to complaining shareholders having a just grievance.

Moving on from the plans to expand, the court next asks whether the expansion is also justification for withholding special dividends. It holds that Ford Motor Company has ample cash to both expand and declare dividends, and affirms the lower court's ruling that the company distribute half of its excess cash to shareholders. Put another way, it holds that Ford Motor Company has accrued so much money that it has triggered a duty on the part of the shareholders to declare dividends.

Assuming the general plan and policy of expansion and the details of it to have been sufficiently, formally, approved at the October and November, 1917, meetings of directors, and assuming further that the plan and policy and the details agreed upon were for the best ultimate interest of the company and therefore of its shareholders, **what does it amount to in justification of a refusal to declare and pay a special dividend or dividends?** The Ford Motor Company was able to estimate with nicety its income and profit. It could sell more cars than it could make. Having ascertained what it would cost to produce a car and to sell it, the profit upon each car depended upon the selling price. That being fixed, the yearly income and profit was determinable, and, within slight variations, was certain.

There was appropriated—voted—for the smelter $11,325,000. As to the remainder voted, there is no available way for determining how much had been paid before the action of directors was taken and how much was paid thereafter; but assuming that the plans required an expenditure sooner or later of $9,895,000 for duplication of the plant, and for land and other expenditures $3,000,000, the total is $24,220,000. The company was continuing business, at a profit—a cash business**. If the total cost of proposed expenditures had been immediately withdrawn in cash from the cash surplus (money and bonds) on hand August 1, 1916, there would have remained nearly $30,000,000**.

Defendants say, and it is true, that a considerable cash balance must be at all times carried by such a concern. But, as has been stated, there was a large daily, weekly, monthly, receipt of cash. The output was practically continuous and was continuously, and within a few days, turned into cash. Moreover, the contemplated expenditures were not to be immediately made. The large sum appropriated for the smelter plant was payable over a considerable period of time. So that, without going further, it would appear that, accepting and approving the plan of the directors**, it was their duty to distribute on or near the 1st of August, 1916, a very large sum of money to stockholders**.

> In reaching this conclusion, we do not ignore, but recognize, the validity of the proposition that plaintiffs have from the beginning profited by, if they have not lately, officially, participated in, the general policy of expansion pursued by this corporation. We do not lose sight of the fact that it had been, upon an occasion, agreeable to the plaintiffs to increase the capital stock to $100,000,000 by a stock dividend of $98,000,000. These things go only to answer other contentions now made by plaintiffs, and do not and cannot operate to estop them to demand proper dividends upon the stock they own. It is obvious that an annual dividend of 60 per cent. upon $2,000,000, or $1,200,000, is the equivalent of a very small dividend upon $100,000,000, or more.
>
> **The decree of the court below fixing and determining the specific amount to be distributed to stockholders is affirmed**. In other respects, except as to the allowance of costs, the said decree is reversed. Plaintiffs will recover interest at 5 per cent per annum upon their proportional share of said dividend from the date of the decree of the lower court. Appellants will tax the costs of their appeal, and two-thirds of the amount thereof will be paid by plaintiffs. No other costs are allowed.

It is worth emphasizing that the holding in this case is far narrower than law school classes and common belief suggest. The court held that at some point, a managerial decision to accrue liquid assets well beyond a firm's needs is an abuse of director discretion and subject to judicial interference. Directors nevertheless enjoy broad discretion, as here where they were well within the bounds of their authority when they decided to nearly double their production capacity.

Unfortunately, the holding in this case is not the part that influenced the development of corporate law. Instead, and despite few direct citations,[21] dicta responding directly to Mr. Ford's testimony has come to dominate practitioners' and academics' views of corporate purpose.[22] This poor handling of a poorly decided case has had wide-ranging negative effects. Not least among the harms, the elevation of Dodge dicta has generated a complex web of thought on the social roles and

---

21. As of July 2019, a search for citations to Dodge v. Ford Motor Company yields 71 cases, only a handful of which address the question of corporate purpose as it relates to the public good. Generally, where it is mentioned, it stands simply for the idea that under special circumstances and when there is clear surplus profit, a shareholder can compel a corporation to issue dividends. For example:

"In particular, if the directors refuse needlessly and improperly to divide what are actually surplus profits, the stockholders have an adequate remedy." City Bank Farmers' Tr. Co. v. Hewitt Realty Co., 257 N.Y. 62, 67 (N.Y. Appellate Division 1931), citing *Dodge v. Ford* in support.

22. As of January, 2020, a Westlaw search for *Dodge v. Ford* in law journal articles returns 1,201 results. The concept of corporate purpose is also making a recent but clear appearance in more popular discourse. In a recent New York Times article, Andrew Ross Sorkin describes corporate lawyer Jamie Gamble's reflections on a career spent advocating for large firms, as well as his insights into boardroom behavior. Mr. Gamble's major contributions are the observation that corporate law forces directors to define good in terms of money and consider only the firm in decision-making. He recommends that corporations be required to adopt ethical rules, and that shareholders be authorized to sue for their breach. Andrew Ross Sorkin, "Ex-Corporate Lawyer's Idea: Rein In 'Sociopaths' in the Boardroom," *New York Times,* July 29, 2019, https://www.nytimes.com/2019/07/29/business/dealbook/corporate-governance-reform-ethics.html.

responsibilities of U.S. corporations, and permitted bad faith actors to take advantage of public subsidies, as the next section discusses.

The Consequences: Dueling Flaws and a Building Conflict

Corporate Philanthropy: Theory and Practice in the Shadow of Dodge v. Ford

Major Legal Questions Governing Corporate Philanthropy[23]

Legal scholarship on corporate charity generally addresses at least one of three major questions: (1) Is corporate charity legitimate as a matter of theory? (2) Is it desirable as practiced? and (3) Is it more efficient than direct service provision? Relevant scholarship can also be roughly divided into those articles that support the practice and those that oppose it. In this section, I briefly summarize the literature on each of the three central questions, noting the most salient points from both critics and proponents.

Is Corporate Charity Legitimate as a Matter of Theory?

One of the most fundamental questions addressed in the literature is whether corporate charity is legitimate; that is, whether managers can justify a decision to donate rather than reinvest in the firm or distribute profits as dividends to shareholders.

Theoretical Arguments Against Corporate Charity

Perhaps the most well-known argument against the legitimacy of corporate charity, and the one that best comports with *Dodge v. Ford*, was made famous by Milton Friedman.[24] He argues that any decision to forgo profit in favor of the public good is, by definition, *ultra vires* and illegitimate. This argument most commonly adopts the *Dodge* view that the principle underlying the corporate form is shareholder primacy; the corporation exists to further the interests of its shareholders and to

23. As many scholars cited below note, the concept of socially responsible corporations is so broad as to defy delineation. Large firms in particular can influence wide swaths of their communities, including the health of the environment, labor bargaining conditions, and consumer safety. As a result, for analytical traction and to avoid repeating myself, this section focuses on one definable area of corporate citizenship: tax-incentivized charity. Corporate charity is a useful case study for several reasons. Most notably, It is one of the largest tax incentives available to corporations in return for public service, and while it allows for a clear definition, it also permits enough heterogeneity to explore a wide variety of implications for economic efficiency and legal theory that are applicable to other contexts such as labor conditions, environmental impact, and political activism.

24. Milton Friedman, "A Friedman Doctrine–The Social Responsibility of Business Is to Increase Profits," *New York Times*, Aug. 19, 1988, A14.

facilitate the separation of ownership from control. As there is no evidence that corporate charity is correlated with commercial success or shareholder benefit, there is no reason to assume it is legitimate, and plenty of reasons to worry about abuse by management.[25] In addition, corporate charity can compromise the independence of directors, thereby threatening the very governance structure seeking to align managers' incentives with those of shareholders.[26]

Some scholars further argue that none of the theoretical alternatives to the shareholder primacy model justify managers' decisions to give firm money away. In particular, two noted alternatives fail: the entity theory, which holds that a corporation is a legal entity existing separately from all of its constituents, not simply an instrument for its shareholders; and the nexus-of-contracts theory, which argues that the real purpose of the corporate form is to provide a default contract, allowing labor to achieve economies of scale that would be impossible with direct contract with all parties required.[27] The entity theory justification, insofar as it relies on an analogy to the individual charitable deduction, fails for three reasons: (1) it is inconsistent with the rest of the U.S. corporate statutory regime, which treats corporations as profit-maximizing entities; (2) it does not confer all aspects of personhood, such as the moral capacity for charity, which are required of individual deductions; and (3) it requires that outsiders be able to distinguish the behavior of the firm from the behavior of the individuals who make it up, which is impossible.[28] The nexus-of-contracts theory fails to justify corporate contributions because no reasonable implied contract would include contributions where one party (the managers) are the donors, while another party (the shareholders or employees) are the driving moral force behind the generosity and bear its costs.[29] Instead, corporations should make only those donations that are directly for the benefit of some group of

---

25. Jill E. Fisch, "Panel Four: Corporate Philanthropy from the Perspective of Corporate and Securities Law: Questioning Philanthropy from a Corporate Governance Perspective," *New York Law School Law Review* 41, nos. 3 and 4 (1997): 1091–1106. Professor Fisch also disagrees with the argument from some proponents that shareholders benefit from corporations exercising their moral duty to act for the public good. She argues that corporations have not historically succeeded at such efforts, and that even if they did so, shareholders as a class would be unlikely to benefit because their moral views and charitable preferences can vary significantly. Ibid., 1097–1098.

26. Benjamin E. Ladd, "A Devil Disguised as a Corporate Angel? Questioning Corporate Charitable Contributions to 'Independent' Directors' Organizations," *William and Mary Law Review* 46, no. 6 (2005): 2153–2191. Ladd cites examples of CEOs making large corporate donations to non-profit organizations run by independent members of their boards, as well as shareholder derivative suits challenging those contributions. He argues that such a conflict of interest necessarily limits directors' independence and ability to exercise strong oversight. Ibid., 2175–2181.

27. Linda Sugin, "Theories of the Corporation and the Tax Treatment of Corporate Philanthropy," *New York Law School Law Review* 41, nos. 3 and 4 (1997): 864.

28. Professor Knauer also stresses the problems of agency between shareholders and managers. Nancy J. Knauer, "The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity," *DePaul Law Review* 44, no. 1 (Fall 1994): 81–84.

29. Others note, however, that the opportunity to do good can be a non-trivial draw for some employees, as the section on corporate services donations below indicates. In addition, research in business and management literatures suggests that high levels of corporate social responsibility can be valuable tools for attracting employees. See, for example, Daniel B. Turban and Daniel W. Greening, "Corporate Social Performance and Organizational Attractiveness to Prospective Employees," *Academy of Management Journal* 40, no. 3 (1997): 658–672.

stakeholders (employees, managers, or shareholders), and that group should report the amount of that compensation as income on their individual tax returns.

Finally, some argue that the current approach to corporate charity fundamentally mischaracterizes corporate behavior and the motivation to donate. Corporate donations represent not the altruism the charitable deduction seeks to reward, but rather the strategic purchase of charitable goodwill. Firms should thus be able to claim an ordinary business expense deduction, at most. Moreover, non-profit organizations should not be able to exempt corporate contributions from their taxable income because as the sale of charitable goodwill, these transactions are insufficiently related to their core exempt purposes.[30]

Theoretical Arguments in Favor of Corporate Charity

Proponents of corporate charity offer several theoretical justifications for the practice. The most well known have roots in the famous Berle-Dodd[31] debate that spanned much of the 1930s, perhaps as a reaction to *Dodge v. Ford*, and certainly in outright defiance of it.[32] Concerned about the increasing distance between ownership and control in large corporations, Professor Berle began the discussion by arguing that, based on the law of trusts, managers' fiduciary duties necessarily extend to all corporate powers and require them to pursue shareholder profit at all times. Professor Dodd, in response, accepted the argument that fiduciary duties extend to all corporate activities, but challenged the idea that shareholder interests are the only ones that matter. Instead, he argued that managers are duty-bound to pursue the interests of a broad range of impacted groups, including shareholders, employees, and the local community. Professor Dodd's stakeholder theory[33] of the corporation remains the leading academic challenge to the shareholder primacy model, and underlies many of the theoretical justifications for corporate charity. Building on that theory, some scholars argue that corporate charity offers a unique way for firms to fulfill their duties to employees, and in some cases the only way for them to meet their obligations to their local communities.[34]

Expanding on the stakeholder model, some scholars argue that as managers of a legal entity, executives have not only the right but also the duty to exercise the firm's moral and economic freedom to contribute to the public good. Legal principles endow corporations with the obligation to act for stakeholders beyond their shareholders, and managers with the right to fulfill those obligations in a variety of ways. The shareholder primacy model thus not only misconstrues the

30. Knauer, "Paradox of Corporate Giving," 22–23. Professor Knauer also traces a broader history of scholarly views on charitable giving and the law. Ibid., 15–21.

31. Adolph A. Berle, Jr., "Corporate Powers as Powers in Trust," *Harvard Law Review* 44, no. 7 (May 1931): 1049–1107 and E. Merrick Dodd, Jr., "For Whom Are Corporate Managers Trustees?," *Harvard Law Review* 45, no. 7 (May 1932): 1145–1163.

32. Or rather, in defiance of the common conception of *Dodge v. Ford*.

33. The stakeholder theory of corporations is also the subject of robust discussion in business and management literature. For a summary, see Thomas Donaldson and Lee E. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications," *Academy of Management Review* 20, no. 1 (1995): 66–73.

34. Leo L. Clark and Edward C. Lyons, "The Corporate Common Good: The Right and Obligation of Managers to Do Good to Others," *University of Dayton Law Review* 32, no. 2 (Winter 2007): 275–304.

aims of the corporate form, but also intrudes on the rights of managers as individuals and the firm as an aggregate.[35]

Relatively newer theories of the firm complement the stakeholder model and further support the practice of corporate charity. In particular, some scholars argue that the nexus-of-contracts and the team production[36] theories of corporations imply that firms can not only benefit from philanthropy, but that in some cases it may be a critical element of their success. In this view, the corporate form is not merely an instrument to reduce the agency problems created by separating ownership from control. Instead, it provides an implied contractual framework for large-scale collaborative efforts, where the costs of direct contracting would be prohibitive.[37] Because we can expect that employees and other stakeholders would bargain for socially responsible corporate behavior, the right to engage in corporate charity is among the implied contractual provisions that the corporate form establishes.

Finally, proponents argue that insofar as charity is a result of the ethical and legal rules that circumscribe corporate behavior, there is no conflict with the goal of maximizing shareholder profit. Shareholder value is one of many goals that management can choose to pursue within the bounds of law and ethics. The goal is secondary, however, and cannot outweigh the rules of the game.[38]

Is Corporate Charity Desirable as Practiced?

In addition to addressing its theoretical legitimacy, scholars have also sought to understand the extent to which corporate charity is desirable as a matter of policy. That is, does modern corporate charity benefit either those firms that donate or the public?

Arguments Against Corporate Charity as Practiced

Many argue that as practiced, corporate charity can do more harm than good. Without proper oversight, diverting interests will turn donations into a mechanism through which managers co-opt shareholder property and political expression for their own benefit.[39] This leads to sub-

35. Ibid., 278–281 (drug hypothetical), 298–299 (obligation to do good).

36. Margaret M. Blair, "A Contractarian Defense of Corporate Philanthropy," *Stetson Law Review* 28, no. 1 (Summer 1998): 48–49.

37. Henry N. Butler and Fred S. McChesney, "Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation," *Cornell Law Review* 84, no. 5 (1999): 1202–1205 (discussion of obligation under nexus theory). The authors acknowledge that under this theory charity detrimental to the firm may also occur, however. Ibid., 1205–10.

38. Melvin Aron Eisenberg, "Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure," *Stetson Law Review* 28, no. 1 (Summer 1998): 3–6.

39. Faith Stevelman Kahn, "Pandora's Box: Managerial Discretion and the Problem of Corporate Charity," *UCLA Law Review* 44, no. 3 (February 1997): 579–676. Empirically, Professors James Werbel and Suzanne Carter find that, as of 2002, CEO interests still explain a small proportion of the variance in

optimal or even wasteful charity, and represents a hidden transfer from shareholders to management.[40] Lawmakers should at a minimum require detailed disclosure of corporate charitable donations, and ideally should also require boards to exercise routine oversight of firm giving.[41] Requiring corporate executives or other actors to report corporate donations as personal, taxable income would also help align managers' incentives with those of shareholders.[42] Finally, some scholars note that the interaction of regulations governing charitable deductions and current election law creates the opportunity for non-profit organizations to serve as a conduit for political spending and advocacy.[43]

Arguments for Corporate Charity as Practiced

On the other side of the debate, scholars argue that corporate charity as practiced generates several important social benefits. As a mechanism of social influence and moral sanctions, the expectation that corporations be socially responsible acts as an important constraint on corporate behavior. Thus, a ban on philanthropy would lead to rapacious profit-seeking behavior that is worse than the least efficient corporate charity today.[44]

Aside from the potential benefits to social welfare, others note that corporate charity as practiced can benefit the firm's bottom line. Many agency problems can be alleviated by adopting shareholder-driven philanthropy, as made famous by the Berkshire Hathaway Shareholder-Designated Contributions Program.[45] Even without shareholder input, however, charitable programs that are well integrated with commercial endeavors can help corporations develop a competitive advantage over rivals.[46] Community-based giving can also serve an important signaling

---

corporate giving. James D. Werbel and Suzanne M. Carter, "The CEO's Influence on Corporate Foundation Giving," *Journal of Business Ethics* 40, no. 1 (2002): 53–56.

40. Jayne W. Barnard, "Corporate Philanthropy, Executives' Pet Charities and the Agency Problem," *New York Law School Law Review* 41, nos. 3 and 4 (1997): 1160–1164.

41. Kahn, "Pandora's Box," 674 and Barnard, "Executives' Pet Charities," 169–70 (disclosure), 173–177 (board oversight).

42. Knauer, "Paradox of Corporate Giving," 48–49 and Sugin, "Theories of the Corporation," 873–877.

43. Frances R. Hill, "Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits," *New York Law School Law Review* 41, nos. 3 and 4 (1997): 881–944.

44. Einer Elhauge, "Sacrificing Corporate Profits in the Public Interest," *New York University Law Review* 80, no. 3 (June 2005): 846–848.

45. The Berkshire Hathaway Shareholder-Designated Contributions Program, which began in 1981, allowed shareholders to vote for up to three donees per share. It closed in 2003 after a subsidiary was threatened with a boycott due to pro-choice donations. John A. Pearce, "The Rights of Shareholders in Authorizing Corporate Philanthropy," *Villanova Law Review* 60, no. 2 (2015): 275.

46. Michael E. Porter and Mark R. Kramer, "The Competitive Advantage of Corporate Philanthropy," *Harvard Business Review* 80, no. 2 (December 2002) 61–62.

function for firms as they manage their public image and reputation,[47] without which business would suffer.

Is Corporate Charity More Efficient Than Direct Services Provision, or Direct Funding of Non-Profits?

The third fundamental question about corporate charity in the law literature is whether it is more efficient than direct services provision—that is, whether the government could do more good by collecting the taxes forgone by the deduction for corporate charity, even at the expense of discouraging such contributions. As a matter of both theory and empirics, this question is very difficult to answer. The relative efficiency of charity as opposed to direct provision or funding depends on the interaction of numerous legal, political, and social factors spanning a wide range of regulatory areas. In addition, to replace charity with direct spending would require major changes to the tax code, the impact of which is nearly impossible to predict without historical precedent. Legal scholars have nevertheless offered several intriguing arguments both for and against the relative efficiency of corporate charity.

Reasons to Favor Direct Spending

Scholarship offers two major reasons for favoring direct government expenditure over a tax subsidy for corporate charity: direct expenditure is more democratic, and it wastes fewer charitable resources. Because tax incentives inevitably favor high-bracket taxpayers, current charity is disproportionately driven by the preferences of the wealthy; direct government expenditure would fund charities in a more systematic and therefore more equitable way. In addition, because corporate charity is often at least partially a purchase of goodwill, funding non-profits through tax incentives requires them to divert resources to providing that goodwill. As a result, there is more waste per dollar received relative to direct government funding.[48] Finally, because delegating public decision-making to private actors can raise serious democratic and equitable concerns, policymakers should prefer direct provision over charitable tax incentives.[49]

---

47. Rikki Abzug and Natalie J. Webb, "Rational and Extra-Rational Motivations for Corporate Giving: Complementing Economic Theory with Organization Science," *New York Law School Law Review* 41 nos. 3 and 4 (1997): 1035–1058. Also see Roy Shapira, "Corporate Philanthropy as Signaling and Co-optation," *Fordham Law Review* 80, no. 5 (April 2012): 1908–1916 for an argument that the costs to the firm of these signals often outweigh the benefits.

48. Knauer, "Paradox of Corporate Giving," 88–91. Professor Knauer also notes that, according to legislative history, Congress believed that the tax deduction for charitable giving would be more efficient than direct services provision. It is not clear whether they considered direct government funding to be an alternative. Ibid., 17. Professor Knauer's conclusion that direct government expenditure is more efficient than tax incentives may depend on the charity's most efficient scale. If large national charities are most efficient, then public funding may be best. On the other hand, if local charities are more efficient, then the extra information corporations possess may favor their funding decisions.

49. Fisch, "Questioning Philanthropy and Governance," 1101–1102.

Reasons to Favor Corporate Charity

Based on the economic theory of competitive advantage, corporate charity, as one part of the market for altruism, can be more efficient than direct funding or services provision, depending on the need being filled. Rather than favoring one segment of the altruism market over another, the government should not distinguish between services provided by for-profit firms, non-profit organizations, or the state. Instead, tax incentives should treat them equally, so that they engage in altruism according to their relative strengths, and total resources are most efficiently deployed.[50] In addition, because the government forgoes only a fraction of the donation (at most, the maximum corporate income tax rate), all else held equal, tax subsidies are efficient because for every dollar that is put to public use, the government spends at most thirty cents.[51]

Historical Examples and the Wide Variety of Corporate Donations in Practice

Anecdotal evidence suggests that arguments from both sides of the debate have merit. In this section, I discuss four examples that demonstrate the wide variety of forms corporate donations can take: RJR Nabisco and the questionable charity of its former CEO Ross Johnson, TOMS Shoes and the symbiotic relationship between its commercial and charitable endeavors, CARE and the efficient use of inventory donations to supply non-profit organizations, and AT&T's controversial donations to Planned Parenthood.

Ross Johnson and Nabisco-Funded Chairs

Ross Johnson, who once famously included "the care and feeding of directors"[52] among a CEO's duties, encountered controversy throughout his tenure at RJR Nabisco—most notably when he led an investment group competing to take over the firm through a leveraged buyout, and worse, started the bidding with an unrealistically lowball offer.[53] He was also heavily criticized for co-opting

50. M. Todd Henderson and Anup Malani, "Corporate Philanthropy and the Market for Altruism," *Columbia Law Review* 109, no. 3 (April 2009): 571–628.

51. Harold M. Hochman and James D. Rodgers, "The Optimal Tax Treatment of Charitable Contributions," *National Tax Journal* 30, no. 1 (March, 1977): 4–7. The assumption that all dollars put to public use are equally valuable likely does not hold in reality, and without it, the conclusion that tax subsidies are necessarily more efficient than direct funding is not guaranteed. See Mark P. Gergen, "The Case for a Charitable Contributions Deduction," *Virginia Law Review* 74, no. 8 (November 1988): 1395–1405 for a discussion of the arguments in favor of the mathematical efficiency of the tax deduction and their limits.

52. Bryan Burrough and John Helyar, *Barbarians at the Gate: The Fall of RJR Nabisco* (New York: HarperCollins Publishers, 2010), 26.

53. The initial bid from Johnson's group was $75 per share; the final price per share was roughly $109 per share. Deborah A. DeMott, "The Biggest Deal Ever," *Duke Law Journal* 25, no. 1 (February 1989): 1–26.

corporate resources for his own benefit, as when his dog Rocco was sent home on the company jet to avoid possible impoundment after biting a security guard at a golf tournament.[54]

Less well known but arguably just as wasteful were his many attempts to use Nabisco's corporate charity program for his own benefit. Johnson often directed Nabisco to make donations to board members' pet charities in an effort to curry their favor, particularly when he wanted to forestall resistance to unpopular decisions. For example, shortly after ousting rival Paul Stitch, $4 million of corporate funds went to endow two chairs and construct a new building for the business school at Duke University.[55] One of the chairs was named after board member Juanita Kreps, and the new building was named after RJR Tobacco Chairman Edward Horrigan.[56] It is easy to see how Johnson and his directors benefitted from this expenditure, but far harder to identify benefits to Nabisco and its shareholders. In addition, because the endowments were eligible for a charitable deduction, It is likely the government subsidized Johnson's career advancement. This abuse of so-called philanthropy is in many ways the textbook case for prohibiting corporate charity, as the amount of the firm's expenditure was probably much larger than any benefit it or the public received.

TOMS Shoes

In contrast to Ross Johnson's charitable efforts at Nabisco, which likely enriched him but cost the firm, TOMS Shoes demonstrates how a closely tailored charitable program can give a firm's commercial projects a competitive advantage. In 2006, TOMS launched its now-famous "Buy a Pair, Give a Pair" campaign, which promises to donate one pair of shoes to a child in need for every pair purchased. Just after the business launched, several leading periodicals, including *Vogue* and Time, covered the "Buy a Pair, Give a Pair" program, and the shoes became an instant hit. They sold 10,000 pairs in the first few months of business, far exceeding their inventory and production capacity, and the brand remains very successful today.[57]

The near-seamless blend between TOMS' retail and charitable endeavors helped the firm establish itself as a new entrant in the generally formidable retail market for shoes in the United States. It provided a positive narrative for retailers choosing among the dazzling array of brands they might stock, and the rare ability for customers to associate contributing to the public good with purchasing shoes. Thus for TOMS, philanthropy is not waste; it is an essential element of the firm's success.

---

54. Burrough, *Barbarians at the Gate*, 95. Johnson denies that the trip was solely to send Rocco home. Ibid.

55. Ibid., 96–97.

56. Ibid.

57. See interview with TOMS founder, Blake Mycoskie, describing how the "Buy a Pair, Give a Pair" program contributed to the success of his company, particularly at launch. Shana Lebowitz, "On the 10th Anniversary of TOMS, Its Founder Talks Stepping Down, Bringing in Private Equity, and Why Giving Away Shoes Provides a Competitive Advantage," *Business Insider*, June 15, 2016, http://www.businessinsider.com/toms-blake-mycoskie-talks-growing-a-business-while-balancing-profit-with-purpose-2016-6.

CARE

An inventory donation program run by the non-profit CARE also demonstrates how some forms of corporate charity can be among the most efficient mechanisms for delivering critical public services. CARE is an international humanitarian organization that provides disaster relief, medical care, and other basic needs services to the world's poorest communities. Before Congress dramatically reduced the deduction for charitable donations of ordinary income property, CARE had come to rely on donations from medical supplies manufacturers to support their international medical aid programs. Administrators would survey the doctors in the field about their needs, and then approach manufacturers and ask them to donate the supplies that had been requested. These donations were "like money" to CARE, and when they plummeted after Congress's change, the organization was left to divert other fundraising in order to purchase the supplies on the commercial market.[58]

From a social welfare perspective, this kind of corporate charity is vastly preferable to Ross Johnson's endowed chairs. There are very few transaction costs associated with the transfer from manufacturer to charitable beneficiaries, who receive among the highest marginal utility per dollar donated. From the government's perspective, the recognized deduction accurately reflects public value received, and the loss in tax receipts is relatively small.

AT&T and Planned Parenthood

Finally, AT&T's controversial donations to Planned Parenthood demonstrate that the value of some corporate charity is ambiguous. Until 1990, AT&T had for 25 years made an annual donation of $50,000 to Planned Parenthood's teen pregnancy prevention program. Though the donations went to an uncontroversial and widely supported cause, once they were widely publicized, many shareholders publicly challenged them on political and moral grounds.[59] To the extent that it was their money, and through it their political expression being transferred, they did not want it to go to an organization they so strongly opposed.

In the effort to identify the most desirable forms of corporate charity, the relationship among AT&T, their shareholders, and Planned Parenthood is difficult to categorize. The extent to which value was successfully transferred from AT&T to the public resists measurement, as does the degree to which the donations benefited AT&T's bottom line. And although the value of preventing teen pregnancy is widely recognized, one can understand why some shareholders would be deeply upset by the donations.

---

58. U.S. Congress, House, Committee on Ways and Means, *General Tax Reform, Public Hearings Before the Committee on Ways and Means*, 93rd Cong., 1st Sess., 1973, 6166 (statement of Frank. L Goffio on behalf of CARE).

59. David Hess, Nikolai Rogovsky and Thomas W. Dunfee, "The Next Wave of Corporate Community Involvement: Corporate Social Initiatives," *California Management Review* 44, no. 2 (Winter 2002): 118.

As the examples above suggest, corporate charity in practice supports the wide range of value that legal scholars ascribe to it as a matter of theory, from the very good to the very bad. Nevertheless, as a matter of policy Congress has decided that the tax incentive is here to stay, and as a matter of law, the courts have agreed.

When Congress instituted the current version of the income tax as part of the Revenue Act of 1913, it included a charitable deduction for individuals, but not for corporations. Congress considered but rejected proposals to add a corporate deduction in 1914, 1919, and 1928.[60] Minimal legislative history suggests that it was excluded because legislators saw no reason to incentivize a practice that in their view didn't exist, and because at the time there was widespread belief that corporate giving is *ultra vires*.[61]

The corporate charitable deduction was first introduced as part of the Revenue Act of 1935.[62] It was designed in part to relieve some of the increasing financial strain the government was experiencing by promoting increased private funding of social services.[63] Despite early reluctance, legislators have since been steadfast in their support of the incentive, offering several policy goals as justifications for its inclusion in the tax code.

With some notable exceptions, when Congress has addressed the corporate charitable deduction post-introduction, it has generally been to expand tax-related incentives, as in 1981 when Congress doubled the maximum corporate income that can be offset by charitable contributions from 5 to 10%.[64] Where concerns about the potential for perverse incentives have prompted legislators to restrict or reduce the corporate charitable deduction, they've done so while acknowledging its value as a matter of policy and with the intent to protect it from potential waste or abuse.[65]

---

60. Knauer, "Paradox of Corporate Giving," 17.

61. See Ibid., 16 for an argument that Congress was wrong about the amount of corporate giving that preceded the income tax.

62. *Revenue Act of 1935*, Public Law 74–407, 49 *U.S. Statutes at Large* 1014 (1935).

63. Knauer, "Paradox of Corporate Giving," 19–20.

64. *Economic Recovery Act*, Public Law 97–134, 95 *U.S. Statutes at Large* 172 (1981).

65. As I discuss below, one notable exception to Congress' expansion of the charitable deduction was the 1969 Tax Recovery Act, in which Congress reduced the deduction for contributions of nearly all ordinary income property (most notably for corporations, inventory) from fair market value to a cost basis. Legislative history indicates that Congress wanted to avoid the potential for very high bracket taxpayers to realize a short-term gain by donating ordinary income property rather than selling it. They nevertheless recognized the value of charitable donations generally, as well as the policy reasons for incentivizing it. For those reasons, Congress rejected other proposed restrictions to the charitable deduction in the same act, such as the suggestion that the tax-exempt status of municipal and state bonds be revoked. U.S. Congress, Senate, Committee on Finance, *Report of the Committee on Finance United States Senate (to Accompany H.R. 13270)*, 91st Cong., 1st Sess., 1969, S. Rep. No. 91–552, 14.

After *Dodge v. Ford,* when courts have been asked to review corporate charity in practice, they have generally been very favorable to it. Moreover, as the case law has developed, judges have demonstrated increasing deference to managerial decisions on philanthropy, as well as a willingness to recognize a broadening class of benefits to corporations accruing from charity.

In 1924, the Supreme Court of Nebraska held that the defendant railroad companies' practice of issuing free or reduced fare tickets to members of the clergy and those employed full time in charitable endeavors was permissible; it did not unjustly discriminate, could not be shown to raise prices for other passengers, and reflected the firms' rights to contribute to charitable causes as entities recognized by law.[66] In upholding a $1500 donation to Princeton University almost 30 years later, the Supreme Court of New Jersey expanded the right to contribute to something closer to a duty. The court held that the challenged donation was "long-visioned," and reflected the firm's efforts to fulfill its obligations as a constituent of modern society.[67] Five years after that, the Supreme Court of Utah upheld a corporate authorization to donate $5000 to a charitable cause.[68]

The two most recent cases challenging corporate charity also reviewed by far the largest gifts. In 1964 the Delaware Chancery Court held that a series of corporate donations totaling over $525,000 was not unreasonable given the firm's $19.1 million profit over the same time period. This case was also the first to explicitly apply the Business Judgment Rule to charitable activities, holding that simply being a bad business decision is not enough to enjoin corporate charity.[69] Finally, in 1991, the Supreme Court of Delaware approved a settlement in which Occidental agreed to donate roughly $50 million to build a museum housing the art collection of its most recent CEO, Armand Hammer. As the settlement arose from only one of three original derivative suits seeking to enjoin a larger donation, the court approved it over the objection of many shareholders.[70]

The disputed philanthropy in every corporate charity case following *Dodge v. Ford* has increasingly strained the shareholder primacy narrative. In 1919, the Dodge brothers were challenging investments in manufacturing that would directly affect the company's core business as well as the market competition it would face, and yet the court found that to be insufficient justification for withholding dividends. By 1991, the Delaware high court[71] approved an Occidental Petroleum donation that would only increase shareholder wealth if a museum housing the former CEO's personal art collection generated enough goodwill and increased business from fossil fuel consumers to cover the $50 million expenditure. And yet, none of these cases have expressly narrowed or overturned the precedent, and so the court-imposed narrative is increasingly at odds

66. State v. Chicago, B. & Q.R. Co., 112 Neb. 248 (Nebraska 1924).

67. A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145 (New Jersey 1953).

68. Union Pac. R. Co. v. Trustees, Inc., 8 Utah 2d 101 (Utah 1958).

69. Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Delaware Chancery 1969).

70. Kahn v. Sullivan, 594 A.2d 48 (Delaware 1991). The original donation included an additional $35 million for initial operating costs, as well as an agreement to use the name "The Armand Hammer Museum and Cultural Center of Art," and to hang a large portrait of Dr. Hammer in the lobby. The settlement stipulated that the museum would instead be named the "Occidental Petroleum Cultural Center Building," and that Dr. Hammer's portrait would not be displayed.

71. As I mentioned above, Delaware is a far more common venue for corporate cases than Michigan, where *Dodge* was decided. It is also a notoriously management- and company-friendly jurisdiction, which may have contributed to its tolerance for charity when the relationship between the donation being challenged and shareholder wealth was distant and uncertain.

with reality, creating obstacles for good-faith social entrepreneurs and a smokescreen for those who might take advantage. Today, that untenable pressure is best represented by the business community's first direct challenge to the *Dodge* narrative: public benefit corporations.

The Crisis a Century in the Making: New Corporate Entities as a Challenge to Dodge v. Ford

Building on the earlier trend of constituency statutes[72], the first unavoidable challenge to the common view of *Dodge* came in the form of brand-new legal entities: firms that are explicitly required to contribute to the public good while also seeking shareholder profit. In the last decade, driven by entrepreneurs and non-profit organizations that openly reject the shareholder primacy norm, more than thirty[73] states have enacted statutes formalizing the double- or triple-bottom line[74] for companies with a social mission. As with all areas of law, there are myriad options in form and venue for entrepreneurs to choose from. Among the new forms, the most common and widely adopted has been the public benefit corporation (or "PBC").[75&76] Of those, most authorizing

72. Constituency statutes, "called Ben & Jerry's laws" in some circles, are largely untested statutes that permit but do not require boards to consider stakeholders outside the shareholders when making meaningful decisions for the company. Ben & Jerry's Homemade, Inc. is a major topic in the final part of this dissertation, as its story highlights both the benefits and drawbacks to running a social enterprise in the shadow of *Dodge v. Ford.*

73. As of September, 2019, 36 states currently permit companies to register as benefit corporations, and five are in the process of passing authorizing statutes. In addition, some states like Washington have developed unique but closely related entities for socially conscious entrepreneurs. For an up-to-date map of states with benefit legislation, see the B-Lab map at: https://benefitcorp.net/policymakers/state-by-state-status.

B-Lab is a non-profit organization that seeks to develop social enterprise as a global force for good. From their website: "A historic global culture shift is underway to harness the power of business to help address society's greatest challenges. B-Lab's goal is to accelerate this culture shift and make it meaningful and lasting. Our vision is that one day all companies will compete to be not just best in the world but also best for the world, and as a result society will enjoy a more shared and durable prosperity." Their main activities include certifying B-Corps (companies that meet high social standards), assessing the effects of social enterprise, and lobbying legislatures to enact enabling statutes based on their Model Code. For more information about their mission, the certification process, and a directory of registered B-corps, see: https://bcorporation.net/about-b-lab.

74. The double bottom line refers to pursuing both fiscal gain and public benefit, traditionally environmental sustainability; by some accounts, executives at Ben & Jerry's were the first to use it before enacting their three-part mission. Some studies add the impact on all stakeholders to consider a triple bottom line, but as always, there is variation in which three lines any given scholar or practitioner selects.

75. Names in this area also vary. Statues based on the Model Code are generally called benefit corporations, while Delaware's law refers to these entities as public benefit corporations. For the sake of clarity, I refer to all such entities as public benefit corporations or benefit corporations in this dissertation.

76. Popular alternatives include the Low-profit Limited Liability company (or L3C) and the Flexible Purpose Corporation. In 2008, Vermont was the first state to offer the L3C option, and in many ways it is the most flexible method of incorporating a social enterprise. L3C companies must serve an educational or charitable purpose, and are allowed to earn (and distribute) profits as a secondary goal. There are no explicit requirements for how the board should conduct business, on the assumption that subsuming profit to a public purpose will sufficiently constrain their choices. These companies can also take advantage of the wide latitude shareholders enjoy in structuring limited liability firms. Flexible Purpose Corporations,

statutes fall into one of two major categories: statutes based on the Model Code offered by the non-profit organization B-Lab,[77] and those based on Delaware's 2013 law creating PBC options for business owners. The two forms are largely similar, but important differences exist.

Feature	Model Code Statute[78]	Delaware Public Benefit Corporation[79]
Election or Termination of Public Benefit Status	Any change in status must be approved by two-thirds of voting shares.[80] Dissenters' rights are not expressly authorized.	90% of voting shares must approve the election of public benefit status. A two-thirds majority can elect to revert to traditional corporate form. Dissenters' rights are guaranteed in changes of status.
General and Specific Public purposes	Companies are required to pursue the general public good, and optionally may also identify specific public purposes.[81] Election or termination of public benefit status must be approved by at least two-thirds of voting shares.	Delaware PBCs must be operated in a "responsible and sustainable manner." Directors must also consider "the best interests of those materially affected by the corporation's conduct" in making strategic decisions. PBCs may also be required to identify and pursue a specific public purpose in addition to the general good. A change in status requires approval from two-thirds of voting shares.
Benefit Leadership	Publicly traded companies must appoint a Public Benefit Director to sit on the board. All companies are expressly allowed but not required to appoint a Public Benefit Officer.	Neither directors nor officers are mentioned, and thus presumably are permitted.

pioneered by California and most closely matched by Washington's Social Purpose Corporations, are much like public benefit corporations, with one important addition: board members are explicitly shielded from breach of duty claims when they sacrifice profits for the sake of the firm's public goal. They are also unique in that only a specific purpose is required, rather than pursuit of the general public good. B-Lab, which prefers mandatory general public purposes, dislikes the California model for this reason. For an excellent summary of the history of social enterprise and the statutory forms it takes, see Mystica M. Alexander, "Benefit Corporations-The Latest Development in the Evolution of Social Enterprise: Are They Worthy of a Taxpayer Subsidy?," *Seton Hall Legislative Journal* 38, no. 2 (2014): 219–280.

77. B-Lab certification is in some ways analogous to the Good Housekeeping Seal of approval. It is designed as a trustworthy signal to consumers, ensuring that the firm's products are ethically manufactured and distributed. Certified companies are listed on B-Lab's website and are permitted to use B-Lab's certified logo on both packaging and marketing materials.

78. The full model legislation is available on B-Lab's website at: https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf

79. Delaware Code, Title 8, Chapter 1, Subchapter 15, §§ 361–368

80. Of course, requiring a supermajority of shareholders to support a change in status makes such a transition exceedingly difficult in practice.

81. In the model provided by B-Lab, General public benefit" is defined as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation." Many interpret this as a requirement that public benefit corporations not do more harm than good, even if doing so would lead to significant gains in their specific public purpose. By contrast, a specific purpose can focus on a single element of social welfare such as carbon recapture, diversity in employment, or expanding infrastructure in underdeveloped areas. *Model Benefit Corporation Legislation*, §§ 102, 201(a)-(b) (2013).

Evaluation and Reporting	Social and environmental impacts must be evaluated using a credible, independent, and transparent third-party standard annually. Reports must be available to the public without charge.	Social and environmental impacts must be evaluated at least every two years. A third-party standard is optional, as is public reporting of the results.
Shareholder Quorums for Derivative suits	2% of eligible voting shares.	2% of eligible voting shares

Generally speaking, the Delaware PBC law provides greater flexibility in structuring a social enterprise, while statutes based on B-Lab's model code provide greater assurance that companies asserting a public purpose do so in good faith.[82] Perhaps most notably, Delaware gives firms significant latitude in choosing how to evaluate their social impact, and has few reporting and transparency requirements. Delaware also requires fewer built-in mechanisms of internal control, such as the appointment of Public Benefit Directors in publicly traded benefit corporations.[83]

Of course, the legal validity of these hybrid entities remains untested. Of greatest concern to scholars is the relative lack of guidance and protection for company directors. Both the model code and the DE statute define the general public good vaguely, and depend largely on the good faith of public benefit companies to ensure compliance.[84] Even worse, none of the authorizing statutes provide guidance as to how corporate executives and directors should balance their twin aims of private financial gain and public value added when the two are in conflict.[85] Neither statute guides or even binds that tradeoff, leaving management free to value one goal significantly over the other, and potentially at risk for shareholder suits.

The meteoric rise of registered public benefit corporations demands that these legal ambiguities be resolved. Just as *Dodge v. Ford* has come to stand for a bedrock principle it never established, the continued entrenchment of public benefit corporations will make correcting any mistakes in the law increasingly difficult over time. Moreover, with each successful PBC, increasing value (and in particular, public value) is at risk of deadweight loss should the companies' pro-social strategies prove extra-legal.

Ultimately, benefit corporations and other hybrid entities are the culmination of 100 years of bad law under *Dodge v. Ford*; the combination of the rising, erroneous belief that precedent requires

82. Which approach is preferable depends on one's point of view. Scholars who are concerned that companies will use public benefit status to greenwash their otherwise profit-driven motives prefer the model code, as it has stronger enforcement mechanisms. Those who view social enterprises as new and experimental businesses tend to prefer Delaware's approach, as it allows for significantly more private ordering and innovation.

83. One feature of Delaware's PBC statute that is stricter than the model code is in the requirement that firms identify and pursue a specific public purpose in addition to the general good. Statues based on the model code allow but do not require a specific purpose.

84. The assumption of good faith permeates both the goals a company elects to pursue and the way in which it measures and reports its success.

85. As the history and sale of Ben & Jerry's described below demonstrates, this balancing act turns out to be the main existential struggle of social enterprises that grow. Statutes that provide such guidance would do far more to address directors' fears of legal exposure, particularly during a merger or acquisition process.

the shareholder primacy norm and growing corporate citizenship that has defied it. The problems created by *Dodge* are clear. First, courts' permissive oversight of corporate charity as practiced has lent a sheen of propriety to corporate philanthropy of wildly varying value to the firm and the public. Perversely, the assumption that directors are pursuing shareholder wealth in combination with the business judgment rule permits precisely the kind of waste that both Henry Ford and the Dodge brothers would have opposed. First and most relevant to social entrepreneurs, the misapplication of *Dodge* dicta has made binding a company to a social mission exceedingly difficult. As the story of one of the first blockbuster social enterprise demonstrates, pursuing a double bottom line is difficult in the best of times, and only intensifies as the size, capital assets, and reach of the company grows and becomes a target for acquisition by multinational conglomerates.

Pulled in opposite directions by the errors in *Dodge*, these issues are best addressed separately. The next two sections of this dissertation discuss each problem in turn, offers two promising early steps for repairing these fundamental flaws, and evaluates their likely effects.

Part Two - Encouraging Good Faith and Efficient Corporate Charity

The perverse consequence of the exaggerated common view of *Dodge v. Ford* is that, far from restraining corporate charity, the assumption of an underlying profit motive has led to corporate philanthropy of all kinds, including contributions that benefit management at the expense of shareholders and the public alike.[86] Even worse, taxpayers subsidize even the least efficient and most egregiously self-serving corporate charity. It is important, therefore, that corporate law emerge from the shadow of *Dodge v. Ford* and separate socially valuable charity from philanthropy that amounts to publicly subsidized marketing. In this part, I offer two suggestions for improving the tax code and increasing the average amount of social benefit per corporate dollar donated: reinstating a modified version of the fair market value deduction for the donation of basic needs goods, and introducing a modest incentive for publicly useful corporate services. Both of these suggestions seek to tether a company's social work to its core business and thereby avoid greenwashing.[87] Because corporate charity is already a significant economic force in the U.S., I also consider the efficiency effects of these proposed changes beyond reconciling doctrine—for example, by predicting the effects on total tax receipts.

Reinstating a Modified Fair Market Value Deduction for Inventory Donations

When Congress first introduced the charitable deduction, all property donations were eligible for a deduction equal to the property's fair market value. In 1969, however, Congress targeted several deductions for reform, including the one for charity. These reforms were driven by concerns about the ability of some very high-bracket taxpayers to shirk income taxes through a combination of excluding half of their capital income and claiming multiple itemized deductions.[88] With respect to charity, legislators were particularly concerned about the potential for perverse incentives that could allow high-bracket taxpayers to realize a short-term gain by donating rather than selling ordinary income property such as inventory:

> [I]n some cases it actually is possible for a tax payer to realize a greater after-tax profit by making a gift of appreciated property than by selling the property, paying the tax on the gain, and keeping the proceeds. This is true in the case of gifts of appreciated property which would result in ordinary income if sold, when the taxpayer is at the high marginal tax brackets and the cost basis for the ordinary income property is not a substantial percentage of the fair market value. For example, a taxpayer in the 70-percent tax bracket could make a gift of $100

86. Occidental's donation to Mr. Hammer's museum, described above, is one of the most obviously inefficient examples. Shareholder property was transferred to management, and any public benefit to the museum was not enough to offset the cost of foregone taxes.

87. For the sake of clarity in a fairly complex subject, I focus on incentivizing the most efficient kinds of corporate charity, which has the automatic effect of disincentivizing bad faith charity. Further research might consider additional disincentives aimed specifically at the worst corporate charity, such as punitive measures for CEOs who would co-opt shareholder resources, as Ross Johnson at Nabisco.

88. U.S. Congress, *Finance Committee Report*, 80.

> of inventory ($50 cost basis) and save $105 in taxes (70 percent of the $50 gain if sold, or $35, plus 70 percent of the $100 fair market value of the inventory, or $70).[89]

Congress considered several possible solutions to their concern over ordinary income property donations, and ultimately chose to limit them to the property's cost basis.[90] Although this nearly eliminated the abuse they sought to deter, it also had a drastic effect on these donations, as 1973 testimony in front of the House Ways and Means Committee argued and later Senate Reports acknowledged.[91] The reduction seems to have hurt charities providing basic needs and services the most, as Frank Goffio in his testimony on behalf of CARE[92] describes:

> One of the things . . . mentioned was contributions of goods in kind . . . CARE in 1966–67 received $3.8 million worth of contributions in kind, materials, and manufacturers' supplies. It ran about that, $3.6 million in 1967–68, $3.5 million in 1968–69. In 1969–70 it jumped up to $6.2 million. After that in 1970–71 it dropped to $1.6 million. It was $1.6 million last year and it will probably run the same this year. The reason for the big drop since 1970 is the provision of the Tax Reform Act of 1969 requiring that these contributions be valued at cost, instead of fair market value. Contributions in kind are like money to an agency like CARE . . . We take things that we would buy if we had the money.[93]

---

89. Ibid.

90. This change was enacted as part of the Tax Reform Act of 1969. Technically, Congress introduced a mandatory reduction in the FVM deduction equal to the "amount of gain that would not have been long-term gain" (in other words, the unrealized appreciation) had the donor sold the property on the day of contribution. In nearly all cases, however, this amounts to a cost-basis deduction. *The United States Tax Reform Act of 1969*, Public Law 91–172, 83 *U.S. Statutes at Large* 487 (1969).

91. Summary of the *Tax Reform Act of 1976*, Summary, Pub. L. 94–455, 90 *United States Statutes at Large 1520* (1976). Indeed, recognizing the loss of particularly beneficial donations, Congress has since 1969 gone to significant lengths to add enhanced deductions for limited corporate donations such as food. Most recently, the *Protecting Americans from Tax Hikes* (PATH Act) Act of 2015 retroactively made permanent the deduction for "apparently wholesome food," codified at 26 U.S.C. § 170(e)(3)(C) (2015). Qualifying donations are eligible for a deduction of the cost basis, plus half of the unrealized appreciation. *The PATH Act*, Public Law 114–113 (2015).

92. In a prepared statement, the Red Cross described a similar experience in the wake of the 1969 Tax Reform Act and asked Congress to reinstate some increased incentive: "[i]n the case of ordinary income property, primarily inventory, the Red Cross has received property that has been of enormous value in the conduct of its disaster operations. Food, medicines, building materials and supplies valued at millions of dollars have been given to Red Cross for the relief of disaster victims. These donations have fallen off substantially since the donors were limited to cost-basis in computing charitable deductions. Some degree of tax incentive for such donations should be restored." U.S. Congress, *Hearing Before Ways and Means*, 6271 (written statement of the American National Red Cross).

93. Ibid., 6166 (statement of Frank L. Goffio on behalf of CARE).

In written testimony, CARE further explained their view of the cause of the drastic decrease in critical donations:

> Manufacturers tell us it is as economical for them to destroy merchandise as it is to give it to charitable organizations like CARE. Indeed, because we ask manufacturers to deliver goods to us at specific times and places, a gift to CARE tends to be more inconvenient and costly.[94]

Given that no known instances of the perverse incentives existed, it is very likely that the reduction in charity occurring as a result of the 1969 Tax Reform Act outweighed any tax savings to the government. Moreover, the perverse incentives that worried Congress occur only where the taxpayer is in an extremely high bracket and the basis of the property donated is small relative to the expected appreciation upon sale. The 70% tax rate in the Senate Report's motivating example is more than twice the current corporate tax rate, and as the figure below indicates, as long as tax rates are below 66%, legislators can prevent perverse incentives entirely by capping fair market value deductions at twice basis.

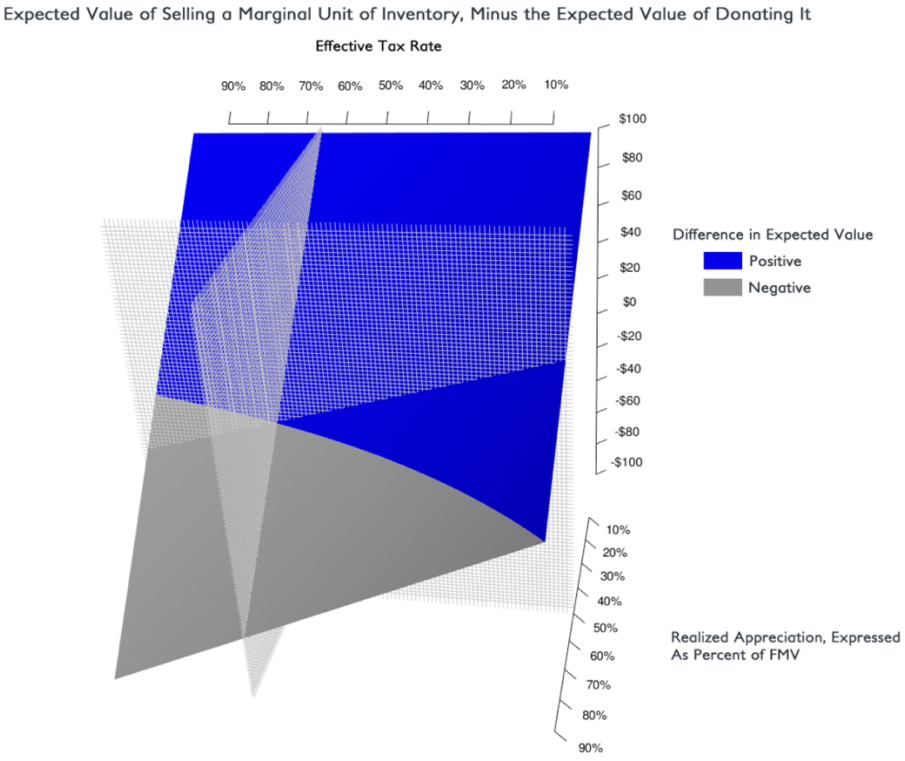


Figure 1: The difference in the short-term payout selling and donating a marginal unit of ordinary income property as income tax rates and property basis vary, where the deduction is fair market value. For the sake of clarity in this example, the fair market value of one unit is assumed to be $100. The relationship among tax rates, property bases, and incentives does not depend on this assumption, however.

94. Ibid., 6170 (statement of Frank L. Goffio on behalf of CARE).

A recent ad describing charity by the Target corporation demonstrates how re-introducing a fair market value deduction for inventory donations could replace some cash donations with inventory contributions that have lower associated transactions costs and in which the deduction recognized more closely matches the net transfer from corporation to public use. In the commercial, an elementary school principal describes how an educational grant from Target allowed the school to replace its old and broken-down physical education equipment, which they otherwise could not afford: "When Target gave us the money, we went straight to Target. There was [sic] three carts full of basketballs, . . ."[95]

Because the school paid retail prices for the goods, they were able to purchase less equipment than they would have received had Target simply given them inventory equal in cost basis to the cash grant. In addition, because Target sold the equipment to the school, they received some of their cash grant right back in profit. The deduction they received thus overstates their net transfer to the school.

Applying hypothetical numbers to this example highlights the relative efficiency of inventory and cash donations, where the recipient needs supplies that are otherwise available on the commercial market. Assume that the grant was $1000, and that the school purchased physical education equipment with an average inventory cost of $15 and a retail price of $20 (represented in this example by soccer balls). Assume further that, were a fair market value deduction available, Target would have been willing to donate $1000 worth of inventory instead of cash.

Target Donates $1000 cash School purchases 50 soccer balls at $20 retail		
School:	+ $750	50 soccer balls, $15 basis
Target:	+ $512.50	+ 350 tax savings + 162.50 after tax profit, 50 soccer balls
Gov't:	- $262.50	- $350 taxes forgone + $87.50 tax on Target's profit

Target Donates $1000 in soccer balls FVM Deduction		
School:	+ $1000	62 soccer balls, $15 basis
Target:	+ $350	tax savings
Gov't:	- $350	taxes forgone

In the case where Target donates inventory directly, the school receives more soccer balls, and the full value recognized by the $1000 deduction is transferred to the school. In the case of the cash donation, however, only $750 of the value recognized by the deduction is transferred, despite the fact that Target benefits from both the full $1000 deduction and $162.50 after-tax profits on the sale to the school.[96]

95. Aired during the summer of 2016. Video recording of June 3, 2016 broadcast on file with the author.

96. The relative loss to the cash donation depends on the difference between the cost basis and the retail price, and need not be 25% in real-world cases. Depending on the relative income and sales tax rates, the government expenditure is also relatively similar in the case of cash donations, as it is when Target

The example provided by this ad makes it clear that some of the transfer in the cash donation is unsuccessful because it goes right back to Target in the form of profit. The problem it highlights applies to any case where a non-profit organization needs to purchase supplies available on the commercial market, however. To change the example slightly, even if the school were to purchase the physical education equipment from one of Target's competitors, they would still receive less value than the cash grant implies. Moreover, some portion of that grant would go directly back to a corporate retailer, thereby diminishing the successful transfer from donors to beneficiaries that the tax code seeks to encourage.[97]

Inventory donations are also particularly valuable to basic-needs charities because they do not require any modification or investment before use, unlike other property donations, which often are not immediately useful for charitable purposes. For example, CARE can send medical supplies directly to their doctors in the field. In order to make use of capital property such as real estate or securities, however, it first has to sell the property and then use the proceeds to support its services. Both of these steps involve transaction costs and loss of value in transfer.

Introducing a Modestly Enhanced Deduction for Corporate Donations of Services Targeting Basic Needs

Section 170(c) defines the scope of a charitable contribution. Although the statute does not explicitly exclude the contribution of services or time, treasury regulations, judicial decisions, and the tax courts have consistently held that such donations do not qualify as charitable contributions under 170(c).[98] Historically there has been some ambiguity with respect to what counts as services donations, but there has been no question that they are ineligible.

The broad prohibition against deductions for services donations makes sense in the individual context. It is difficult to measure and value the donation of an individual's time, and as a result the opportunities for abuse are significant. Even were it possible to know precisely how many hours a person contributed, it would be difficult for the state to determine how much of a deduction that contribution warrants.

The problems with services donations are much more manageable in the corporate context, however, as are the potential gains to incentivizing these contributions. As in the inventory context, where the most efficient way for non-profits to receive necessary supplies is through inventory

---

donates 50 soccer balls directly, the amount they can purchase with cash. In this example, where a corporate income tax of 35% and a sales tax of 0.875% are assumed, the tax receipt loss for a $1000 cash grant is identical to an inventory donation of 50 soccer balls.

97. Cash donations also place nearly all the burden of acquiring supplies on the recipient, whereas inventory donations leave open the possibility of delivery by the manufacturer, who is presumably able to do so at lower cost.

98. 26 U.S.C. § 170(c)(3)(C) (2015). 98 26 U.S.C. § 170(a)(3)(C) (2015) also defines charitable contributions more broadly. Treasury Regulation § 1.170A-1(g) (as amended in 1996) describes the prohibition on the deduction for donated services, while E.I. DuPont De Nemours v. United States, 288 F.2d 904 (U.S. Court of Claims 1961) and I.R.C. § 170(e)(1) seek to determine whether contested contributions are services and thus ineligible. For a discussion of how this distinction applies to intellectual property, see William A. Drennan, "Charitable Donations of Intellectual Property: The Case for Retaining the Fair Market Value Tax Deduction," *Utah Law Review* 2004, no. 3 (2004): 1045–1154.

donation and where corporate services would be socially valuable, direct donation of those services realizes efficiency gains by avoiding the loss associated with converting them to cash. For example, charities with computing and database requirements (such as blood banks and marrow registries) would benefit significantly were corporations to provide resources for cloud computing. Companies such as Google and Amazon could provide cash grants, but as with the school purchasing their gym equipment from Target, some of that grant would go back to donor or related firms when the recipients purchased those resources on the market. Moreover, for the same expenditure, those companies could provide more resources with a direct donation than the equivalent grant can purchase.

The benefits to corporate services donations accrue from their unique skill sets, the economies of scale with respect to labor, and the ability to verify their expenditures such as wages through existing reporting mechanisms. Related commercial products and corporate financial statements also give tax officials a mechanism for verifying sufficient quality and benchmarking an appropriate deduction. Firms seeking a services deduction could provide a tax assessor with an expense report similar to those used in the federal procurement system, as well as appropriate benchmark products and a three-year running average of their "asset turnover efficiency" ("ATE") for related products. If the assessor determines that the donated service provides public benefit, leverages unique firm value, and matches the benchmarks in quality, the firm could then receive a deduction equal to their expenditure plus one-third of their expected ATE for a commercial product of the same size.[99] Costs plus one-third expected return is a conservative incentive designed to protect the state from losses even where the service is mistakenly over-valued. It is hopefully also strong enough, however, to encourage corporations to seek out and identify opportunities to create public value.

In order to ensure that recognized public services produce benefits in excess of the potential loss to tax receipts, I would argue that early iterations of this program should also restrict deductions to services related to basic needs.[100] This ensures that beneficiaries are among those with the most marginal utility received per dollar donated, and that the services provided are ones that the government would otherwise have to fund or provide directly. Should these donations prove socially beneficial, policymakers might consider expanding the areas of service eligible for the enhanced deduction to leverage a greater breadth of corporate skills.

---

99. Because this would be a novel incentive, there is currently no research indicating the optimal incentive. I propose expenses plus one-third ATE as a workable and modest start; however, the most efficient percentage of costs may be different.

100. I would not argue, however, for as strict a definition of basic needs as the IRS has taken in other contexts, such as the enhanced deduction for products solely for the use of the ill, needy, or infants. For example, in 2014, the IRS denied an enhanced deduction for personal hygiene and grooming products donated to homeless shelters: "[t]he Donated Products have no relation to alleviating or satisfying a 'necessity of life' such as the need for food, clothing, or shelter (or other basic needs). A person who cannot afford the Donated Products may be needy, but the Donated Products do not relate to the specific need that caused the person to be needy (such as lack of financial resources, for example)." *Internal Revenue Service*, Internal Revenue Service Memorandum Number: 201414014, 2–4 (2013), 4. That such products might help a person in financial distress to find a job is apparently not a direct enough link to justify an enhanced deduction. Such a strict definition of basic needs, in my view, is not necessary to ensure that recognized donations are worthwhile. Moreover, it excludes valuable donations that could provide significant public value at low cost. A broader definition of basic needs could serve the purpose of ensuring public benefits without such a sacrifice.

Some corporations, such as the San Francisco-based software development firm Zendesk, have already recognized the potential for public benefit from their services, even without a tax incentive.[101] As part of its municipal property negotiations with the city, Zendesk agreed to engage in local volunteering, although neither the nature nor the extent of that volunteer work was specified.[102] Some employees began to volunteer at a local technology center, training homeless and low-income people in the use of personal computers, smartphones, and office software. Through the course of that work, however, Zendesk employees noticed two things: that the center was still using paper flyers to inform guests about other local services, and that most of those guests had regular access to some kind of Internet-enabled phone. The employees recognized that they could leverage their skills and experience working together on commercial projects to create a website that more efficiently directs low-income people to the services they need. The result is the mobile website, http://www.link-sf.com/. LinkSF displays local shelter, medical, hygiene, and technology services, and walking or public transportation directions to reach them. This is a vast improvement over the paper-based system, and has almost certainly created value for San Francisco's low-income population that exceeds both the labor and business costs Zendesk incurred to develop and maintain it. Much of the extra value comes from infrastructure that Zendesk had already developed for its commercial products, including their software production, testing, and roll-out platforms, as well as the economies of scale associated with their teams of experienced engineers who work together often.[103]

In addition to the public value, Zendesk has also significantly benefitted from the neighborhood investment program. The firm reports that providing an opportunity for software developers to put their skills to public use significantly improves their ability to attract and retain highly skilled employees. The spirit of public service also improves the culture at Zendesk and thereby contributes to employee satisfaction, even among those who work solely on commercial products. In the software development market, where nearly all of a firm's value is realized through employee labor, and where talent is by far the most precious resource, this is a significant advantage. The firm's charitable efforts are also a centerpiece of its marketing pitch to potential investors.[104] Zendesk's experience suggests that there are opportunities for contributions to the public benefit that are unique to corporations, and that in turn can benefit the donating firm. Congress should consider implementing a conservative incentive for these donations. A deduction for firm expenditures plus one-third average asset efficiency, subject to approval by an assessor and a basic needs focus, would be a good place to start.

---

101. Telephone interview with Megan Trotter, Senior Global Community Programs Manager, Zendesk (Aug. 23, 2016).

102. Zendesk was the first firm to negotiate a mid-Market St. payroll tax exclusion with the city of San Francisco—the so-called "Twitter Tax." In return for a promise to invest in property and the local community, large firms with offices in the Tenderloin neighborhood can receive a payroll tax credit applied to new hires for up to seven years. To ensure that these companies undertake projects that will benefit the local community, a Neighborhood Advisory Committee oversees and approves these charitable programs. Ibid.

103. Ibid.

104. Ibid.

Effects on the Efficiency of Corporate Charity, Narrowly Defined

If we look at corporate charity in isolation, both of the proposals above should improve the average efficiency of corporate donations, and in so doing take one step towards repairing the first of the two major doctrinal flaws imposed by *Dodge*.

Defined as the value successfully transferred per dollar donated, the efficiency gains come from two primary sources: (1) an increase in the probability that charitable dollars go to projects the public will value, and (2) a decrease in the average transaction costs associated with corporate donations.

Increasing the Probability that Corporate Donations Lead to Commensurate Public Value

As the cases and examples above illustrate, there is no set ratio between the amount of a corporate donation and the amount of value the public enjoys as a result. Under the original terms of the donation challenged in *Kahn v. Sullivan*, Occidental would have contributed roughly $85 million to house and display Dr. Hammer's collection of art, but whether the public would draw more than $85 million in enjoyment from the ability to visit the museum was difficult to say.[105] At worst, some contributions can amount to near total waste. Donations where the deduction far exceeds public value added reduce the average efficiency of corporate charity, and are often the reason for critics' calls to abolish charitable deductions for businesses. Inventory and services donations, on the other hand, offer greater certainty that realized public value will approach the recognized deduction. The increase in efficiency is further augmented if services and inventory donations replace more wasteful contributions.

In the case of inventory donations, accurately determined fair market value deductions are predicated on what the commercial market is willing to pay for donated goods. In addition, a twice-basis cap on the fair market value deduction disfavors the donation of luxury goods with high mark-ups, which Congress fears are most susceptible to perverse incentives and manipulation. Because fair market value can lag behind actual market value, inventory donations are not immune from losing value in the transfer from donor to beneficiary, particularly where donated goods have recently experienced a decline in market value. hey are less susceptible to the massive losses associated with charitable endeavors without a basis in established commercial value, however, such as the construction of a new museum.

In the case of services donations, the public assessor serves to ensure that recognized tax deductions reasonably reflect public value received, as does the requirement that recognized donations be related to basic needs. Before approving a deduction, the assessor should confirm that the services donation fulfills a recognized public need for basic services, and matches the quality of comparable commercial endeavors with proven market value. Like the fair market value standard for inventory donations, assessor evaluations and eligibility determinations need not be entirely error-free in order to increase the efficiency of corporate charity generally.

105. *Kahn v. Sullivan*, 51.

Decreasing Average Transaction Costs

Another efficiency benefit of inventory and services donations is that they are associated with relatively low transaction costs compared to other forms of corporate charity. This is particularly true when the goods or services donated would otherwise be purchased by non-profits or the government.

Inventory donations are generally associated with low transaction costs because they can be put directly to public use. As the examples of medical supplies solicited by CARE and shoes donated by TOMS demonstrate, many inventory donations can be transferred from corporate donors to recipients with little additional investment by the non-profit distributing them. This is in contrast to capital property donations, which usually must be sold, altered, or repurposed before they can be put to public use. Non-profit organizations also have a finite need for capital property, and as such, the marginal return on capital donations diminishes rapidly. Inventory, on the other hand, often fills ongoing needs, and reasonable excess can be saved for future use. As a result, the marginal utility associated with inventory donations diminishes more slowly than for contributions of capital property.

Services donations are also associated with low transaction costs, particularly in the basic services context where they fill a need that the government would otherwise pursue. Savings come from three major sources. First, services donated from the private sector leverage firms' economies of scale and existing skill sets, saving the state from having to invest in the infrastructure and personnel required to provided services directly. Second, they allow the government to avoid paying the full mark-up associated with services purchased on the retail market. Instead, the government pays a fraction of the normal appreciation by forgoing the taxes that otherwise would have been paid on one-third of the firms' mark-up. Finally, in systems where an assessor approves services deductions after evaluating the final product, the government avoids the risk associated with production delays or defects, which should result in additional taxpayer savings.

Effects on Efficiency More Broadly Defined

Of course, since corporate charity and its tax treatment are already a major factor in U.S. economics, it is important to consider the effect of the changes I propose on social welfare generally; improving the coherence of doctrine is only worthwhile if it doesn't have other, more negative add-on effects. And, as Congress' treatment of inventory donations demonstrates, it is important that any change to the tax code be considered in context. This section seeks to ensure that improving legal doctrine and the average corporate donation also benefits the public generally.

Holding all else constant, improving the efficiency of corporate charity should improve total social welfare, or efficiency more broadly defined.[106] Of course, in reality, charity is just one of

106. This is in addition to the benefits of healing the gaps in precedent created by *Dodge v. Ford.* Because charitable giving by corporations is already a significant part of the U.S. economy, I include this discussion on the effects of that doctrinal repair on aggregate social welfare, as it is important that the solution not cause more problems than it creates.

myriad interrelated factors that influence the economy and social welfare. As a result, an increase in the efficiency of corporate charity need not improve total social welfare if the gains in corporate donations are offset by efficiency losses elsewhere. A full theoretical treatment of this complicated question is beyond the scope of this dissertation. Instead, in this section, I highlight some of the related theoretical work and its implications for the efficiency of my proposals. Because a major threat to the net efficiency of these proposals arises if they encourage corporations to donate above the optimal level, I focus on theory related to three major questions: (1) Will total corporate charity increase in response to these changes? (2) Assuming corporations do increase their giving, will total tax receipts decrease as a result? and (3) If so, could the government have done more for the public good with the forgone taxes than charities will with the increased donations? Where possible, I also report on the empirical literature relevant to these questions.

Will these Proposals Affect Total Corporate Giving?

If the supply of corporate charity is completely inelastic, then increasing the quality of corporate philanthropy should lead to an increase in overall efficiency. The question becomes much more complicated, however, if firms respond to a reduction in the price of some forms of charity by changing the amount of their total social contributions. Thus, one important theoretical question is: What drives corporate philanthropy, and how will these proposals affect managerial decision-making with respect to charity? Theoretical and empirical work related to this question is robust in the business and management literatures, and includes discussions of the theory of "corporate social responsibility" ("CSR"), agency theory, and strategic corporate giving.

Theories of Corporate Social Responsibility (CSR)

As a theoretical concept seeking to explain a firm's decision to dedicate resources to the public good, CSR[107] has turned out to be both contentious and dynamic.[108] The major branch that is

107. A related but unique concept is corporate social responsiveness. Although the two terms interact, scholarship focused on social responsiveness tends to take a more narrow view of the question, both with respect to the obligations a firm owes to whom, and the scope of managerial discretion and action. For a helpful discussion of the relationship between these two concepts in business and society literature, see Steven L. Wartick and Philip L. Cochran, "The Evolution of the Corporate Social Performance Model," *Academy of Management Review* 10, no. 4 (October 1985): 758–769.

108. That CSR is a viable theoretical concept is not universally accepted, however. Some scholars resist the idea that corporate social responsibility can be effectively captured in a general model, and argue instead for narrow models tailored to specific situations and operationalized to reflect corporate modes of social engagement. Tim Rowley and Shawn Berman, "A Brand New Brand of Corporate Social Performance," *Business & Society* 39, no. 4 (December 2000): 397–418. Others argue that all research on CSR is fatally flawed because the dispositive corporate responsibility is an economic one owed to shareholders. Theodore Levitt, "The Dangers of Social Responsibility," *Harvard Business Review* 36, no. 5 (1958): 41–50. Finally, some critical scholarship argues that CSR literature mischaracterizes corporate public engagement as contribution to the social good, when in fact it is a tool by which management can influence other actors and stakeholders. Usha C.V. Haley, "Corporate Contributions as Managerial Masques:

most relevant here evaluates CSR using supply and demand theory from the firms' perspective.[109] These models generally assume that social engagement results from firms competing for a finite amount of social regard (or reputation), and that managers select the amount of resources to dedicate to the public good by optimizing their firm's utility along an indifference curve relating a dollar spent on firm investment to one spent on public projects.[110] The shape of a firm's indifference curve is influenced by several factors, including its size, industry, proportion of inelastic sales, and labor market conditions. In this view, managers efficiently sort into different levels of CSR from heavy to no social engagement, and the population of firms taken together displays a neutral relationship between CSR and financial performance.

Agency Theory and the Managerial Decision to Donate

Stepping down one level of generality, some scholars have focused on individual managers' decisions to contribute to the public good, and whether any agency problems arise from them. For example, in a 1988 article,[111] Peter Navarro developed two mathematical models of managerial discretion over corporate giving, one in which the manager seeks to maximize firm profits,[112] and

---

Reframing Corporate Contributions as Strategy to Influence Society," *Journal of Management Studies* 28, no. 5 (1991): 485–510.

109. Another major though less immediately relevant branch of this literature is based on Archie Carroll's seminal three-dimensional model of CSR. Archie B. Carroll, "A Three-Dimensional Conceptual Model of Corporate Performance," *Academy of Management Review* 4, no. 4 (1979): 497–505. These models posit that three major factors influence a firm's behavior: the specific social issue involved, the firm's responsibilities with respect to that issue, and its general philosophy of responding to public input. Ibid., 502. In this view, a firm's economic and social responsibilities are not at odds with one another, but rather two complementary pieces of the firm's total responsibilities, which also include legal, ethical, and discretionary duties. Ibid., 499. Models must account for a variety of factors that drive managerial decision-making with respect to social engagement, as focusing on just one element such as the impact to profits can be misleading. Ibid., 502–03. Later scholarship explores the mechanisms through which firms can fulfill their social responsibilities and respond to social issues (Wartick, "Evolution of Corporate Social," 766–67) and introduces the influence of internal firm politics and external stakeholder activism. David P. Baron, "Private Politics, Corporate Social Responsibility, and Integrated Strategy," *Journal of Economics & Management Strategy* 10, no. 1 (2001): 7–45 and Bryan W. Husted, "A Contingency Theory of Corporate Social Performance," *Business & Society* 39, no. 1 (2000): 24–48. Applied to corporate donations to charity, these models would predict a very small increase in total corporate behavior in response to introducing a limited inventory or services deduction. The new deductions would be expected to influence only consumer-based decisions at proactive firms led by managers who believe in exercising discretionary responsibilities—a very small proportion of the total.

110. Abagail McWilliams and Donald Siegel, "Corporate Social Responsibility: A Theory of the Firm Perspective," *Academy of Management Review* 26, no. 1 (2001): 99–120 (firm competition), 124–125 (firms selecting the optimal level of CSR. See also Krishna Udayasankar, "Corporate Social Responsibility and Firm Size," *Journal of Business Ethics* 83, no. 2 (2008): 167–175.

111. Peter Navarro, "Why Do Corporations Give to Charity?," *Journal of Business Ethics* 61, no. 1 (January 1988): 65–93.

112. On the demand side of the profit-seeking model, where contributions can serve as a form of advertising, the manager seeks to maximize the function $\pi = PQ(P,G) - C[Q(P,G)] - G$, where π represents profits. Q represents the level of product output as a function of P, the product price, and G, the level of firm giving. C represents the cost of production. This leads to the first order conditions

one in which she seeks to maximize her own utility, which is influenced by firm profits and other factors.[113]

Like the supply and demand models discussed above, the profit-maximizing model suggests that managers will choose to increase giving until the marginal benefit equals the marginal cost. The marginal cost of giving is the price of the gift plus the changes to production costs and revenue associated with a decrease in quantity sold.[114] Under this model, a change in the corporate tax rate changes the cost of marginal giving and investment equally, and thus will not affect the managers' preferred level of giving.[115]

The utility maximization models nests the profit motive within a manager's utility function such that a profit-maximizing level of giving exists, but managers can choose to exceed that level for their own benefit. The amount of excess giving is constrained by expected minimum profits, however. The interaction of excess giving (where the marginal cost exceeds the marginal benefit) and a minimum profit threshold suggests that a change in the effective corporate tax rate could lead to a change in corporate giving in two ways. According to the standard preference model, managers experience a decrease in price of the forms of some giving as an increase in discretionary profits, but the relative returns from both options are unchanged, and so consumption of both investment and charity increases proportionally. According to a preference model that incorporates managerial utility derived from the act of giving, a price decrease further lowers the after-tax cost of giving relative to other uses for discretionary funds, while the substitution effect leads to a greater increase in excess giving.[116]

Strategic Corporate Giving

Finally, a robust literature in business, society, and management analyzes the evolution and determinants of corporate social activity as strategy. Work in this area synthesizes the economic and social responsibilities of the firm to create an instrumental theory of corporate philanthropy, and highlights the ways that managers can use contributions to establish or protect competitive advantages.[117] Many scholars focus on two critical firm resources: reputation and labor. According

$P + Q\frac{\partial P}{\partial Q} = \frac{\partial C}{\partial Q}$ and $P\frac{\partial Q}{\partial G} = \frac{\partial C}{\partial Q}\frac{\partial Q}{\partial G} + 1$. To illustrate that CSR may also reduce firm costs, Professor Navarro adds a function representing environmental attributes to the determinants of production cost in the firm's original demand function. This shows that firms whose positive environmental attributes rise with *G* will have a higher ratio of giving to sales than those with a neutral or negative relationship. Ibid., 67–68.

113. Space prohibits repeating Professor Navarro's mathematical model for the utility maximizing manager here, which can be found in his 1988 article. Ibid., 70–76.

114. Ibid., 70.

115. James R. Boatsman and Sanjay Gupta, "Taxes and Corporate Charity: Empirical Evidence from Microlevel Panel Data," *National Tax Journal* (1996): 195.

116. Navarro, "Why Do Corporations Give," 71–76.

117. A survey conducted by David Saiia, Archie Carroll, and Ann Buchholtz reports a similarly growing consensus among corporate executives and giving professionals with respect to the prevalence and utility of strategic philanthropy. David. H. Saiia, Archie B. Carroll and Ann K. Buchholtz, "Philanthropy as Strategy: When Corporate Charity Begins at Home," *Business & Society* 42, no. 2 (2003): 181–185.

to this view, firms compete for a finite, exogenously determined supply of both, and philanthropy is one dimension on which firms can signal their commitment to social norms to customers and potential employees.[118] Models of strategic philanthropy therefore predict that corporate giving will be more robust in competitive industries with high rates of public contact and advertising; within one industry, firms that are larger, not yet fully mature, and have more slack[119] will tend to give more.[120]

Related scholarship has reported the rise of professionalized giving, particularly at large companies, which can serve a variety of functions. Proactive strategic giving entails social programs that build reputations and are explicitly tied to tangible, measurable returns.[121] Reactive strategic giving is often a defensive tactic aimed at mitigating reputation damage after a negative event.[122]

Implications for Proposed Tax Changes

Nearly all of the theoretical work on the determinants of corporate social engagement would predict an increase in total giving as a result of introducing additional incentives for inventory or services donations. According to the firm demand and profit-motive models of agency theory, the new deductions decrease the price of one of the inputs (charity) relative to the other (private investment). As a result these models would expect an increase in charity proportional to the percent decrease in the cost of giving. In the case of a new fair market value deduction for inventory capped at twice basis, they predict increase relative to: min(FMV, cost*2) – cost.

According to managerial utility models in agency theory, giving will increase by an even greater proportion, as the utility the manager receives from giving augments the substitution effect of the price decrease. The increase is nevertheless constrained by the minimum excess profits constraint, and thus would not be expected to rise too far above the increase predicted by the profit-maximizing models.

---

118. Ann K. Bucholtz, Allen C. Amason and Matthew A. Rutherford, "The Mediating Effect of Top Management Discretion and Values on Corporate Philanthropy," *Business & Society* 38, no. 2 (1999): 167–187.

119. In this context, organizational slack is defined as firm resources available to respond to internal or external pressures for change. Ibid., 171 (definition of slack).

120. William O. Brown, Eric Helland and Janet Kiholm Smith, "Corporate Philanthropic Practices," *Journal of Corporate Finance* 12, no. 5 (2006): 869–875. The authors stress that they find evidence of agency costs as well. Ibid., 869.

Professor Useem also argues that a firm's local business culture is an important determinant of corporate giving, as are other social and moral influences on management. Michael Useem, "Market and Institutional Factors in Corporate Contributions," *California Management Review* 30, no. 2 (1988): 77–88 (size and industry, as well as local culture/manager social and moral influences). Louis H. Amato and Christie H. Amato, "The Effects of Firm Size and Industry on Corporate Giving," *Journal of Business Ethics* 72, no. 3 (2007): 235–237 (firm size, advertising, and industry).

121. Timothy S. Mescon and Donn J. Tilson, "Corporate Philanthropy: A Strategic Approach to the Bottom Line," *California Management Review* 29, no. 2 (1987): 50–51.

122. Robert J. Williams and J. Douglas Barrett, "Corporate Philanthropy, Criminal Activity, and Firm Reputation: Is There a Link?," *Journal of Business Ethics* 26, no. 4 (2000): 348–349.

Finally, the strategic corporate giving literature predicts that where inventory and services donations are associated with positive returns for the firm,[123] introducing new deductions will increase their contributions. Donation programs already operating at the firm's optimal level would again increase in proportion to the price decrease. Where these deductions create opportunities for donations that did not exist before, there may be a substantial increase in a given firm's level of charity, up to the point where the marginal benefit to the firm is zero.

Relevant Empirical Literature

As in the theoretical literature, empirical papers on the determinants of corporate giving vary in their approaches to the question and their results. Nevertheless, similar themes emerge.

Perhaps the most mixed empirical results occur with respect to the agency and managerial discretion theories of corporate giving. Using various measures, including insider stock ownership and the proportion of insiders on the board of directors,[124] several studies have found that managerial utility is a non-trivial driver of corporate charity.[125] Others have found either only a very limited relationship[126] or none at all.[127] Studies using the proportion of institutional ownership as a proxy for shareholders' ability to constrain managerial-driven charity also yield conflicting results; some report a strong negative relationship between institutional ownership and giving,[128] while others find no evidence of such a trend.[129]

The most consistent evidence supports elements of the firm-based demand and strategic giving theories. A firm's industry does seem to influence corporate charity, with those firms in more competitive fields where differentiation is difficult and consumer contact is frequent giving more

123. If inventory or services donations fall outside those with sufficient benefits to the firm, strategic giving theory would predict no change as a result of the new deductions.

124. Scholars use these proxies based on the theoretical claim that the proportion of insiders on a board is inversely related to the amount of oversight the board will exercise over management. Thus, corporate giving is expected to rise as the proportion of inside directors does.

125. Lisa Atkinson and Joseph Galaskiewicz, "Stock Ownership and Company Contributions to Charity," *Administrative Science Quarterly* 33, no. 1 (1998): 82–100. See also Jia Wang and Betty S. Coffey, "Board Composition and Corporate Philanthropy," *Journal of Business Ethics* 11, no. 10 (1992): 771–778 and Brown, "Corporate Philanthropic Practices."

126. Using changes in the marginal tax rate to estimate managerial responses to changes in income, Boatsman and Gupta find a small but positive relationship between managerial discretion and corporate giving. One major limit to the relationship comes from an exogenously imposed minimum profit constraint. Boatsman and Gupta, "Taxes and Corporate Charity," 198.

127. Navarro, "Why Do Corporations Give?," 85–90.

128. Barbara R. Bartkus, Sara A. Morris and Bruce Seifert, "Governance and Corporate Philanthropy: Restraining Robin Hood?," *Business & Society* 41, no. 3 (2002): 332–335 (results).

129. Betty S. Coffey and Gerald E. Fryxell, "Institutional Ownership of Stock and Dimensions of Corporate Social Performance: An Empirical Examination," *Journal of Business Ethics* 10, no. 6 (1991): 440–442 (results).

than others.[130] Similarly, as supply and demand theory suggests, larger firms are generally expected to give more.[131] Evidence also supports the idea that firms are increasingly taking a strategic view of charity in which social programs are tied to explicit tangible returns, and using philanthropy as both a proactive and defensive reputation management tool.[132]

Will an Increase in Total Corporate Charity Reduce Total Tax Receipts?

On the most basic level, one would expect that decreasing the price of some forms would increase the total amount of corporate charity. If so, the next important question for the impact of these proposals on total social welfare is whether such an increase would negatively affect tax receipts.

With respect to corporate tax receipts, if charitable contributions have no influence on a firm's income, the government will lose a maximum of $t_{max}*g_m$, where t_{max} represents the highest corporate tax rate and g_m represents the marginal giving due to the decreased price of some forms. If charity reduces corporate income beyond the amount donated, the government will lose even more, $t_{max}*g_m + t_{max}*i_d$, where i_d represents the decrease in corporate income attributable to charity in excess of the donations themselves. On the other hand, if, as some of the theoretical literature suggests, charity can benefit a firm's bottom line, as any taxes paid on income due to charity will offset the government's loss: $t_{max}*g_m - t_{max}*i_i$, where i_i represents the increase in firm income attributable to the increased giving. As the benefits to the firm from charity increase, the loss in tax receipts decreases. At the point where one dollar of charity provides one dollar of additional income, the government's loss is zero. Beyond that, the government experiences a gain in receipts, at most $t_{max}*(g_m - i_i)$.

A broad array of studies on the link between Corporate Social Performance ("CSP") and Corporate Financial Performance ("CFP") speaks to the question of what will happen to corporate income when managers increase their giving in response to these proposals. The robust discussion of the relationship between philanthropy and profits is very divided, however. Using a variety of methods, scholars studying the CSP–CFP link have reported both positive[133] and negative[134]

---

130. Amato, "Effects of Firm Size," 235–237 and Brown, "Corporate Philanthropic Practices," 863–865.

131. Mike Adams and Philip Hardwick, "An Analysis of Corporate Donations: United Kingdom Evidence," *Journal of Management Studies* 35, no. 5 (1998): 650–651 and Peter A. Stanwick and Sarah D. Stanwick, "The Relationship between Corporate Social Performance, and Organizational Size, Financial Performance, and Environmental Performance: An Empirical Examination," *Journal of Business Ethics* 17, no. 2 (1998): 198. Amato and Amato report a slight variance on this trend. They find that very small and large firms are more likely to give than medium sized firms. Amato, "Effects of Firm Size," 235–237. In both cases, however, it is the firm's high level of visibility that drives giving.

132. Williams, "Corporate Philanthropy, Criminal Activity," 346–348.

133. Sandra A. Waddock and Samuel B. Graves, "The Corporate Social Performance-Financial Performance Link," *Strategic Management Journal* 18, no. 4 (1997): 310–311 (results). See also Peter W. Roberts and Grahame R. Dowling, "Corporate Reputation and Sustained Superior Financial Performance," *Strategic Management Journal* 23, no. 12 (2002): 1090–1091.

134. Amy J. Hillman and Gerald D. Keim, "Shareholder Value, Stakeholder Management, and Social Issues: What's the Bottom Line?," *Strategic Management Journal* 22, no. 2 (2001): 132–134 (results).

relationships. A well-regarded meta-analysis[135] of this expansive literature, which accounts for several study features such as expected sampling errors, finds a consistently positive relationship.[136] The consistently positive relationship does vary, however, from strongly positive to modestly so, depending on factors such as the effect of charity on reputation and the way that CFP is measured.[137]

If it is correct that the relationship between CSP and CFP varies in magnitude but always remains above zero, the expected loss in corporate tax receipts as a result of these proposals is $t_{max}*g_m - t_{max}*i_i$. The ultimate effect will depend on the strength of the positive relationship between the marginal giving and CFP. If the marginal donations, most often of inventory and services, are only weakly positively associated with CSP, we can expect that the government will still experience some portion of $t_{max}*g_m$ as loss, though will realize an offsetting benefit of $t_{max}*i_i$. If, on the other hand, inventory and services donations are forms of CSP that are strongly positively associated with CFP, the government may break even, or even experience a gain in tax receipts up to $t_{max}*(g_m - i_i)$.

The question of how an increase in corporate charity will influence tax receipts from individuals is far from clear, and depends on the effect of the marginal donations on the general economy. It is worth noting, however, that to the extent that increased charity benefits the economy,[138] an increase in the individual tax base and average contribution could offset some of the potential losses to corporate tax receipts, or supplement gains.

On Average, are Government Expenditures as Efficient as Local Charity?

Assuming for now that the government suffers a decrease in total tax receipts as a result of these proposals, the final question is whether the negative effects of lower tax receipts outweigh the benefits to increased corporate donations. Put another way: Is the tax subsidy for private charity efficient? Perhaps because the charitable deduction has always been a part of the income tax and counterfactuals are rare, no empirical scholarship of which I'm aware addresses this question directly. Theoretical scholarship addressing the efficiency of the charitable deduction is also less numerous than research in other areas, but nevertheless offers important insights.

As work on the price elasticity of giving indicates, if the elasticity of charitable giving is greater than 1, an increase in the marginal rate of subsidy to contributions will increase giving by an amount greater than the associated revenue loss. Moreover, empirical literature on the elasticity of giving with respect to tax subsidies for individuals suggests that the elasticity is indeed above 1, and may be as high as 2. Thus if one assumes that government and charitable dollars put to the public good are equally worthwhile, the charitable deduction is efficient, and tax revenue losses are acceptable as they lead to even greater increases in giving. In addition, tax subsidies spread some of the cost of providing public goods to the entire tax base, which can help to implement collective preferences and mitigate the free rider problem of public finance.

---

135. Marc Orlitzky, Frank L. Schmidt and Sara L. Rynes, "Corporate Social and Financial Performance: A Meta-Analysis," *Organization Studies* 24, no. 3 (2003): 423–425 (results discussion).

136. Ibid.

137. Ibid.

138. For example, through more widely available basic services or job training programs.

As scholars have noted, however, the conclusion that the tax subsidy for charity is efficient no longer holds once the assumption that, dollar for dollar, charitable and government expenditures for the public good contribute equally to social welfare is relaxed. As Professor Gergen puts it "[t]wo dollars spent on mime theatre . . . may not be worth a dollar in lost revenue." On the other hand, two dollars spent on basic needs services such as food or shelter probably are worth a dollar lost in taxes.

Ultimately, then, the question is whether the marginal charity incentivized by these proposals is worth reducing government taxes by the marginal taxes forgone that aren't offset by new taxes on increased profits. Ideally, the twice basis cap on the fair market value of inventory donations, as well as assessor oversight of services donations that are required to target basic needs, should help to ensure that marginal donations add more to social welfare than they take away. They should also favor donations benefitting recipients with the greatest potential for gains in marginal utility.

Without implementing these proposals and observing their influence on the nature and quantity of corporate charity, however, it is impossible to be certain. The high potential gains nevertheless suggest that a general effort to incentivize well-targeted, efficient charity is worth pursuing. Aligning corporate practice with social value would also be an important step in correcting the errors in *Dodge*-imposed corporate law and, if successful, could be the first piece in a network of new rules that allow policymakers and regulators to distinguish between good faith corporate social investments, greenwashing, and managerial misconduct.

Bringing Doctrine Back in Line with Reality and Public Expectation

When the court decided *Dodge*, it did not intend to make it hard for CARE to collect medical supplies while allowing Ross Johnson to use Nabisco funds for his own personal advantage. Nevertheless, the blanket narrative of shareholder primacy that the case imposes has led to all sorts of corporate behavior, with wildly divergent consequences for social welfare being swept into a single category. Tying the tax deduction for corporate charity to a firm's core business purpose should help to clarify the distinction that doctrine unknowingly obscured.[139] Moreover, It is a good first step for courts to begin recognizing the limits of the shareholder primacy norm, and ensuring that public subsidies of corporate behavior will lead to an increase in public value.

139. For example, It is hard to imagine what part of Nabisco's core business relates to funding academic chairs or golf tournaments, while the connection is obvious when a firm sells medical equipment for profit and donates the same to charity. This makes the business case much easier, albeit with the caveat that some social purpose is admitted. Charity that is tied to a business' core function is also explicitly approved in *Dodge*. *Dodge v. Ford*, 506-507.

Part Three - Binding Social Enterprises to a Double (or Triple) Bottom Line

The second major class of problems created by the *Dodge*-imposed narrative has made it nearly impossible for social entrepreneurs to bind their managerial successors to a social mission.[140] Or, as I have come to think of the issue, has created the "Ben & Jerry's problem." Using the first modern blockbuster social enterprise as a case study, this part analyzes the extent of the problems created by *Dodge v. Ford*, suggests new legal approaches to mitigate those problems, and looks at ways to bridge the gap between *Dodge* dicta and the current view of the shareholder primacy norm.

Ben & Jerry's and the Sale of an Icon: Perception and Reality

In the 1980s and 1990s, Ben & Jerry's was the first darling of social enterprise; it was a quirky but successful oddball company, disrupting corporate culture and demonstrating that profit, fun, and social contributions need not be mutually exclusive. But for many, the story of Ben & Jerry's went from comedy to tragedy when in 2000 it was sold to Unilever, the second largest global food conglomerate at the time.[141] To some it represented the unstoppable power of big business to stamp out any enterprise that defies industry norms.[142] To others, it was the story of two heroes falling from great heights, ultimately lured by money and convinced to sell out to the man.[143]

Of course, just like *Dodge v. Ford*, the real story of Ben & Jerry's is far more complicated than common belief supposes. Both because of and despite the nuances, however, one fundamental question remains: How could the flower-powered rebel of the business world, the company that pioneered corporate activism with its incongruous pairing of an anti-war, pro-engagement philosophy and ice cream, end up a wholly owned subsidiary of one of the biggest players in the very system that its founders distrusted? More importantly, what should today's Bens and Jerrys,[144] in contemplating their own radically progressive companies, do if they want to avoid the same fate? Whether time has changed their preferences or simply revealed them, if one offered the founders of Ben & Jerry's the chance to prevent the business' very fate as they were establishing the firm in the

---

140. Unlike the current oversight of corporate charity, which influences every incorporated entity with more or less weight depending on its annual giving, the population of businesses affected by this class of *Dodge*-inspired problems is much smaller. It is important to address them, however, because the doctrine presents an insurmountable obstacle to many would-be social enterprises, and each medium- to large-social enterprise forgone imposes significant opportunity costs and social loss.

141. Brad Edmondson, *Ice Cream Social: The Struggle for the Soul of Ben & Jerry's* (San Francisco, CA: Berrett-Koehler Publishers, 2014), 1.

142. Kevin Jones, "Selling vs. Selling Out," *Stanford Social Innovation Review*, February 27, 2009, https://ssir.org/articles/entry/selling_vs_selling_out.

143. Antony Page and Robert A. Katz, "The Truth About Ben [&] Jerry's," *Stanford Social Innovation Review*, Fall 2012, https://ssir.org/articles/entry/the_truth_about_ben_and_jerrys.

144. A more accurate question would ask about the optimal strategy for the "Bens, Jerrys, and Jeffs" of today, since Jeff Furman has been a leader at the company, along with Ben Cohen and Jerry Greenfield, from nearly the very beginning and remains so to this day, albeit in different form since the sale. Edmondson, *Ice Cream Social*, xv.

late 1970s, they probably would have taken it. So, how can today's social entrepreneurs learn from the rise and possible fall of the first behemoth in their industry? It is important to be specific about enforcement protections for social enterprise because fairly or not, the sale of Ben and Jerry's has come to stand for the idea that social businesses will always be vulnerable to corporate greed. As Professor Jones puts it, "No one wants to end up like Ben and Jerry's..."[145]

Given the firm's trail-blazing nature from incorporation to acquisition, and given how inaccurately its sale has been portrayed in the literature,[146] a brief history of the company and its pursuit of the double bottom line is useful here. There are lessons to be learned for today's modern social entrepreneurs and their counsel throughout. In my view, the rise of Ben & Jerry's is a story about growing pains and the perils of breaking new ground because, while the company is best known for its social values, integrating those values was never as easy as its reputation would imply. It is also a story of social entrepreneurs' struggle to operate in a system that they didn't entirely trust, and as it would turn out, for good reason.

1978–1984: From A Renovated Gas Station to a National Stock Offering

It is fair to say that none of the founders of Ben & Jerry's expected that they'd be running a nation-wide, publicly held corporation after less than 25 years in business, and It is probably also fair to say that they didn't want such an outcome.[147] In 1977, when Jeff Furman[148], Ben Cohen, and Jerry Greenfield wrote the first business plan for a small scoop shop[149], they built both an appreciation for and a wariness of corporate power into the firm's foundation. Their vision for the business was flexible, and by far their strongest commitment was to run a fun business that has a

145. Jones, "Selling vs. Selling Out." The full sentence is: "Nobody wants to end up like Ben and Jerry's, where soon after a multinational acquired it, key facets of its social mission were cut from the company."

146. Katz and Page, for example, argue that both Cohen and Greenfield had the authority to prevent the sale to Unilever entirely, but having been persuaded by the $50 million they'd earn by selling their shares, chose not to exercise it. Katz, "The Truth About Ben [&] Jerry's." My hope in this section is to demonstrate that this view is incomplete.

147. They wanted to own their own business, and they wanted that business to reflect their values, but business success itself was never their primary aim. Edmondson, *Ice Cream Social,* 15. As opportunities for growth arose, however, they took them in the belief that they could do more good with the proceeds from a bigger business. Ben Cohen, Jerry Greenfield, and Meredith Maran. *Ben Jerry's Double Dip: How to Run a Values Led Business and Make Money Too.* (New York: Simon and Schuster, 1998). They never fully assimilated the business norms they ultimately embraced, and they never ceased occasional small acts of defiance like wearing t-shirts and jeans to negotiations with enormous stakes. Edmondson, *Ice Cream Social,* 157.

148. Mr. Furman is often referred to as the ampersand in Ben & Jerry's. Ibid., 5. Fred "Chico" Lager, who joined the business in 1981, also had significant and lasting influence as one of the firm's first managers. Ibid., xvi.

149. A scoop shop does not offer pre-packed pints for sale, but scoops individual orders from large batches. It is an important distinction because pre-packaging requires significant start-up investments in manufacturing.

positive impact on the community.[150] Without any examples to follow, however, exactly what form that business would take was unclear.

Their big idea was adding large pieces of candy or desserts to ice cream, or "chunks" as the company would call them.[151] They believed in the concept's promise enough to turn an empty gas station into an ice cream shop in Vermont, a conviction that would be justified when loyal fans flocked to the innovative new product soon after it was introduced.[152] Almost immediately, demand exceeded what the company could produce, thanks in large part to a 1981 cover of *Time* magazine featuring Ben and Jerry, which drastically increased consumer interest. This would turn out to be a pattern for the company, as pressures of excess demand would influence nearly every major business decision for the next ten years.[153]

Growing Pains

1981, Ben & Jerry's third year in business, turned out to be a pivotal one, most notably because it represented the first major leap in the company's size. The founders were faced with new and uncharted challenges in running a business, and for the first time were forced to address the root of their skepticism about the social value of business. Jerry's view was clear; not long after the *Time* magazine article made him famous, he left the company and moved out of state with his wife. Ben was more torn; his competitive side anticipated the chance to make it big, but his fun-loving side shied away from the sheer amount of work it would take. Having grown up fiercely opposed to the Vietnam War and deeply suspicious of those who supported it, he was also almost cynical about what a large version of his ice cream company would be: "[Y]ou know what business does, it's harmful to the environment, it's harmful to its employees…".[154] Ultimately it was a fellow local business owner who convinced Ben not only to keep the company, but to use it as a weapon against the very flaws he saw in modern business. "And he said, 'Ben, if there's something you don't like about business, why don't you just do it different?' That hadn't really occurred to me before."[155]

Newly committed, Ben and Jeff turned to their new roles as executives in a large business. They made major hiring decisions, licensed their first few franchises, and began the process of building a proper manufacturing plant while, employees at the former gas station struggled to keep

150. Indeed, their primary motive seems to have been fun, but as products of their generation, they believed that their business could only be fun and successful if it had positive local impact and found support in the local community. Ibid., 16.

151. Ice cream mixed with large pieces may seem commonplace today, but at the time it was a radical idea that required changes throughout the manufacturing process. The company's small size allowed the founders to update the manufacturing process through trial and error. Ibid., 19.

152. The first few months must have been dizzying. In early 1981, *Time* Magazine featured them on the cover, and increased consumer interest significantly. The first line of the article was: "What you must understand at the outset is that Ben & Jerry's in Burlington, Vermont makes the best ice cream in the world." Janice Simpson, "Ice Cream: They All Scream for It," *Time*, August 10, 1981.

153. Edmondson, *Ice Cream Social,* 17, 32, 68

154. Ben said this to a local restaurant owner, explaining why he was putting the company up for sale. Ibid., 18, quoting an interview on the program Biography, CNBC, 2006.

155. Ibid.

up with ever-increasing demand. Their unique approach to business meant they also faced unique problems, but their relatively small size and unchecked growth allowed them to find creative solutions that adhered to their social values.[156&157] By 1982 their annual sales were just under $1 million, and they'd hired over a dozen new employees.

Perhaps the most critical business test came in 1984, when management looked to significantly increase its capital for the first time, and lenders balked at their hippy image[158] and anti-establishment philosophy. As usual, the company responded in a unique and quirky but ultimately successful way: it offered stock at a modest price to Vermont residents only, pitching it on their pints and in hotel conference rooms across the state.[159] The move not only raised the $750,000 Ben & Jerry's needed in equity to finance their new plant, but also further entrenched their ice cream in the local community and ensured that people all over the state had an interest in its success. As Edmondson describes in his history of the company: "The in-state stock offering was a classic Ben move, an idea that seemed crazy and exasperated his colleagues but then succeeded brilliantly."[160] It was also the first step toward what would be a major sea change at the company: a year later and still facing dizzying growth, the company announced its plans for a nation-wide stock offering, again using a notice on its pints as a method of advertising to potential investors.[161]

---

156. Perhaps best known was their response to pressure from Pillsbury, a large conglomerate that owned Häagen-Dazs, the first super premium ice cream sold in the United States and Ben & Jerry's only real competition in the early years. When Ben & Jerry's started selling in Boston, Pillsbury retaliated by issuing an ultimatum to their local distributors: they could sell one of the two brands, but not both. Rather than take up a legal challenge, as many companies would have done, management at Ben & Jerry's took a very different approach with what today might be called a viral marketing campaign. As Brad Edmondson describes it, "They put notices on their pints inviting customers to join a campaign called 'What's the Doughboy Afraid Of?' They mailed out packets with bumper stickers and form letters customers could send to Pillsbury's CEO. They also flew Jerry to Minneapolis to stand in front of Pillsbury's headquarters with a picket sign." Ibid., 24.

157. Other notable differences were built into the firm's structure. For example, the first board of directors, which included Ben, Jeff, and Chico, tended to govern informally via long meetings, rather than by voting. Ibid., 21.

158. As Edmondson points out, the view of Ben, Jerry, and other early managers as hippies is inaccurate. "Ben and Jerry were emphatically *not* hippies." "They were smart and creative but ambivalent toward government, suspicious of big business, painfully aware of injustice, and looking for better ways to live." That is not to say, however, that they were averse to long hours of hard work. Ibid., 7, 16.

159. As Edmondson notes, this strategy also had the benefit of exempting the stock offering from some of the SEC's more onerous reporting requirements by limiting the size of the offering, and confining it to a single state. *Securities Act* 15 U.S.C. § 77a et seq. The full name of the 1933 Securities Act is "An Act to Provide Full and Fair Disclosure of the Character of Securities Sold in Interstate and Foreign Commerce and Through the Mails, and to Prevent Frauds in the Sale Thereof, and for Other Purposes."

160. Edmondson, *Ice Cream Social*, 22.

161. Ibid., 25.

Towards Finding a Pro-Social Identity

The expansion goals that led to Ben & Jerry's first stock offerings also catalyzed its first major step towards formalizing the founders' social values. In the first few years of lean business, "free cone days"[162] had made up the bulk of the company's pro-social behavior, and even that was primarily for marketing purposes. As yearly income grew, however, they slowly developed a program of giving to local charities.[163] As they were preparing to offer stock nationwide, however, management realized they'd have to inform potential investors of how much profit they planned to give away, and that going forward they'd need some method of accounting for that philanthropy.

Their solution was to create the Ben & Jerry's Foundation, a non-profit funded by the firm responsible for providing grants to local charities that would improve quality of life in underserved communities and offering a model for others to follow.[164] Ben donated 50,000 Ben & Jerry's shares (roughly 10% of his equity) to cover the foundation's start-up costs and early programs. The foundation also marked Jerry's first (but not last) step back into management, as he agreed to serve on the board with Jeff.[165]

Deciding how much Ben & Jerry's should donate to the foundation each year proved to be the most contentious issue. Ben, who'd been making steadily larger donations to local groups, argued loudly for 10% of pretax profits, or roughly double their current practice, and Jeff agreed. Chico Lager was concerned that committing such a large portion would tie up funds for future expansion, and financiers warned that investors would be put off from buying stock for fear of reduced dividends.[166] After much discussion, the board adopted a compromise and set annual giving at 7.5% of pretax profits.[167]

Contractual giving is far from a robust or fully developed social program. Establishing the foundation and setting a level of giving was nevertheless a critical step in Ben & Jerry's development as a social enterprise. It formalized their philanthropic beliefs and established a precedent of behavior that would be pivotal decades later, when Unilever took control of day-to-day operations.

---

162. Ibid., 16.

163. Chico, the first manager, tried to peg the company's giving to 5% of its pre-tax profits, but Ben apparently resisted this curtailment. Ibid., 25–26.

164. Ibid.

165. Ibid., 26.

166. Chico was, after all, Ben & Jerry's first professional manager, and often tasked with ensuring that Ben's creative ideas were also sound business strategy: "'Working with Ben was, in plain English, a pain in the ass,' wrote Chico in his entertaining memoir of the early years, Ben & Jerry's: The Inside Scoop. 'Ben was usually so single-mindedly convinced that he was right about something that he often didn't even acknowledge the legitimacy of alternative points of view.'" Ibid., 30, quoting Fred "Chico" Lager, *Ben & Jerry's: The Inside Scoop: How Two Real Guys Built a Business with a Social Conscience and a Sense of Humor* (New York: Crown Trade Paperbacks, 1994), 150.

167. Edmondson, *Ice Cream Social*, 30.

1985–1999: From a National Stock Offering to a Takeover Target

1985, the company's seventh year in business, was another time of critical change at the company. Most notably, having long outgrown the renovated gas station, the company opened its first proper manufacturing plant in Waterbury, Vermont.[168] This vastly increased production capacity and the number of people employed, requiring more middle managers to direct aspects of the business such as sales and human resources. The founders had always adapted to roles they weren't trained for, but this expansion put even more distance between them and the day-to-day operations of the plant, and tensions between the needs of a large business and their non-conforming style of management started to appear.

(Dis)Economies of Scale and a Rapidly Changing Market

By all appearances, the end of the 1980s and the following decade were a tremendous financial success for the company. Indeed, from sales of not quite $1 million in the beginning of the decade, by 1989 they'd reached nearly $60 million; from two best friends working and sleeping in a renovated gas station, by the end of the 1980s there were more than 250 people on the payroll.[169] Just like their first few years in business, however, the growth in sales helped conceal some mistakes and vulnerabilities underlying it, but unlike those early years, the size of the company made it difficult to minimize the consequences of those weaknesses. This growth also hinted at the difficulties of scaling up a socially conscious business. Most critical in this period were pressures on the way Ben & Jerry's distributed their ice cream, and on the compensation they offered everyone from line workers to CEO.

Distributing Ice Cream Nationwide

Scholars and commentators tend to understate the extent to which external pressures influenced decision-making at the company. The reality of distributing frozen foods, for example, would have far-reaching consequences, up to and including the sale to Unilever.

When the Waterbury plant opened in 1985, it more than quadrupled the company's manufacturing capacity to about 800 gallons per hour, though even that vast expansion could not fully meet consumer demand.[170] The firm's plans to expand to markets[171] beyond New England were challenged, however, by other new entrants into the super-premium ice cream market. Management

---

168. In a stroke of good fortune, much of the construction was overseen by Merritt Chandler, a retired executive who'd expressed interest in buying first-round stock. He brought engineering experience that was critical to the ambitious yet delicate construction project, and would become an influential voice on the board during his tenure from 1987–1996. Ibid., 26–27 (construction participation), xv (board tenure).

169. Ibid., 21(1982 and 1989 sales figures), 36 (payroll).

170. As Edmondson puts it, "The factory was too small, even on the day it opened…" Ibid., 32.

171. Ben & Jerry's now consciously refers to "communities," rather than "markets." Ibid., 258 (Jeff Furman's epilogue). For the sake of familiarity, I retain the term "markets."

wanted to get Ben & Jerry's into new markets across the country before their new competitors could. They were successful, but at a cost; in 1986, management entered into a deal with Dreyer's, then a small California-based ice cream company, to distribute their ice cream throughout the country.[172] The arrangement solved their distribution scale problems immediately, but also sacrificed an important element of control; from then on, the company was partially dependent on Dreyer's for the sales growth that had sustained it thus far, and vulnerable to any changes in the distribution network. Those changes would come in the late 1990s and create monumental challenges to those opposing the Unilever sale.

The Salary Ratio and a Living Wage

The company's commitment to social progress influenced its salary decisions in two important ways. First, the company committed to paying all of its employees a living wage, which was often significantly higher than the local market rate. Management also decided to impose a salary ratio: the top earner at the firm could not make more than five times the lowest salary paid by the company.[173] Both of these decisions were popular with their employees, the press, and consumers, and indeed would become central to the company's identity[174]

Just as with distribution, however, the salary ratio became increasingly difficult to sustain as the firm grew. The larger the company got, the more that running it demanded skills that in-house management lacked, and yet the harder it became to attract outside talent. Five times a living wage was still nowhere close to the average salary a CEO or other senior manager could earn elsewhere, and eventually it seemed the firm would have to choose between executives who were committed to the mission and those who had the experience and background to run a company of Ben & Jerry's size:

> "It made my job impossible. As the company grew, the jobs at the top kept growing and changing, while the scooper jobs at the bottom never changed. After a while, we couldn't hire qualified people for the top positions. During most of my tenure, half of those jobs were not filled.[175]

The lack of experienced management was not a small problem. In the early 1990s, the company decided to build its largest manufacturing plant by far in St. Albans, with the goal of developing capacity that exceeded consumer demand for the first time. Management was unprepared for such an undertaking, however, and the build was fraught with problems that significantly increased its cost and time-table. Ben & Jerry's, used to runaway growth that could

---

172. Ibid., 28.

173. The decision resulted from an offhand suggestion that Jeff made in 1985 after learning about the Mon-dragon Corporation, a confederation of worker-owned cooperatives in Spain, where employees set managerial compensation by voting, leading to a salary ratio of roughly 3:1. Ibid., 28–29.

174. As Edmondson notes, however, from the beginning business professors were not a fan of the ratio and advised that it would ultimately fail. Ibid., 29.

175. Chico Lager, the business manager who was often tasked with implementing Ben's grand ideas. Ibid., 92. The salary cap included all forms of compensation, including stock options.

paper over mistakes, was suddenly under increasing financial pressure[176] and in ever more desperate need for executives who could steer them through restructuring. In 1992 the company increased the ratio to seven to one, and in 1995 announced it was doing away with the ratio altogether. The decision helped the company hire experienced, profit-focused executives, and soon it had returned to posting strong profits.[177] This return to profitability came with a major change in the company's culture, however, and according to some, significantly influenced the sale to Unilever.[178]

Problems of Scale in a Social Enterprise

In addition to the growing pains that any large company experiences, during this period Ben & Jerry's management encountered problems unique to growing social enterprises. Their commitment to sustainably sourced ingredients, for example, became much more difficult when they needed to acquire very large quantities of them. The company's needs for ingredients like nuts very quickly exceeded what any one supplier could produce, and because consumers demand consistency in retail products, simply buying from a group of independent suppliers was rarely a viable solution.[179]

The company also faced a similar issue when selecting the bakery that would supply their brownie pieces. In 1988 they decided to switch suppliers and buy their brownie pieces from a for-profit bakery run by the non-profit Greyston Foundation. The switch was motivated by the bakery's positive social impact: it had a practice of hiring formerly homeless and otherwise difficult to employ people. Ben & Jerry's saw an opportunity to help Greyston expand their business and hire many more underserved workers in the process. The partnership would ultimately be a success, but only after significant pain and a few close calls with the bottom line.[180]

---

176. In fact, the company posted a loss of $1.8 million in 1994. Ibid., 103.

177. The first CEO under the new system was Robert Holland, an African-American engineer who brought long sought diversity to the management team, believed in the three-part mission, and had experience troubleshooting and working with non-profits. His salary was below the national average for similarly sized firms, but still a tremendous departure for Ben & Jerry's; it was also supplemented with stock options that could net him $3 million or more in just a few years, if he could get the stock price to rise. Ibid., 98–99.

178. Ibid., 139–140.

179. As I discuss further below, the story of one of Ben & Jerry's most popular flavors, Rainforest Crunch, demonstrates this problem. Rainforest Crunch was created to draw attention to the problem of deforestation in the Amazon and contained nuts sourced from Xapuri, a native-owned co-operative in Brazil. Xapuri soon struggled to meet demand, however, leading Ben & Jerry's to remove the co-op's name from pint labels and source most of the ingredients from conventional sources. This would lead to one of the firm's first big scandals when journalist Jon Entine cited this change as an example of Ben & Jerry's hypocrisy. Ben & Jerry's ultimately agreed with Entine's point and retired the flavor. Jon Entine, "Rain-forest Chic," *The Globe and Mail Report on Business Magazine*, October 1995, http://archives.jonentine.com/articles/rainforest_chic.htm and Edmondson, *Ice Cream Social*, 82–83.

180. Ramping up production to supply all of Ben & Jerry's needs put significant stress on the bakery, and it nearly went bankrupt several times. Ben & Jerry's stuck with the bakery far longer than many would have, adjusting for manufacturing delays in their own plants and loaning executives to help with financial restructuring. All the while, they received complaints about their brownie pieces from dissatisfied customers. In my view, this is an example of one of the most undervalued pro-social aspects of Ben &

The Social Mission Golden Years

When most people think of Ben & Jerry's as a pioneer of social enterprise, they likely picture the Ben & Jerry's of the mid-1990s. While their business gains defied some underlying issues, developments in their social mission were almost entirely positive. In particular, after much effort, they took the final step of formalizing their values by announcing the firm's three-part mission. Leaders at the company also made significant strides in the way that their social programs were implemented, monitored, and evaluated.

The Mission in Theory

The modern incarnation of the Ben & Jerry's mission, announced by the board in 1988, contains three equal parts: 1. A commitment to product quality, 2. A commitment to stakeholders broadly defined (the social mission), and 3. A commitment to the financial interests of the firm, its shareholders, and constituents like employees and suppliers. It was the result of in-depth discussions across the company and was based on a summary of a board meeting the same year:

> Ben & Jerry's is dedicated to the creation and demonstration of a new corporate concept of linked prosperity. Our mission consists of three interrelated parts. The PRODUCT MISSION is to make, distribute, and sell the finest quality all-natural ice cream and related products in a wide variety of innovative flavors made from Vermont dairy products. The SOCIAL MISSION is to operate the company in a way that actively recognizes the central role that business plays in the structure of society by initiating innovative ways to improve the quality of life of a broad community: local, national, and international. The ECONOMIC MISSION is to operate the company on a sound financial basis of profitable growth, increasing value for our shareholders and creating career opportunities and financial rewards for our employees. Underlying the mission of Ben & Jerry's is the determination to seek new and creative ways of addressing all three parts, while holding a deep respect for individuals, inside and outside the company, and for the communities of which they are a part.[181]

With its roots in peace pops and defiant marketing, the three-part mission represents the evolution of the company's effort to integrate social values with profit-making. Leadership viewed both of those goals as existential requirements,[182] and yet recognized that they were often in tension in the course of day-to-day business. They also believed that both goals depend on a commitment

---

Jerry's. In more than just brownie pieces, the company was willing to accept some failure as a cost of social innovation. The board was not bothered, for example, when some of its non-profit Partner Shops folded after only a brief time in business. A company focused only on profit would have found such losses unacceptable. Ibid., 50.

181. Ibid., 47–48.

182. That is, that the loss of either profitable growth or increasing returns to social investments would fatally damage the very core of the business.

to quality. Their decision to elevate quality to equal importance would turn out to be critical to the long-term health of the business, even after it was sold to Unilever.

By the late 1980s, Ben & Jerry's was not the only company to integrate social goals into its core mission; it was, however, the first to explicitly make profit and social goals equal. The view that each of the three parts stood on its own, and that multiple goals complement rather than subjugate one another, evolved in tandem with what would become their philosophy of "linked prosperity."[183]

The Mission in Practice

If the 1980s were for finding and formalizing their social mission, the 1990s were for implementing it, and if size made some of the inward-looking[184] aspects of their social mission harder, it significantly improved the outward looking parts. Led by Liz Bankowski, a board member and manager who'd been with the company since 1990,[185] the Ben & Jerry's Foundation made large strides and by the end of the decade bore no resemblance to the value-driven donations and free cone days of the first few years in the company.

Most critically, the company developed tools for identifying their specific social goals, measuring the effect of their efforts, reporting on their progress to share- and stake-holders, and locating areas for improvement.[186] The company was one of the first to publish social progress reports and to have them independently audited. The progress was by no means linear, but over time it became significant. By the end of the 1990s, under Ms. Bankowski's leadership, the company was transparent and accountable for the wide-ranging impacts of its business. As their social auditor, James Heard, put it in his 1999 report on the company: "Ben & Jerry's most impressive achievement regarding its social mission is the way in which it has institutionalized the company's values into decision-making." It would be this very transparency and broad thinking that fans of the company feared would disappear if Ben & Jerry's was sold to a global conglomerate like Unilever.

---

183. Linked prosperity is the idea that everyone, including the business, does better when corporations pursue the well-being of all stakeholders, including shareholders, employees, local populations, customers, and so on. Ibid., 4.

184. By inward looking, I mean pertinent to manufacturing, labor, relations, or other internal processes.

185. Ms. Bankowski became a voting member of the board in 1990, having shared a long transatlantic flight with Ben and become interested in what she saw as a revolutionary company with no one who wanted to run it. When she accepted a position as the company's first director of the social mission late in 1991, she joined Ben and Chuck Lacy to become only the third person to have both managerial and directorial authority; she leveraged this unique status to develop and institutionalize the mission while also preserving the flexibility to respond to unanticipated social challenges as they arose. Ibid., 51, 55, 75.

186. This iterative process was important for several reasons, not least because it maintained the flexibility that Ms. Bankowski viewed as critical to the company's mission. Throughout the history of the company, she worked hard to make sure the company could respond to new social issues or concerns as they arose. Ibid., 75.

The Market Share of No Return?

It is not true, as some suggest,[187] that the founders could have rejected the Unilever buyout deal and continued as they were. Beginning in 1997, maneuvering by the two leading global food suppliers, Unilever and Nestlé, led to an increasingly tightening market. Most critically for Ben & Jerry's, Nestlé owned a minority share of stock in Dreyer's, the company that distributed more than half of Ben & Jerry's sales nation-wide. That distribution agreement was negotiated yearly, and without it Ben & Jerry's had no meaningful alternative:

> At the end of July 1997…[CEO] Perry [Odak] called [a] meeting to assess the company's competitive position and generate new ideas. The group talked at length about the distribution problem. The company was now selling 55 percent of its ice cream to Dreyer's, and that share seemed likely to increase as Dreyer's continued to buy up small distribution companies. Ben & Jerry's desperately needed to find a new distribution partner, or some new way to get its product to customers, because, as Jeff puts it, "It's like selling shoes to Wal-Mart. When your company has just one customer, that customer owns you."[188]

That Dreyer's was fast becoming part of the larger struggle between Nestle and Unilever only made the situation more precarious. The distribution agreement that Ben & Jerry's had made with Dreyer's in 1986 was an excellent solution to their growing pains at the time, and one that solved their problem of getting pre-packaged pints to the consumer market, but increasingly became an unwanted source of dependence and outside pressure, particularly because the terms had to be renewed annually.[189] That pressure became an emergency when in 1999, Dreyer's did not renew the agreement.[190] Unilever's independent distribution system would mean that for the first time in a decade, the company would not be dependent on a competitor for its survival. All of the founders, most notably Jerry, were aware that the fate of more than a thousand employees rested on the

---

187. Antony Page and Robert A. Katz, "Freezing out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon," *Vermont Law Review* 35, no. 1 (Fall 2010): 211–250 and J. Haskell Murray, "Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes," *American University Business Law Review* 2, no. 1 (2012): 6–7.

188. Edmondson, *Ice Cream Social,* 141–142.

189. Ibid., 139.

190. Another complicating factor was the state of Häagen-Dazs, the other major super premium ice cream brand not already owned by either Unilever or Nestle. Häagen-Dazs was owned by the British mega-conglomerate Grand Metropolitan; when that parent company merged with Guinness, the new parent company, Diageo decided not to sell any of its holdings until the market was more settled, thereby eliminating the brand as a stake in the larger fight between Nestle and Unilever. Worse for Ben & Jerry's, Dreyer's and Nestle were forming a new venture that would have exclusive rights to distributing Häagen-Dazs. Leadership at Ben & Jerry's worried that Diageo would use this opportunity to put further distribution pressure on Ben & Jerry's, and thereby its ability to sell pints, which by the end of the 1990s made up 85% of their annual sales. Ibid., 139, 141–142, 153.

continued success of Ben & Jerry's. Excess risk was not just gambling with their business legacy, but with the living wage incomes that their line workers and others could not replace. A fractured board with competing factions further complicated any of the members' plans, and according to some, made it easier for profit-focused managers to sway decisions.[191] Thus, while it might seem maintaining control was a simple matter of voting down Unilever's offer, in reality the board had two options, neither of which they viewed as good. Those options were a friendly buyout from Meadowbrook, a private group of socially oriented investors that would return the bulk of direct control to Ben Cohen, and selling to Unilever.[192&193]

The option to return to private ownership was led by Terry Mollner, who imagined that buying out Ben & Jerry's stock holders could be the first step in a new process; the holding company

---

191. Ibid., 144–145.

192. Technically there was a third option, to merge with Dreyer's. The board had concerns about how well the social mission would survive such a merger. Unilever was also determined to avoid such an outcome, and was willing to increase its bid or even cooperate with Meadowbrook, the private takeover group, to ensure the merger with Dreyer's didn't happen. Some managers, including CEO Perry Odak, nevertheless preferred the Dreyer's merger because it would be the simplest to accomplish and lead to fewer taxes on shareholders, since it would involve a stock swap rather than case sale. Ultimately opposition from Ben and Jerry, as well as a lucrative cash offer from Unilever, took the Dreyer's merger out of the running. Ibid.,164–166, 173.

193. While they considered their options, in 1998 the board also added two protections against a hostile takeover: they successfully lobbied Vermont for a constituency statute, and also authorized the board to immediately issue enough new shares to maintain the firm's current power structure should an outside buyer acquire large amounts of existing stock. It is unclear how much the constituency statute, known as the "Ben & Jerry's Law," influenced the ultimate sale to Unilever. It was still untested when the company stock became the target of a bidding war, and directors were wary of being the first to litigate it. Ibid., 175. The current version of the statute, most recently amended in 2010, says in relevant part:

> [I]n a manner the director reasonably believes to be in the best interests of the corporation. In determining what the director reasonably believes to be in the best interests of the corporation, a director of a corporation which has a class of voting stock registered under section 12 of the Securities Exchange Act of 1934, as the same may be amended from time to time, may, in addition, consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the state, region and nation, community and societal considerations, including those of any community in which any offices or facilities of the corporation are located, and any other factors the director in his or her discretion reasonably considers appropriate in determining what he or she reasonably believes to be in the best interests of the corporation, and the long-term and short-term interests of the corporation and its stockholders, and including the possibility that these interests may be best served by the continued independence of the corporation; provided that nothing in this subdivision shall affect in any way the interests that may be considered by the director of a corporation which does not have a class of voting stock registered under section 12 of the Securities Exchange Act of 1934, as the same may be amended from time to time, in determining what such director reasonably believes to be in the best interests of the corporation." Vt. Stat. Ann. tit. 11A, § 8.30.

Because the Vermont law is a permissive constituency statute (that is, one that permits but does not require directors to consider stakeholders generally), it is unlikely that the firm would have been required to seek shareholder approval before implementing this new flexibility in the board's decision-making process. In the unlikely event that a court deemed such a process as a fundamental change to the corporation, however, Ben, Jerry, and Jeff owned more than enough voting stock to approve it on their own.

that owned Ben & Jerry's would go on to acquire other socially oriented businesses and build an entirely new kind of conglomerate. Along with a banking friend who had just launched a socially conscious investing group called Meadowbrook and with help from Ben, Terry convinced more than twenty investors to make a competing offer for Ben & Jerry's. The Meadowbrook group would have trouble offering as much cash as Unilever could, but had the stronger argument when it came to protecting the three-part mission.

Unilever clearly had the advantage over Meadowbrook with respect to the price per share it could offer. With the overarching goal of competing with Nestle and Diageo, Unilever was willing to offer $43.60, far more than Meadowbrook could afford.[194] Unilever also had another advantage, however, even if it was one that management didn't want to discuss too loudly. Any version of a private equity deal that would buy back public stock involved a return to leadership under Ben. Ben was the visionary; he'd been vital to the company's growth in all areas, and it was his creativity that had earned their staunchly loyal fans. And yet, as the business had grown, his management style had become increasingly problematic. The same spirit that had made him a socially conscious maverick in the corporate world made it hard to work for him; Ben was passionate to a fault, subject to changing his mind with little or no notice, and generally resisted structure of any kind. While this spirit had helped Ben & Jerry's overcome significant challenges when it was small, many board members weren't convinced that the firm would survive in a vastly more competitive market if he regained control. In their eyes, the private offer was the significantly riskier option.

Board members who worried about the risk associated with a return to private ownership also doubted how much more Meadowbrook could offer with respect to maintaining the three-part mission. Unilever and its chief negotiator Dick Goldstein were determined to keep Ben & Jerry's away from Unilever's competitors, and very conscious of the fact that Ben and Jerry were the brand.[195] Unilever made large, wide-ranging promises to continue the social mission, and offered to cede control over product quality and the social mission to a board that would remain independent of the conglomerate. In the end, with the livelihood of their employees and potentially the very future of the company at stake, the board chose to sell to Unilever on April 11, 2000.[196]

---

194. More also than Dreyer's offered in its last stock swap option of $41 or $42 per share. Edmondson, *Ice Cream Social*, 176.

195. Goldstein in particular was determined that Ben & Jerry's not merge with Dreyer's, to the point that Unilever was willing to cooperate with Meadowbrook and help take the company private. "We didn't know how in hell we would write the agreements with Meadowbrook and who would have the responsibility for what." "This was the least worst alternative," he said. "I would consider doing it if it were the only way to keep the business from going to Dreyer's." Ibid., 176, 174.

196. According to Edmondson, it was Jerry's decision in 1999 that the time to sell had come that ultimately swayed the majority of the board. "[A]t some point during the fall of 1999, probably during one of those tense, endless [board meetings], Jerry decided that selling the company was the lesser of two evils. Ben, Jeff, and Pierre still wanted to remain independent, even if it meant shrinking the company. But Jerry became convinced that an independent Ben & Jerry's could not succeed, and when he changed his mind…the vote became five to three." Jerry would later say that their first choice was to avoid a sale altogether, but it appears he didn't see a viable way to do so. The rift that this caused with Ben was among the most painful consequences to long-time leaders at the company. Ibid., 165–166.

Entrenching the Three-Part Mission

Despite the split over whether to sell, once it was decided, the entire board was determined that acquisition by Unilever would not be the end of the company's three-part mission. To that end, they included several enforcement mechanisms in the terms of the sale that, despite going largely unnoticed by scholars and observers, were in their own way revolutionary.[197&198]

Most critical among the novel aspects of the sale is that the agreements separated the three parts of the mission, and Unilever gained control of only one of them: the economic mission.[199] Under the terms of the agreement, Unilever selects Ben & Jerry's CEO after good faith consultation with the independent board and Ben, and controls economic and operations decisions like the price point of pints, where the super premium ice cream is manufactured, and how it is transported to retailers for sale to the public. Decisions affecting product quality or the social mission, on the other hand, are either made by a Ben & Jerry's board that is totally independent from Unilever, or at least subject to their veto.[200] The independent board selects its own members in perpetuity and has the right to initiate lawsuits at the company's expense.

The agreement moves away from a commitment to donate a certain percent of pre-tax profits, instead requiring Unilever to guarantee an annual $1.1 million donation to the Ben & Jerry's Foundation, with future upward adjustments for inflation or a material increase in sales. Unilever

197. The most salient portion of the sale agreement, describing the structure of Ben & Jerry's control post acquisition, is included in Appendix C.

198. The agreements of sale refer to Conoco, a separate entity owned by Unilever that acquired Ben & Jerry's. For the sake of simplicity, I refer to Ben & Jerry's post-sale environment as Unilever.

199. This is perhaps a bit of an over-simplification, since Unilever does control aspects of the economic mission that can affect other issues like product quality. At least nominally, however, and depending on the strength of the independent board, control of each part should be separate. From the agreement: "The Merger Agreement provides that the Surviving Corporation Board shall have primary responsibility with respect to the enhancement of the Social Mission Priorities (as defined below) of the Company, as they may evolve, and the preservation of the essential integrity of the Ben & Jerry's brand-name. [Unilever wholly owned subsidiary] Conopco shall have primary responsibility in the area of financial and operational aspects of the Surviving Corporation and in all areas not allocated to the Surviving Corporation Board. The Chief Executive Officer of the Surviving Corporation shall manage the affairs of the Company pursuant to an annual delegation of authority and within the scope of an annual business plan approved by [Unilever subsidiary] Conopco following good faith discussions with the Surviving Corporation Board." Sale agreement, Appendix C.

200. The first independent board included seven directors from before the sale, two directors selected by Meadowbrook, one selected by Unilever's subsidiary Conoco, and the post-sale company's CEO (selected by Unilever after good faith consultation with the independent board). Ben and Jerry are technically employees of Unilever rather than members of the board, but leadership at Unilever [AN: find the name of the co-chief from Europe] have recognized that Ben Cohen and Jerry Greenfield are the brand, and demonstrated that the company will take direction from the founders. The specific language of the sale agreements is: "In the Merger Agreement, Conopco has agreed following the Effective Time to maintain a board of directors of the Company (the "Surviving Corporation Board") composed of (i) seven directors from among the current members of the Board of Directors and persons nominated by such continuing directors (collectively, from time to time, the "Class I Directors"), (ii) two members to be appointed by Meadowbrook (the "Class M Directors"), (iii) one member to be appointed by Conopco and (iv) the Chief Executive Officer of the Surviving Corporation." Sale agreement, Appendix C.

determines most of the compensation for the CEO, but the independent board sets the portion that is pegged to the company's social performance. Unilever is also required to pay for third-party social auditing, was prohibited from laying off or cutting employee benefits for two years, and barred from leaving Vermont for five.[201] Most strikingly, the agreement does as much as possible to build in the parity of economic and social goals.[202] Unilever agreed to develop a set of social metrics with the independent board, and expressly stated the goal that the outcomes of those social metrics rise faster than sales.

Underlying the agreement was also an important philosophical belief that the three-part mission was both critical to Ben & Jerry's survival and a good worth valuing on its own:

> "Antony Burgmans, cochairman of Unilever, flew to New York and put on a T-shirt for his first meeting with Ben. "He came back from that meeting and said, 'Don't touch Ben & Jerry's,'" said [Unilever ice cream executive] Kees van der Graaf. "'He said it was a jewel, a diamond, and that we need to cultivate it. Our instructions were to learn from Ben & Jerry's.'"[203]

2000 and On: Ben & Jerry's in a Unilever World

Bi-Directional Culture Shock

The belief that Unilever, a shark in the retail food market, swallowed up Ben & Jerry's and then jettisoned two-thirds of the company's mission is incomplete, but understandable. It is true that the acquisition was not the easiest fit for either side at first. In the first few years after the sale, both sides had trouble adjusting to their new structure. Executives at the highest levels of Unilever were committed to making the three-part mission work, but they had done a poor job of communicating that to the mid-level managers making day-to-day decisions for the firm, and the routine practices to which they defaulted were incompatible with following through on that promise.[204]

---

201. One provision that protects Unilever is that all Ben & Jerry's employees and board members are subject to the Unilever code of conduct, which limits what people can say in public about the company and their experience working for it. It is unclear how or to what extent Unilever would be able to enforce this gag order on Ben, Jerry, or other leaders in the company, but It is unlikely that line workers would feel comfortable challenging the rule. Edmondson, *Ice Cream Social,* 184.

202. In the agreement: "The Company and Conopco also have agreed that following the Effective Time, they will work together in good faith to develop a set of social metrics to measure the social performance of the Surviving Corporation. The parties also have agreed that the Surviving Corporation will seek to have the rate of increase of such social metrics exceed the rate of increase of sales." Sale agreement, Appendix C.

203. Edmondson, *Ice Cream Social*, 187.

204. The default was to consolidate and cut costs. To the extent that mid-level managers thought about the social mission, it was viewed as an obstacle to the economic success they were under pressure to achieve. To them, this was just the next stage in their successful campaign to acquire, integrate, streamline, and expand their ice cream empire. They assumed the Vermonters would get used to the new order, just as

It also took a few years for the independent board to adjust to their new positions. Most of the directors had been on the Ben & Jerry's board before the sale, and were exhausted after having negotiated three possible takeovers. They were also uncertain about how to best wield their influence in a new corporate dynamic, and so by many accounts were too passive in their oversight role.[205] Thus, despite good intentions on all sides, it is not surprising that the first two prongs of the three-part mission suffered from serious drift after Unilever took ownership of the firm.

The drift that marked the first few years after the sale was not permanent, however. In 2007, the independent board began to exercise its contractual authority. In their view, the three-part mission had become little more than a marketing stunt, and rather than allow that drift to continue, they resolved to use their capacity to sue at Unilever's expense as a way to reverse it. In most cases, the newly vocal board was able to reach consensus with Unilever executives fairly easily.[206] The result would not be a return to the Ben & Jerry's of the 1990s, but a new version of the company that retained its core identity while also adapting to the realities imposed by its size and a market that was consolidating around it.

---

others had. One Green Bay manager says that the universal attitude toward what they called "the social mission crap" was "How can we get around this?" Ibid., 189.

The most obvious act of defiance came when Unilever-hired executives lowered the butterfat content in Ben & Jerry's ice cream and changed the recipe for Cherry Garcia, one of the brand's signature flavors, without even informing the independent board, much less seeking its approval. ""They took Cherry Garcia, a best-selling flavor, and put new kinds of cherries into it that were smaller and tasted like rubber,' said Pierre. 'I eat a lot of Cherry Garcia so I could tell, this was definitely not super-premium ice cream. And Jeff, who always pays close attention to customer complaints, saw that the rates were starting to climb.'" Ibid., 203.

205. Ibid., 187.

206. One major reason for the successful consensus building is that the board was negotiating from a position of strength. The business-as-usual model had not transferred well to Ben & Jerry's, and sales were down. Customers had noticed and punished the unapproved recipe changes, for example, and recent health trends caused ice cream sales to decrease market wide. Thanks in large part to the very reputation that the Unilever executives were tarnishing, Ben & Jerry's was one of the brands least affected by this general trend, even compared to other Unilever brands. This gave the company time to rebound from its self-inflicted mistakes, but only as long as their traditional customers remained loyal. The board's threat to go public with their belief that their pro-social reputation was increasingly unearned carried a lot of weight, as did their practical experience in producing the ice cream that had developed such a resilient fan base. Unilever knew that the business-as-usual strategy was degrading the brand, and were receptive to the board's ideas about how to repair the damage. Among the first changes undertaken with the more active independent board was a return to the original recipes. The board also worked to develop new metrics for social contributions that had been promised, tailoring them to the terms of the sale agreement so they could hold Unilever to the agreement that social outcomes rise faster than sales. The trust that had eroded was not rebuilt overnight, however. Ibid., 212–213.

The New Normal

Today, neither Ben & Jerry's nor Unilever is exactly the company it was before the sale. At Ben & Jerry's, large-scale stability has replaced the daring innovation and disruption of the early years, and the company's financing looks nothing like it did before the acquisition. Now that the independent board and Unilever executives have learned to work collaboratively, however, the soul of the company has rebounded and remains strong. All of the ice cream flavors are now made according to their original recipes, which has repaired much of the damage to the first part of their mission and has led to a commensurate decrease in consumer complaints.[207] A return to the spirit of Ben & Jerry's has also coincided with growth in sales, which combined with the distribution resources available as part of a large conglomerate has led to healthy economic gains and increasing success in the third part of the mission.

The greatest turnaround since 2007, and perhaps the most surprising, has been the company's pursuit of its social goals, the second of three equal parts of its mission. Ben & Jerry's was the first corporation to express solidarity with the protestors of the Occupy Wall Street movement, long before it had gained mainstream attention or support, and despite the fact that the protest directly challenged the kind of power large companies like Unilever enjoy.[208] And while the pre-sale Ben & Jerry's was committed to buying dairy from local farmers who did not use bovine growth hormone,[209] today it pays suppliers to participate in the Caring Dairy program. The program helps farmers develop sustainable methods and encourages them to take an iterative approach to measuring and improving their practices. Under this plan, farms are held accountable for their use of energy and pesticides, their emission of greenhouse gases, the experience of their labor force, and the effect of their husbandry on biodiversity and the health of the animals in their care. Of course, It is impossible to know if Ben & Jerry's would have made even larger social gains had it remained independent (and solvent). Nevertheless, it is clear that the social mission at Ben & Jerry's is thriving today, even more than in the 1990s.

Unilever has also changed since 2000, thanks to both a changing corporate culture on a global scale and the opportunities it has had to learn from Ben & Jerry's. In fact, when Unilever's first vocally progressive CEO Paul Polman[210] promoted new sustainability programs, he often cited Ben & Jerry's as his source of inspiration:

> "I want to show that big doesn't necessarily mean bad, and that it's not only small that is beautiful. I want to show that even big companies can be a force for change in this world. Take Ben & Jerry's. They have championed social and environmental causes since their beginning, and look at the impact that they have increasingly in the mainstream culture."[211]

Unilever continues to feature Ben & Jerry's in its annual financial statements, attributing much of the conglomerate's growth to it and other sustainability focused brands.[212] Mid-level managers who have been responsible for implementing Unilever's lofty social aspirations have also attributed much of their progress to the example and influence of Ben & Jerry's:

> "We are helped by having an organization like Ben & Jerry's. We are learning from an organization that has always put stretch objectives into areas such as Fair Trade and finding sustainable sources."[213]

Changing consumer preferences and other external pressures have certainly contributed to Unilever's change of heart. Thanks to the company's gargantuan size, however, the effects of that change are significant. If it is true that Ben & Jerry's has facilitated that change, then resulting public value added would more than make up for any lost in the sale itself. Put another way, the public has more to gain from Ben & Jerry's dragging Unilever even an inch closer to social values than it stood to lose when it was acquired.[214]

Lessons for Today's Social Entrepreneurs

The sale of Ben & Jerry's has come to stand for the idea that social missions cannot survive a takeover, but like the shareholder primacy norm and *Dodge v. Ford*, this over-simplification is inaccurate and counterproductive. Far from a cautionary tale, the history of Ben & Jerry's should be a model for social enterprise to follow. And yet it is true that the legacy of *Dodge* creates obstacles for entrepreneurs seeking to bind their companies in the long term. So, taking into account Ben & Jerry's entire journey from a misfit startup to a progressive staple in a global conglomerate, what should the Bens and Jerrys of today do? And how can policy makers fix *Dodge v. Ford*'s failure to bind without undermining the century of precedent and practice on which it is based?

---

207. The company decided to not to announce the return to original recipes for fear it would draw attention to the changes that had been made in the first place and cause more bad PR than good. Instead, they ran a marketing campaign focused on Cherry Garcia, as changes to the cherries had been one of the greatest sources of consumer complaints. A few years later, sales of the flavor returned to average, suggesting that the company avoided permanently alienating fans of the flavor. Ibid., 231.

208. Ibid., 241–242.

209. Ibid., 243. The use of bovine growth hormone has long been an issue at Ben & Jerry's and was the source of its second major pitched battle, this time against Monsanto over the issue of mandatory labeling. For an excellent history of this fight and how it affected Ben & Jerry's see "Calling Monsanto's Bluff," Ibid., 75–79.

210. Paul Polman was CEO at Unilever from 2009–2019, when he left to establish Imagine, an organization that seeks to help businesses address social inequity and climate change. Today, Alan Jope is the chief executive at Unilver, and along with his appointment came assurances that he would maintain Unilever's commitment to the social mission. David Aaker, "The Good News: Unilever's New CEO Will Stay the Course," *Aaker On Brands,* December 4, 2018, https://www.prophet.com/2018/12/the-good-news-unilevers-new-ceo-will-stay-the-course/.

211. Edmondson, *Ice Cream Social*, 247.

212. Unilever, *Annual Report and Accounts, 2018,* https://www.unilever.com/Images/unilever-annual-report-and-accounts-2018_tcm244-534881_en.pdf

213. Kevin Havelock, President of the refreshments division at Unilever. Edmondson, *Ice Cream Social,* 247.

214. Because Ben & Jerry's is now wholly owned, a precise comparison of their sizes is not possible, but a sense of the scale is useful. In 2018, Unilever reported more than $55 billion in revenue, about $13.5 billion of which was operating profit. By contrast, estimates of Ben & Jerry's recent annual revenues range from about $280–480 million. Unilever, *Annual Report and Accounts. Owler* estimate for the low end of Ben & Jerry's revenue, https://www.owler.com/company/benjerry, and *Statista* for the high end of Ben & Jerry's revenue, https://www.statista.com/statistics/190426/top-ice-cream-brands-in-the-united-states/.

The nascent literature on the difficulties associated with binding a social enterprise[215] tends to focus on mission creep[216&217] and often suggests that the appropriate remedy is stronger or more finely specified articles of incorporation, by-laws, and contracts.[218&219] While an explicit charter may help founders to assert a strong social identity, without robust enforcement mechanisms, it is by no means sufficient to resist the myriad factors that lead to mission drift. Moreover, from a theoretical standpoint, the focus on mandates misses half of the question because the flip side of mission creep is the problem of the dead hand.[220]

Just as it doesn't serve the public interest for a property owner to restrict the use of their assets in perpetuity, strict contractual limits diminish a firm's capacity to react to market conditions, and risks making its social contributions obsolete. For example, Rain Forest Crunch was one of Ben & Jerry's most successful flavors; it contained nuts from a native-owned co-op near the Amazon in

---

215. That is, ensuring that the social mission survives changes in control and ownership.

216. First appearing in military terminology, mission creep refers to a gradual, unidirectional, shift in goals that is difficult or impossible to avoid. In business literature, the term is synonymous with mission drift, and almost always refers to a slow but steady erosion of pro-social values in a social enterprise. In this view, the social mission is strongest at a company's founding, as it weakens under the influence of market pressures that favor profit over purpose. Decentralized control that comes with public financing and executive turnover are among the most commonly cited causes. Alicia E. Plerhoples, "Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation," *Tennessee Journal of Business Law*, 13, no. 2 (Spring 2012): 260–261 and J. Haskell Murray, "Defending Patagonia: Mergers and Acquisitions with Benefit Corporations," *Hastings Business Law Journal* 9, no. 3 (Spring 2013): 485–516.

217. For an excellent summary of existing literature, see Christopher Cornforth, "Understanding and Combating Mission Drift in Social Enterprises," *Social Enterprise Journal* 10, no. 1, 3–20. Professor Cornforth ultimately concludes that a combination of governance mechanisms and management strategies is best suited to protect a social enterprise's mission.

218. For the sake of simplicity, I refer below to all mandates on a company's behavior, including any in articles of incorporation or by-laws, as contractual obligations.

219. Similar to the argument about social charters, some scholars suggest that the best remedy is available by incorporating as a public benefit corporation, or even better a California Flexible Purpose Corporation, which explicitly insulates directors from liability during a merger or acquisition. Ross Kelley, "The Emerging Need for Hybrid Entities: Why California Should Become the Delaware of 'Social Enterprise Law'," *Loyola of Los Angeles Law Review* 47, no. 2 (2014): 650, Dina Dalessandro, "The Development of Social Enterprise and Rise of Benefit Corporations: A Global Solution?," *Hastings Business Law Journal* 15, no. 2 (Summer 2019): 308 and Alicia E. Plerhoples, "Social Enterprise as Commitment: A Roadmap," *Washington University Journal of Law & Policy* 48, no. 1 (2015): 89–138. While registering as a social entity may help strengthen a firm's social commitment, it still leaves the company vulnerable to all of the issues of control and scale discussed above.

220. In property law, the dead hand is a concept that comes up in rules against perpetuities. With limited exceptions, these rules prevent property owners from creating future interests that last long after the owner has passed away. Because no one can predict the future, policymakers seek to prevent property owners from unreasonably restricting future use in the public interest. In this section, I argue that social entrepreneurs face a similar issue when they seek to bind their firms to a social mission.

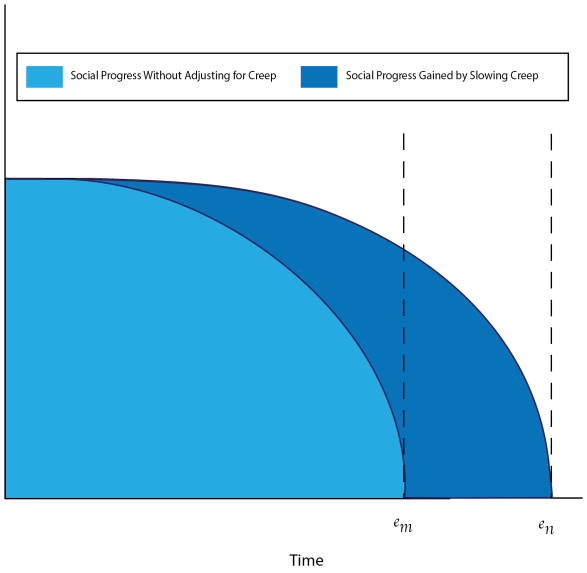
Brazil, and was aimed at raising awareness about the threat to the Amazon ecosystem as well as funds for conservation. Fairly soon, however, demand for those ingredients exceeded what they could source from those farmers, and they had to revert to more traditional suppliers.[221] Had executives seeking to protect the social mission made fair-trade sourcing an immutable requirement, production would have ended years before it did, and the benefits accruing to the message and fundraising would have been forfeited.

On a more fundamental level, in the 1980s, environmentally conscious social enterprises might have imposed limits on the firm's chlorofluorocarbon emissions in an effort to protect the ozone layer and combat the hole in it that was increasing at the time. Thirty years later, it turns out that greenhouse gas emissions are a far more imminent environmental threat; it would be counter to both the founder's wishes and public policy if a self-imposed limit on CFC emissions were to impede a firm's ability to address its carbon footprint. Thus, from a theoretical standpoint, it is important to look at binding a social enterprise as a question of balance, rather than a pure effort to stall mission creep. Or, put another way, theory ought to recognize that addressing mission creep with contractual obligations can be effective, but comes with the risk of ending social contributions prematurely.[222]

221. Rainforest Crunch eventually became an embarrassment for the firm, when journalist Jon Entine cited it as an example of disingenuous behavior by a social enterprise. Mr. Entine had been influential in the downfall of another well-known social enterprise, The Body Shop, and some believe that he viewed Rainforest Crunch as an opportunity to do the same to Ben & Jerry's. Edmondson, *Ice Cream Social,* 82–85.

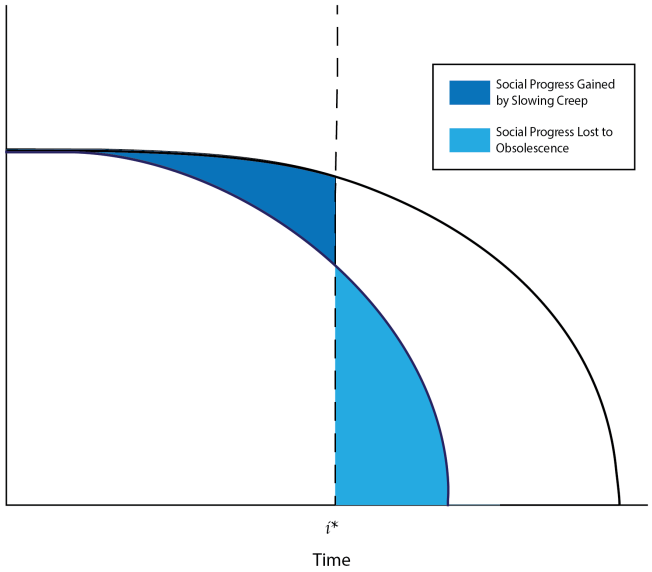
222. A relevant but potentially apocryphal anecdote comes from Harvard University, which endowed a chair to study railroads in 1915 with funds from James J. Hill and other railroad magnates. *Harvard Alumni Bulletin*, Volume 18, Number 5, October 27, 1915. When and how the university expanded that purview to accommodate modern research needs is unclear, but today Professor Juan Alcacer's studies information, competition, and multi-national corporations' decision-making about where to locate their facilities. https://www.hbs.edu/faculty/Pages/profile.aspx?facId=178197.

The Contract Solution

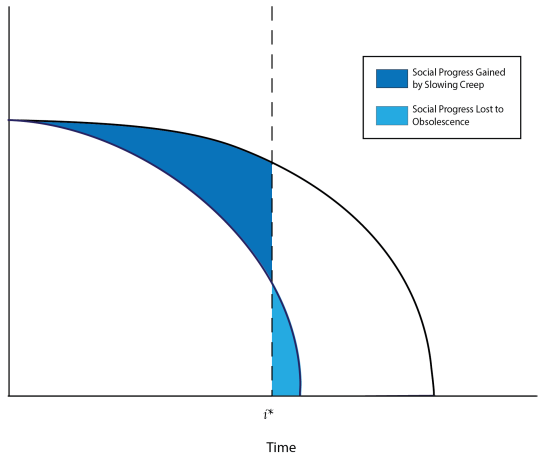
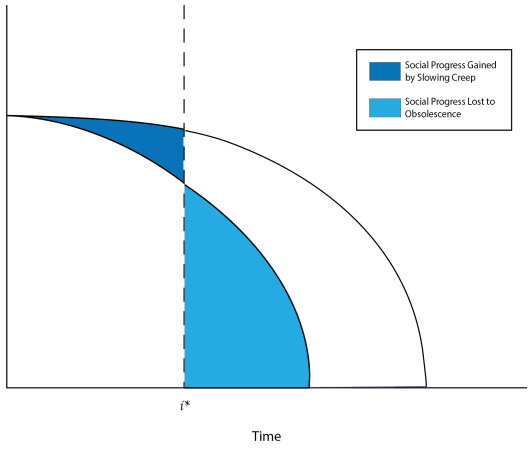


As the figure above demonstrates, the intuition underlying a remedy-by-contract view is straightforward and largely persuasive. Both curves represent the expected public contributions by a social enterprise over time. They have a negative first derivative to reflect the difficulties of implementing a social mission at scale and the natural attrition of changing circumstances. The second derivatives are also negative because the factors affecting a social mission are varied and co-determinant. A single loss would be unlikely to have a major impact on the firm's output, but as changes to the mission compound, their effect is amplified. Similarly, most firms will have a threshold beyond which no public output is possible, even if some socially-oriented practices remain. Literature on mission drift thus seeks to lower the absolute value of both derivatives. The more entrepreneurs can bind their firms to socially responsible practices, the more they can slow the rate of attrition and flatten the curve. The expected gains to this contractual solution are represented by the dark blue area on this figure, or the integral of {*f(contract) – f(no contract)*} taken over time period *0* to *i**.

The Problem of the Dead Hand



The effort to preserve a social mission becomes counterproductive when unanticipated developments make it impossible to both satisfy the terms of the contract and honor the spirit of the social mission. In the most extreme cases, as depicted in the figures, the conflict created by an outdated contract can prevent a firm's social contributions altogether. Then the question becomes whether more is lost by the premature end (the light blue region in the figure above) than was gained by slowing the rate of mission creep (the area noted in dark blue).

Net Gains to Binding Via Contract	Net Losses to Binding Via Contract
	

As the figures above demonstrate, the value to writing stricter contracts depends not only on decreasing the rate of mission creep, but also the probability that an intervening event or pressures from growth will render the social mission obsolete. Where a company's lifespan and scope of operations are well defined and contained, as in the figure on the left above, preserving the misison by contract is worthwhile. As either the time a firm aims to stay in business or uncertainty about the future increases, however, so too does the risk that well-intentioned choices will backfire and constrain rather than protect the firm's pro-social stance. For those companies that operate in a dynamic market or have long-term ambitions, contracts and rules alone will not not suffice, and more fundamental changes are required. Because corporate law is by design flexible, what fundamental changes social enterprises select can vary, but again Ben & Jerry's path from disruptive pioneer to target for takeover can be instructive.

Beyond Incorporation: Nurturing a Social Mission in all Stages of Growth

Recognizing the Spectrum and Planning for Divided Control

The first lesson that today's social entrepreneurs should take from the history of Ben & Jerry's is that a firm's capacity and obligation to a social mission is never static, and binding future leadership doesn't happen at a single moment in time. As pioneers working without a playbook, executives at Ben & Jerry's were often surprised by the unique challenges involved in scaling up a socially conscious enterprise. After all, it is one thing to commit to using locally sourced dairy and paying a living wage as a small startup, and entirely another to source enough sustainably produced milk for global distribution and ensure that all employees in the chain are well treated. Just as importantly, a firm's capacity to absorb mistakes and failures changes as it grows. Increased tension

between social goals and the slim margins for error in a large corporation is not necessarily undesirable, however; even watered-down social practices can have significant benefits at scale. Or, as Ben & Jerry put it in their discussion of a double bottom line,

> "…[W]e thought the best way to make Ben & Jerry's a force for progressive social change was to grow bigger so we could make more profits and give more money away. We'd decided to give away 10 percent of our profits every year. Ten percent of the profits of a $100 million company could do a lot more good than 10 percent of the $3 or $4 million we were currently doing."[223]

The effect of a social enterprise on the conglomerate that acquires it should also not be under-valued. Only a handful of companies control the vast majority of the retail food market worldwide; getting one of them to move even an inch towards more responsible practices will have far-ranging impacts.[224] And so, rather than viewing the social mission as a monolith that's diminished with every concession to scale, today's social entrepreneurs should instead plan for that shifting balance, and build checks and balances into their firms' governance structures so that oversight of their finances and social contributions can be divided among specialists.

Protecting the Dual Mission with an Independent or Substantively Divided Board

The second major lesson from the history of Ben & Jerry's is that, at least in the long run, a multi-part mission requires multi-faceted mechanisms of control, and that as a social enterprise grows, it will demand specialists in areas that directly compete with each other.[225] Companies should

---

223. Cohen, Greenfield, and Maran, *Double Dip*. The ten percent figure only lasted a few years, however. In preparation for a national stock offering, Ben and business manager Chico compromised at 7.5%, which continued until the company was sold. Edmondson, *Ice Cream Social*, 25–26.

224. For example, the newly energized board convinced Unilever to improve its labor practices. Unilever agreed to extend the living wage policy beyond Ben & Jerry's employees in Vermont so that people who made and sold Ben & Jerry's in Vermont, Nevada, the Netherlands, and everywhere else would be paid according to the same system. Ibid., 227.

225. For example, Robert Holland, the first CEO hired without the previous 7:1 ratio imposed on his salary, was also the first real outsider to assume control. Chief among the many reasons he was selected was his financing expertise. Issues with building the St. Albans plant had put the company in a financial bind, and they needed someone like Mr. Holland to help them restructure nearly every item on their balance sheet. While he was outwardly supportive of the social mission, it was neither his strength nor his central concern. Ibid., 90–91, 96–97, and 107. Perry Odak, the CEO who saw the firm through acquisition, also claimed to value the social mission, but some observers were skeptical and believed his willingness to sacrifice the social mission in favor of stock price led to a less-than-ideal outcome for the firm (thanks to stock options, Odak made $12.6 million on the sale, about a third of what Ben did and $3 million more than Jerry received for his shares). Ibid., 123, 139–140, 178.

Whether intentional or not, both leaders made financial decisions that would ultimately complicate the effort to protect the social mission. That they could was partly a result of an already contentious relationship among board factions, which only exacerbated the social mission's vulnerability to takeover by leaders with an eye on the bottom line. Ben & Jerry's may have weathered the St. Albans difficulties and market consolidation more successfully had some of the directors been charged with overseeing and defending the company's social values. It also makes the search for talent far more practical in terms of

plan ahead to divide oversight responsibilities and authority once that tension has reached a critical mass, and executives are faced with making tradeoffs between them.[226] Ben & Jerry's accomplished this after the sale by establishing an entirely separate board that has delegated authority and works with the executives at Unilever. A younger company could do the same by adopting a substantively divided board, in which each member is assigned to pursue one part of the multi-faceted mission, and decision-making authority is divided accordingly.[227&228]

Who Should Serve? The Ben & Jerry's Model

For most companies, the founders will be the first stewards of the social mission, as was the case at Ben & Jerry's, and for many their solution may work as well. In the sale agreements, nine of the eleven members of the independent board were selected either by Ben & Jerry's executives or the social investment group Meadowbrook, most of whom were long-standing directors who stayed on after the acquisition.[229] Under the terms of that agreement, the board also selects its own successors, which protects them from being voted out by Unilever. The benefit of this set-up is its flexibility. It allowed leadership at Ben & Jerry's to select people who know the business well, and helped maintain continuity beyond the sale. With that flexibility comes increased risk, however, as both the current and future success of the mission depends on the individual directors, their judgment, and their capacity to exert influence.

Ben and Jerry's first decade as part of Unilever highlights this dependency; in the first few years post-sale, the independent board was largely passive. The directors found themselves yet again charting unforged territory, and weren't sure how to navigate a brand new and unfamiliar territory as independent checks on a wholly owned subsidiary. They were also exhausted, however, after eighteen months of internal acrimony and high stakes negotiation leading up to the sale.[230] That fatigue likely contributed to the significant drift that occurred during the firm's first ten years post-

finding one person with the skills and capacity to both arrange financing in the hundreds of millions and overcome the unique challenges of building a social enterprise. Mr. Holland successfully and vastly improved the company's financing, but his brief tenure might have been more broadly successful had his role been more defined, limited, and subject to cooperation with leaders in charge of the firm's social footprint.

226. Empowering the social directors is the subject of the next section, which discusses how to structure and assign decision-making authority.

227. Social enterprises could also consider divided management. Until a few years ago, and long after it considerably dwarfed Ben & Jerry's in size, Unilever was run by two chief executives. Having one CEO for the economic mission and another for the social mission would involve non-trivial costs, such as the excess time it takes to make decisions by consensus rather than fiat. Separated roles and delimited authority could, however, help social enterprises with dual missions avoid the forum-shopping that ultimately prompted Unilever to switch to more traditional structure with a single chief executive.

228. This proposal represents a meaningful shift in the way that most boards currently operate, as fiduciary duties at traditional companies require all board members to pursue the best interests of all shareholders, even if they are elected by only a subset of them.

229. Terry Mullner, the driving force behind Meadowbrook, was one of the first directors appointed by the financial group. Ibid., 176.

230. Ibid., 178, 187, 190–191.

acquisition, when in contravention of the agreement, Unilever-selected leadership made unapproved changes to the recipe and either neglected or outright ignored the social mission.[231] The social mission might have benefitted from an infusion of energy from external social managers who viewed the sale as the beginning of a new process rather than the end of another, and who were experienced in the rough-and-tumble world of global companies where when it comes to control, "all the seats in big business are rented."[232]

That the independent board selects its own successors also exposes the social mission to risk. As time passes and an acquired social enterprise integrates into a larger organization, the benefits of the founders' detailed knowledge of the firm are diminished, as is their capacity to identify executives who are best suited to both protecting the mission and working within the constraints of a larger organization. As long as the directors are chosen well and operate in good faith, the commitment to the social mission should be largely intact. If and when ill-suited or bad faith actors become directors, however, any damage they do will be difficult to correct, as there's no institutional backstop to reinforce the company's core values once they drift.

Who Can Serve? Adding Institutional Heft to the Ben & Jerry's Model

One unique aspect of Ben & Jerry's that may not transfer to younger social enterprises is the brand power associated directly with the founders' names. Both the Ben & Jerry's board and Unilever were aware of this strategic advantage during the sale negotiations, which earned their employees some protections that Unilever doesn't normally provide.[233] It was also a critical lever for the newly engaged independent board in 2007. Spearheaded by Ben, they were prepared to launch another of their non-traditional marketing campaigns to advertise Unilever's breach of the sale agreement and their disillusionment, but scrapped it when Unilever's response to their concerns was swift.[234] For those companies that lack such strong influence over the public perception of their company, even stronger structural guarantees achieved by issuing special classes of stock may be helpful.

---

231. Jennifer Henderson, the first post-sale board president: "And so I found myself in charge of this group that had contractual obligations, but did not have the energy or the strategy to meet them." Ms. Henderson had joined the company at its smallest when in 1998 Ben overheard her telling a friend that all three founders were crazy, and eventually convinced her that she was the best person to corral them. She had also been on the board since 1994, and so was perhaps uniquely positioned to know the personalities of the board and how to motivate them. After months of frantic negotiations and increasingly personal tension, however, even her vast experience wasn't enough to keep everyone engaged. Ibid., xvi, 1–2, 187.

232. Ms. Henderson. Ibid., 184.

233. "The agreements require Ben & Jerry's to maintain a corporate presence and substantial operations in Vermont for at least five years, and they prohibit layoffs and benefit cuts for two years." Ibid., 172.

234. One of their ideas was a new flavor called "Unilever Squash," which would draw attention to the conglomerate's crushing Ben & Jerry's social mission. In addition to their belief that Unilever was in good faith when it promised to work with the independent board, Jerry was concerned that bad press could harm Ben & Jerry's employees. Ben was apparently surprised when other directors told him to wait on the marketing campaign, but happy to oblige and wait to see if Unilever would live up to its commitments, as it ultimately did. Ibid., 225, 230–231.

Multi-Class Stock and a Specialized Board

Most commonly associated with firms like Google and Facebook,[235] the use of dual- or multi-class stock with asymmetrical voting power as a mechanism for governance has recently gained popular attention thanks to its use at very large, well-known companies,[236] and is an option that social entrepreneurs ought to consider when seeking to entrench a social mission into their business.[237&238] Thus far, super-voting stock has mainly been a tool for the founders to retain control after a company goes public and ownership is significantly diluted.[239] In these systems, shares are divided into two groups: Class A, or common stock, and Class B, with up to ten times greater voting power. Social entrepreneurs can adapt this governance mechanism to bind future boards to a social

---

235. Google now has three classes of shares. Class A receives dividends and is entitled to one vote per share, Class B shares received dividends and have 10 votes per share. Class C receives dividends but has no voting rights at all. Class C shares were introduced as a way to compensate employees without diluting the owners' control, and are also available for purchase by investors. Facebook still issues two classes, both including a right to dividends, while Class B shares have 10 times the voting power of Class A shares. Steven Davidoff Solomon, "New Share Class Gives Google Founders Tighter Control," *New York Times*, April 13, 2012, https://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/.

236. The institution itself is not new, as companies have used dual classes since the nineteenth century. In the 20th century, corporate governance moved significantly in the direction of the "one share, one vote" model, though dual-class share structures never disappeared entirely, even when U.S. stock exchanges prohibited such structures at publicly listed companies. Their use at widely influential and popular technology companies is less than 30 years old, however, and represents another meaningful shift away from what had become a default rule. Stephen Bainbridge, "Understanding Dual Class Stock Part I: An Historical Perspective," September 9, 2017, https://www.professorbainbridge.com/professorbainbridgecom/2017/09/understanding-dual-class-stock-part-i-an-historical-perspective.html

237. Dual-class voting shares have been somewhat controversial. As I discuss in greater detail below, however, many of the concerns raised by practitioners and scholars do not apply to social enterprises that use voting stock to enshrine a social mission. For an excellent summary of current views on dual class capital structures, see Zoe Condon, "A Snapshot of Dual-Class Share Structures in the Twenty-First Century: A Solution to Reconcile Shareholder Protections with Founder Autonomy," *Emory Law Journal* 68, no. 2 (2018): 335–368. For a prominent article on the potential agency problems inherent in dual class structures, see Ronald W. Masulis, Cong Wang and Fei Xie, "Agency Problems at Dual-Class Companies," *The Journal of Finance* 64, no. 4 (2009): 1697–1727.

238. The NYSE and Nasdaq require that multi-class stock systems with asymmetric voting be arranged before an IPO, based on their rules-based implementation of the SEC's now defunct proposed Rule 19c-4. Christopher C. McKinnon, "Dual-Class Capital Structures: A Legal, Theoretical & Empirical Buy-Side Analysis," *Michigan Business & Entrepreneurial Law Review* 5, no. 1 (Fall 2015): 84.

239. It is also this application that has generated the most controversy, as it raises *Dodge v. Ford*-style concerns regarding shareholders using their voting power advantage to self-deal, co-opting wealth that rightfully belongs to all shareholders. For example, courts decided *In re Delphi Financial Group Shareholder Litigation* when minority shareholders opposed management's negotiation of a premium for super-voting shares in contravention of the company's charter. The merger was not enjoined because a better buyout offer was unlikely, but the court suggested that minority shareholders could sue for damages. That suit was ultimately settled for about 90% of the premium that management had collected for their super-voting shares. Ibid., 84–85.

mission by creating Class S shares that have the exclusive right to elect specialized directors; thereby dividing control rather than weighting it in favor of a select group. Such an arrangement, in which Class A[240] shareholders elect directors in charge of the economic mission and Class S shareholders elect members of the social audit committee,[241] would recognize the divergence of those two corporate goals and facilitate effective management that balances them.

Features of Dual-Class Stock

When there is more than one class, the difference between traditional and super-voting stocks tends to be organized around three central features: voting rights, cash rights, and transfer restrictions on stock ownership.

Multi-Class Feature	Class A Shares	Class B Shares	Class S Shares
Voting Rights, Single Mission	One vote per share	Ten votes per share	--
Voting Rights, Dual Mission	One vote per share Non-social directors only	--	One vote per share Social directors only
Cash Rights	Dividends	Dividends	No dividend rights. Regular, preferred-style resources to support oversight
Ownership or Transfer Restrictions	None	Limited to founders or small group of influential investors	Limited to non-profit organizations or incumbent-selected successors

Voting Rights

Unlike traditional split stocks that concentrate influence over all corporate decisions, Class S shares would have the exclusive right to vote for directors who will sit on the social audit committee, and no right to vote for the remaining members of the board.[242] Thus, Class A stockholders'

240. Of course, companies could issue all three classes. Because the relevant relationship here is between shares that vote for social and non-social directors, which is not affected by Class B weighting, I focus on the simpler context in which a social enterprise issues only Class A and Class S shares.

241. Sometimes called "social directors" in literature that argues for the inclusion of at least one socially oriented director on the board of each social enterprise, and as is often required in states adopting a version of B-Lab's model code. I use the terms synonymously, with the caveat that I am referring to the group of directors who are distinct from those filling the traditional oversight roles.

242. In the purest form of this system, members of the social audit community do not vote on issues outside their exclusive purview. Social enterprises could further titrate the balance between the economic and social goals, however, by allowing social directors to vote on all issues and setting a high or

influence would be substantively truncated, but not diminished in those areas where they retain control.

Cash Rights

In the most common dual-class systems, both A and B class shares are entitled to equity-based dividends, though not always identical ones. By contrast, Class S shareholders should have no stake in equity, and should receive no special dividends. Depending on ownership and the complexity of the social mission, founders may elect to provide modest regular dividends[243] to cover the costs of oversight.

Ownership and Transfer

Perhaps the most critical decision about Class S shares is who should own them. Under the Ben & Jerry's model, Class S shares would go to a select group of committed insiders who would also have the right to appoint their own successors. As I discuss above, this had the advantage of allowing founders to select directors who understand the social mission and have firm-specific knowledge and skills. The disadvantage, however, is that self-appointed successors leaves the social mission vulnerable to bad faith or ineffective directors, without an institutional backstop that can make corrections.

A more complex[244] but also stronger option would be to grant Class S shares to non-profit organizations in socially responsible business and other industries relevant to the social mission. A company that produces solar panels[245], for example, could award shares to non-profits such as The

---

low ratio of Class A to Class S seats on the board. In this scenario, if there are far more Class A seats, Class S directors have little influence outside of the social audit committee, a situation that mirrors the pure division I describe here. At the other extreme, having far more Class S seats would give social directors significant power over the entire business.

243. That is, regular payments established by contract rather than resulting from excess profits.

244. More complex and therefore more costly. Thus, as with the decision between strict contractual constraints and a divided board, a company's size and longevity ambitions may determine which method is best.

245. Solar panels can have positive effects on greenhouse gas emissions, but also pose non-trivial risks to social welfare. They are made of earth minerals (most commonly quartz, or silica dioxide) that are difficult to mine safely in large quantities, and manufacturing byproducts can br toxic to employees and the local environment. As the industry and size of manufacturers grow, the difficulty in ensuring that these downsides don't outweigh the benefits to greenhouse emissions will increase. For example, in 2008 the *Washington Post* reported that the Chinese Luoyang Zhonggui High-Technology Company, which owned a polysilicon manufacturing facility, and at the time produced solar cells for the largest panel manufacturer in the world, was dumping large amounts of toxic waste in nearby communities, rending the land infertile and creating poison hazards for local people and animals. Independent tests of nearby soil found high levels of chlorine and hydrochloric acid. Ariana Eunjung Cha, "Solar Energy Firms Leave Waste Behind in China," *Washington Post*, March 9, 2008, https://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030802595.html. See also Dustin Mulvaney, "Solar Energy Isn't Always as Green as You Think: Do Cheaper Photovoltaics Providing Solar Energy Come with a Higher

Aspen Institute,[246] ACORE,[247] Work Safe[248] and Pure Earth.[249] Larger firms could select organizations from all of their non-equity stakeholders: consumers, labor, local communities, and environmental protection groups, or rely on a diverse group of non-profits focused on sustainable business.[250] Transfer would be limited to other non-profits working in the same substantive area and trigger a review of the corporate resources the non-profit receives for oversight costs, if any. The benefit of this system is an increase in the institutional heft supporting the social mission in the long term, both because the semi-democratic selection process can correct errors, and because as a group, non-profits will outlive any individual's tenure at a social enterprise. The non-trivial downside is the increased costs to coordination and the relative lack of firm-specific expertise.[251]

Oversight and the Social Audit Committee's Substantive Purview

Once the membership of the board is arranged, the next critical step is structuring firm decision-making and distributing authority among the Class A and Class S directors. Again, the Ben & Jerry's sale to Unilever is a useful foundation to build on.

Wages, Salaries, and Stock Awards

Once Ben and Jerry's attained a multi-national reach, the board ran into trouble with the salary ratio the company had imposed.[252] They needed financing expertise, and the ratio capped the salary they could offer at well below market rate. Yet many of the directors regretted removing it entirely. In particular, they regretted the lack of caps on stock compensation, which by some accounts aligned management's preferences with a sale too strongly. Giving members of the social

---

Environmental Price Tag?," *Washington Post*, November 13, 2014, https://spectrum.ieee.org/green-tech/solar/solar-energy-isnt-always-as-green-as-you-think.

246. The Aspen Institute studies and promote values-based leadership. One of their largest programs on socially responsible businesses was established in 1998. https://www.aspeninstitute.org/issues/business-society/.

247. The American Council on Renewable Energy, which studies the wide-ranging impact of various forms of energy production. https://acore.org/what-we-do/.

248. Work Safe is a California non-profit dedicated to preventing illness and injury in the workplace, as well as advocating for marginalized labor forces. https://worksafe.org/about/.

249. Pure earth is a pollution non-profit, with particular focus on toxic pollution in underserved communities. https://www.pureearth.org/what-we-do/.

250. Or rather, select a few organizations from each group of stakeholders to diversify opinions and increase the probability of meaningful oversight.

251. Unlike managerial firm-specific skills, however, a non-profit's skillset should not diminish over time. A non-profit should also be less susceptible to hostile takeover by bad faith actors, as it is supported by institutional weight and does not receive equity-based dividends or returns to a change in ownership.

252. As I discuss above, the original salary ratio between the highest and lowest paid employees was 5:1. The board raised the ratio to 7:1 before eliminating it entirely in the mid-1990s. Edmondson, *Ice Cream Social*, 29, 63–64.

committee some measure of control over compensation across the organization could provide the flexibility that Ben & Jerry's needed in the 1990s without sacrificing oversight of managerial incentives altogether.[253]

With respect to compensation, there are three levers available to founders seeking to bind a social mission through Class S shares. Giving the social audit committee the ability to set wages for labor, and in concert with the compensation committee to set compensation for management,[254] would provide the strongest cover for the social mission but would leave the business vulnerable to the kinds of problems that Ben & Jerry's faced in the mid-1990s. Giving the social committee the power to veto compensation packages would soften the restrictions placed on the business side of the mission,[255] but may not provide enough oversight if Class S directors are limited by their take-it-or-leave-it choices. A third, and for many companies the best option, would be to assign authority over wages and compensation, but make it subject to procedural controls granted to Class S directors. As with all governance mechanisms, companies could tailor the balance between the two groups, but one promising start would be to task social directors with selecting methods used to determine local living wages, and then within those bounds, allow economic directors to choose the exact wage offered to various groups of employees based on market conditions and the future needs of the firm. Social directors could also have direct authority, or at least veto power, over equity-based compensation for senior executives, but the capacity to challenge managerial salary only when it meaningfully exceeds the going rate at similarly positioned companies. This would allow social directors to cap the influence of short-term managerial incentives without imposing their preferences in an area where their expertise is not directly relevant.

Metrics

One of the most critical substantive areas that founders should consider assigning to Class S directors is the metrics by which the firm's progress is measured. One of the two major levers that allowed Ben & Jerry's 2007 board to newly assert its authority was the requirement that sales and social indicators rise largely in step, combined with the already established social metrics that directors could use to demonstrate Unilever's breach of the sale agreement. Moreover, as a firm grows, the substance of a firm's social contributions will be increasingly shaped by the way they are measured. Similarly, as the determinants and consequences of business practices become more

253. An alternative would be to impose a set ratio or other limits on managerial compensation. Such a contractual obligation would be a low-cost and effective option for those companies with limited scope and a known timeline. However, the costs to such a solution increase and the benefits decrease as a firm's substantive scope or ambitions for longevity increase.

254. Along with input from shareholders according to "say on pay" requirements. For an in-depth discussion of say on pay in the U.S., see Randall S. Thomas, Alan R. Palmiter and James F. Cotter, "Dodd-Frank's Say On Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?," *Cornell Law Review* 97, no. 5 (2012): 1213–1266. Articles addressing the effect of these regulations on executive compensation include Steven Balsam, Jeff Boone, Harrison Liu and Jennifer Yin, "The Impact of Say-on-Pay on Executive Compensation," *Journal of Accounting and Public Policy* 35, no. 2 (2016): 162–191 (U.S. companies) and Ricardo Correa and Ugur Lel, "Say-on-Pay laws, Executive Compensation, Pay Slice, and Firm Valuation Around the World," *Journal of Financial Economics* 122, no. 3 (2016): 500–520 (international).

255. And in so doing, perhaps reassure investors of the long-term economic health of the firm.

complex, investors and stakeholders alike will depend on transparent metrics to safeguard and advocate for their interests. Class S directors should thus be responsible for selecting an independent social auditor to prepare social reports, and at least have veto authority over the selection of financial auditors.[256]

Protecting Opportunities for Failure

One important social contribution from Ben & Jerry's that is not immediately obvious is the way that, throughout its history, the company has been willing to support endeavors where some measure of failure is guaranteed. Executives knew that, by their nature, some of their non-profit partner shops would not survive in the long run, but viewed those losses as part of the cost of supporting the rest. Similarly, when Greyston struggled to scale up their production to fill Ben & Jerry's brownie piece orders, they committed human and financial resources to shore the bakery up until it could stand on its own. A firm that was purely focused on profit would not have signed a contract with Greyston in the first place, much less stuck with the struggling bakery through several bankruptcy near misses. And, most notable post-sale, the members of the independent board took their responsibility to franchisees seriously when consumer demand for ice cream didn't increase as much as industry forecasts had predicted: "This was also a moral issue for me," said Jeff. "We had encouraged the franchisees to take risks, and I felt that we had to take some of the responsibility for what happened."[257] By contrast, purely profit-focused firms would likely have avoided as much responsibility for failed franchises as possible, in service to their single bottom line.

This willingness to accept failure as part of the cost of innovation and pursuing the social mission has been critical to some of Ben & Jerry's most socially beneficial projects. Between partner shops, Greyston and other socially conscious suppliers, and the post-acquisition franchises that needed additional support, one ice cream company has created innumerable jobs for a vulnerable work force and shown other socially conscious enterprises that it is possible to do so. And yet, this tolerance for failure is also among the practices most vulnerable to erosion after takeover by larger corporate entities. In a world driven by balance sheets, anything that results in negative financial return for a global conglomerate is an easy sacrifice to make, and a hard one to defend. Thus, it is critical that Class S directors at a minimum have an opportunity to veto Class A decisions that would focus on the costs to failure over the benefits to related success.

The Decision-Making Process

One of the most flexible ways to set the balance between Class A and Class S directors is through the process by which the board makes decisions. In any given area, requiring that Class S directors achieve a simple majority, supermajority, or unanimity to veto Class A director decisions will offer increasing protection to the financial interests of the firm. Similarly requiring different

256. A related but more drastic option would be to allow Class S directors to set a cap on pre-tax profits to prevent Class A directors from slowly undermining social goals by committing excess resources during successful times.

257. Edmondson, *Ice Cream Social*, 210.

thresholds for affirmative Class S decisions will affect the ease with which social directors can impose their views on the entire firm, and create inertia in favor of the status quo.

Firms that are determined to disrupt conventional corporate practices[258] could also consider requiring consensus between the Class A and Class S directors when the board is making decisions that will have the most meaningful impacts on the company's future.[259] Without a mechanism for breaking a stalemate, however, the costs associated with a lengthened decision-making process may outweigh the benefits to requiring cooperation among stewards of the multi-part mission.

Enforcement Mechanisms

Perhaps the final lesson from Ben & Jerry's for social entrepreneurs is that the economic mission is well protected by traditional corporate governance mechanisms, but that safeguarding a social mission requires a big stick. Thus, it is critical that Class S directors be authorized to sue at the firm's expense if Class A directors undermine the social mission. Even in registered public benefit corporations, by default only shareholders are granted standing to sue, and few social enterprises have opted to extend it to other stakeholder groups.[260] Moreover, even where stakeholders are explicitly authorized to sue in a company's articles of incorporation or by-laws, as a practical matter, few stakeholders will have the resources to do so, and attorneys are unlikely to take cases for solely a share of any damages when the remedies are non-monetary in nature. Nor has increased shareholder activism proven to be a benefit to companies or society alike.[261] Endowing Class S directors with the authority to sue at the company's expense for disregarding the social mission is therefore critical to ensuring that the natural inertia in favor of the economic mission doesn't overtake the founder's commitment to a multi-part mission.[262]

---

258. In its early years, revolutionizing the way business are conducted was itself an explicit goal at Ben & Jerry's, but one that necessarily faded as the practical demands of large-scale business increased. Ibid., 2 (regarding their initial, disruptive goals).

259. For example, the Ben & Jerry's sale agreements allow Unilever to select CEOs after good faith consultation with the independent board, but it seems that the two sides had different understandings of what that good faith consultation would require. Ben began interviewing candidates shortly after the sale, and was apparently surprised when Unilever executives didn't express interest in them. The independent board was also not overly fond of the first few Unilever-appointed CEOs. Ibid., 171, 185.

260. This default is true for both statutes that are based on B-Lab's model legislation and the Delaware legislation authorizing Public Benefit Corporations. Gil Lan, "Benefit Corporations: A Persisting and Heightened Conflict for Directors," *Journal of Law and Business Ethics* 21 (2015): 113–124, citing in footnote 22 Janine S. Hiller, "The Benefit Corporation and Corporate Social Responsibility," *Journal of Business Ethics* 118, no. 2 (2013): 287–301 and Brett McDonnell, "Benefit Corporations and Strategic Action Fields or (The Existential Failing of Delaware)," *Seattle University Law Review* 39, no. 2 (Winter 2016): 284.

261. Jonathan M. Karpoff, Paul H. Malatesta and Ralph A. Walkling, "Corporate Governance and Shareholder Initiatives: Empirical Evidence," *Journal of Financial Economics* 42, no. 3 (1996): 365–395 and David Parthiban, Matt Bloom and Amy J. Hillman, "Investor Activism, Managerial Responsiveness, and Corporate Social Performance," *Strategic Management Journal* 28, no. 1 (2007): 91–100.

262. As with areas where Class S directors have direct authority or veto power, entrepreneurs can adjust the strength of this enforcement mechanism by requiring that social directors achieve a simple majority, supermajority, or unanimity before initiating a suit at the firm's expense.

Effects of Class S Shares on Efficiency, Narrowly Defined

Much of the literature on traditional multi-class systems, in which Class B shares have ten times the voting power of Class A shares, has focused on one of two questions: whether such a structure increases the financial value of the company and, more broadly, whether such a structure benefits shareholders' and potential investors' interests. In both the theoretical and empirical literature, conclusions on this narrow question of efficiency are decidedly mixed.

Theoretical Arguments in Favor of Dual-Class Structures

Theoretical literature in this area tends to focus on the effects of multi-class capital structure on managerial incentives, the types and sources of available financing, and the frequency and outcome of takeover attempts.[263&264] Scholars who favor dual-class voting stock see non-trivial benefits to managers' capacity to direct firm business when the levers of control are distanced from stock ownership. Freed from immediate market pressures and the influence of outsiders who may not have the best interests of the company at heart, managers can focus on long-term investments and projects with the greatest, rather than the most immediate, expected return.[265] Increased personal security also allows managers invest in firm-specific knowledge, skills, and personnel,[266] thereby protecting their judgment when their individual interests diverge from the firm's.[267]

---

263. For a thorough yet accessible review of the theory underpinning these three central questions, see Burkart and Lee's article evaluating the merits of proposed rules mandating "one-vote, one share" governance, which draws on regulatory frameworks in the U.S. and the European Union. Professors Burkart and Lee ultimately conclude that prohibiting dual-class capitalization will lead some firms to choose sub-optimal financing, and thus argue that regulators ought to at least permit, if not encourage, multi-class voting stocks. Mike Burkart and Samuel Lee, "One Share-One Vote: The Theory," *Review of Finance* 12, no. 1 (2008): 1–49.

264. Of course, these three questions are not entirely independent of each other, as the threat of successful takeovers and opportunities for financing are significant influences on managerial behavior. The three questions do not entirely overlap, however, and as such warrant separate analysis.

265. McKinnon, "Dual-Class Structures," 89.

266. Charles R. Knoeber. "Golden Parachutes, Shark Repellents, and Hostile Tender Offers," *American Economic Review* 76, no. 1 (1986): 155–167. Scott B. Smart and Chad J. Zutter, "Control as a Motivation for Underpricing: A Comparison of Dual- and Single-Class IPOs," *Journal of Financial Economics* 69, no. 1 (2003): 88 citing Harry DeAngelo and Linda DeAngelo, "Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock," *Journal of Financial Economics* 14, no. 1 (1985): 33–69. See also Daniel R. Fischel, "Organized Exchanges and the Regulation of Dual Class Common Stock," *University of Chicago Law Review* 54, no. 1 (Winter 1987): 119–152. David J. Denis and Diane K. Denis, "Majority Owner-Managers and Organizational Efficiency," *Journal of Corporate Finance* 1, no. 1 (1994): 91–118.

267. Or, put another way, this protects managers from the very conflict of interest that some at Ben & Jerry's believe influenced Perry Odak's decisions while he was negotiating the sale of Ben & Jerry's. Odak preferred a merger with Dreyer's over a sale to Unilever, perhaps because it was the easiest deal to

Proponents also view the effect on the population of investors as a positive effect of dual-class frameworks. When managers also own a large part of a firm's equity, they may decline to pursue growth opportunities that a risk-neutral observer would undertake for fear of a bad outcome's effect on their personal wealth. Separating management from ownership invites more diversified investors than a single-class structure, which lowers the risk premium that shareholders demand and permits management to invest those resources in the company instead.[268]

Scholars who support multi-class capital structures also see value in the extent to which such a structure can act as an anti-takeover mechanism. By separating control from ownership, incumbent managers can pursue growth and the increased capital it requires without fearing that they are exposing themselves to increased risk of usurpation by rivals. They can shield any operating surplus that might attract unwarranted influence from underinformed outsiders and reduce the probability that the firm will have to defend itself against inefficient takeover bids. Finally, they can use the flexibility granted by the anti-takeover defense to invest what resources they save back into the business.[269]

Arguments against Dual-Class Structures

For every theoretical point that proponents offer in favor of dual-class capital structures, critics have one to counter. In this view, separating control from ownership is a nearly unalloyed drawback precisely because it permits managers to pursue goals beyond wealth maximization. For bad faith executives, decoupling financial stakes and control creates opportunities to consume private benefits at the expense of the firm, and particularly outside shareholder, wealth.[270] Even among good faith managers, misaligned incentives can cloud their judgment and promote poor decisions. Since they do not bear commensurate financial risks, executives with disproportionate control will take unnecessary risks, pursuing growth even when It is inadvisable or requires value-destroying transactions to accomplish.[271] Managers will also persist in this decision-making behavior because dual-class structures make it difficult for shareholders to replace them.[272]

---

accomplish, and because, as a stock swap, the tax implications were significantly more favorable for shareholders like him who owned large stakes in the company. Edmondson, *Ice Cream Social*,173.

268. Scott W. Bauguess, Myron B. Slovin and Marie E. Sushka, "Large Shareholder Diversification, Corporate Risk Raking, and the Benefits of Changing to Differential Voting Rights," *Journal of Banking & Finance* 36, no. 4 (2012): 1244–1253 and Jason W. Howell, "The Survival of the US Dual Class Share Structure," *Journal of Corporate Finance* 44 (2017): 440–450.

269. Kristian Rydqvist, "Dual-Class Shares: A Review," *Oxford Review of Economic Policy* 8, no. 3 (1992): 45–57 citing Armen A. Alchian and Harold Demsetz, "Production, Information Costs, and Economic Organization," *American Economic Review* 62, no. 5 (1972): 777–795 and Jeremy C. Stein, "Takeover Threats and Managerial Myopia," *Journal of Political Economy* 96, no. 1 (1988): 61–80.

270. McKinnon, "Dual-Class Structures," and Masulis, "Agency Problems at Dual-Class Companies."

271. Ibid., citing J. Ramachandran, K. S. Manikandan and A. Pant, "Why Conglomerates Thrive (Outside the US)," *Harvard Business Review* 91, no. 12 (2013): 110.

272. Ibid., citing Masulis, "Agency Problems at Dual-Class Companies," S. J. Grossman and O. D. Hart, "The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration," *Journal of*

Critics further question the extent to which diversifying the pool of investors is worth the resulting changes in its composition. Dual-class structures by their nature narrow the circle of influence over corporate behavior and create obstacles to oversight by activist shareholders.[273] Of particular concern is the possibility that institutional investors will avoid buying restricted voting shares, thereby removing a traditional mechanism for checking managerial missteps; indeed, some large institutional investors have recently expressed their view that U.S. stock exchanges should prohibit dual-class IPOs.[274] This also reduces the share price stockholders can command, since investors value the ability to replace managerial incumbents, and discount stocks that confer restricted voting rights.[275]

Finally, scholars who are skeptical of the value of dual-class structures see harm rather than benefit in the chilling effect it can have on takeover offers. While fending off inefficient takeover offers or justifying managerial decisions in the face of opposition from underinformed outsiders can be a waste of corporate resources, takeover attempts by their nature tend to increase both firm and share value.[276] Acquirers tend to overpay for target firms, and thus, as with other anti-takeover defenses, increasing managers' capacity to resist such offers reduces the probability that a value-increasing takeover will occur, and that investors will collect a premium for their shares as a result.[277]

Empirical Evidence and Arguments for the Middle Ground

There is relatively little empirical research on dual class companies with super-voting stock, since large companies with dual-class shares are few, and publicly owned firms with this capital structure are even fewer; perhaps as a result, the findings in this literature are just as widely spread as

Political Economy 94, no. 4 (1986): 691–719 and M. Harris and A. Raviv, "Corporate Governance—Voting Rights and Majority Rules," *Journal of Financial Economics*, 20 (1988): 203–235.

273. "[D]isproportionate voting common stock is the corporate law equivalent to price-fixing. It is one of a comparatively few transactions that must be proscribed in order for a market system to operate effectively." McKinnon, "Dual-Class Structures," quoting Joel Seligman, "Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy," *George Washington Law Review* 54, no. 5 (1985): 687–724.

274. Among those investors are the Council of Institutional Investors, Institutional Shareholder Services, and CalPERS (the California Public Employee Retirement System). McKinnon "Dual-Class Structures," citing Stephen I. Glover and Aarthy S. Thamodaran, "Capital Formation: Debating the Pros and Cons of Dual Class Capital Structures," *Insights: The Corporate & Securities Law Advisor* 27, no. 3 (March 2013): 2–3.

275. Scott B. Smart, Ramabhadran S. Thirumalai and Chad J. Zutter, "What's in a Vote? The Short- and Long-Run Impact of Dual-Class Equity on IPO Firm Values," *Journal of Accounting and Economics* 45, no. 1 (2008): 94–115.

276. M. C. Jensen and W. H. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure," *Journal of Financial Economics*, 3, no. 4 (1976): 305–360.

277. McKinnon, "Dual-Class Structures," citing Sanford J. Grossman and Oliver D. Hart, "One Share-One Vote and the Market for Corporate Control," *Journal of Financial Economics* 20 (1988): 175–202 and Harris, "Voting Rights and Majority Rules."

the related theoretical claims.[278] Scholars do seem to have reached one tentative conclusion, however: super-voting shares command a higher price in the exchanges than traditional shares,[279] although whether that's due to a control premium on super-voting shares or a liquidity discount for traditional shares remains unclear.[280] Evidence on the aggregate effect on firm value and shareholder interests is still inconclusive, and at least some well-regarded scholarship supports the theory on both sides of the issue.[281] For example, divergent scholarship has found that: 1. Dual-class structures improve managerial incentives and strengthen their corporate focus and performance,[282] but also that a widening gap between ownership and control leads to an increase in managerial cooptation of corporate resources[283] and worsens their decision-making;[284] 2. That post-IPO dual-class firms have modestly higher institutional investment,[285] and that such a structure drives those investors away;[286] and 3. That multi-class structures ultimately provide higher takeover premiums to shareholders[287] and increase aggregate firm value,[288] or that they reduce share price[289] and damage firm value.[290]

The heterogeneity of empirical conclusions prohibits a blanket statement about the effect of multi-class capitalization on an average firm's value and its shareholders' wealth. This lack of consensus may support a middle path in the theory, however. This research argues that, regardless of the effect of dual-class shares on the average firm, such structures should not be prohibited outright. According to this view, the very survival of dual-class structures in the midst of hostile regulatory environments suggests that It is the most efficient option for some firms, and regulators

---

278. Empirical literature also studies geographically diverse firms that are subject to a variety of regulatory systems, which further complicates the potential for consensus.

279. Rydqvist, "Dual-Class Shares Review," 54, citing Clas Bergström and Kristian Rydqvist, "Differentiated Bids for Voting and Restricted Voting Shares in Public Tender Offers," *Journal of Banking & Finance* 16, no. 1 (1992): 97–114.

280. R. Neumann, "Price Differentials Between Dual-Class Stocks: Voting Premium or Liquidity Discount?," *European Financial Management* 9, no. 3, (2003): 315–332.

281. McKinnon, "Dual-Class Structures," 81.

282. Bauguess, "Large Shareholder Diversification."

283. Masulis, "Agency Problems at Dual-Class Companies" and Vijay M. Jog and Allan L. Riding, "Price Effects of Dual-Class Shares," *Financial Analysts Journal* 42, no. 1 (1986): 58–67.

284. Per-Olof Bjuggren, Johan E. Eklund and Daniel Wiberg, "Ownership Structure, Control and Firm Performance: The Effects of Vote-Differentiated Shares," *Applied Financial Economics* 17, no. 16 (2007): 1323–1334.

285. Smart, "Control as Motivation."

286. Kai Li, Hernán Ortiz-Molina and Xinlei Zhao, "Do Voting Rights Affect Institutional Investment Decisions? Evidence from Dual-Class Firms," *Financial Management* 37, no. 4 (2008): 713–745.

287. Bauguess, "Large Shareholder Diversification."

288. Valentin Dimitrov and Prem C. Jain, "Recapitalization of One Class of Common Stock into Dual-Class: Growth and Long-Run Stock Returns," *Journal of Corporate Finance* 12, no. 2 (2006): 342–366.

289. Gregg A. Jarrell and Annette B. Poulsen, "Dual-Class Recapitalizations as Antitakeover Mechanisms: The Recent Evidence," *Journal of Financial Economics* 20 (1988): 129–152.

290. Paul A. Gompers, Joy Ishii and Andrew Metrick, "Extreme Governance: An Analysis of Dual-Class Firms in the United States," *The Review of Financial Studies* 23, no. 3 (May 2009): 1051–1088.

ought to trust managers to know when to select it.[291] Moreover, some entrepreneurs and insiders will be determined to maintain control of their companies, even if they have to resort to inferior financing mechanisms to do so, and thus ought to be allowed to choose the most effective way to fulfill their non-negotiable preferences.[292]

Effects on Efficiency More Broadly Defined

Ultimately, regardless of the effect on a firm's financial bottom line, it is important to remember that in a social enterprise, the social goals are as important as the economic ones, and that its knowledgeable investors support or at least accept this equality of purpose. Thus, even if Class S directors' influence reduces the monetary value of a company's shares, their ability to protect the social mission likely increases the firm's aggregate value to stakeholders, including those who own its stock and the founders who bound the firm originally.

Holding all else constant, a rise in firm or share value should also increase social welfare generally, making the addition of the Class S directors socially efficient as well as responsive to founders' preferences. A second and potentially even more important social benefit, however, comes from the effect of social directors on corporate behavior. One of the most fundamental arguments against corporations of any kind is that corporate behavior is associated with massive externalities, and indeed that the shareholder primacy norm perversely incentivizes actions that have large, negative effects on non-equity stakeholders. In that view, Class S shares at least allow corporations to opt into a framework that incentivizes socially efficient behavior, thereby internalizing some of the costs that traditional firms would impose on others. If so, substantively divided boards will not only satisfy social entrepreneurs' preferences, but also begin to repair one of the biggest efficiency drains in modern corporate law and increase the public benefits associated with the corporate form.

Effects on Doctrine

Ben & Jerry's and all of the social entrepreneurs they've inspired have made obvious what could have been clear from the day that *Dodge v. Ford Motor Company* was decided: The shareholder primacy norm has never reflected the reality of business, and in the century since, the difference between the legal narrative and practical reality has only grown. Recognizing a dual system with Class S shares would be an important first step towards reconciling that difference, without directly overturning the century-old precedent. Fortunately, social entrepreneurs can leverage another basic tenet of corporate law, the inherent flexibility of corporate governance, to accomplish what case law has yet to achieve: recognizing that social contributions vary widely among firms, and even across time within them. Hopefully, doctrine will follow their lead.

---

291. Howell, "The Survival of Dual Class" and Douglas C. Ashton, "Revisiting Dual-Class Stock," *John's Law Review* 68, no. 4 (Fall 1994): 863–960.

292. Burkart, "One Share-One Vote."

Conclusion

It is a legal irony that one decision, *Dodge v. Ford*, has had two nearly opposite and yet equally negative effects on the state of modern business. A case poorly argued by the litigants, poorly decided by the court, and poorly applied by scholars and practitioners since, *Dodge* has made it easier for bad faith actors to disguise their attempts at cooption as philanthropy, while also making it harder for socially-minded entrepreneurs to bind their companies beyond changes in ownership.

The recent boom in public benefit companies, along with the stories of pioneers like Ben & Jerry's, makes it clear that these flaws in corporate regulation are no longer tenable. And yet, the case also has one hundred years of precedential weight behind it. As a result, policymakers must find solutions that will comport with established law, discourage greenwashing, and encourage social entrepreneurs to found and bind companies with positive public value. There is no single solution to the dual classes of bad law created by the U.S. legal system's peculiar attachment to *Dodge* and its dicta. Addressed separately, however, it is not only possible but long past time to begin addressing these flaws and repairing the unintended consequences that arose from the clash of the 20th-century automobile titans.

Appendix A – Selected Testimony from Henry Ford in *Dodge v. Ford Motor Company*

Reprinted from: Kawaguchi, Linda. "Introduction to Dodge v. Ford Motor Co.: Primary Source and Commentary Material." *Chapman Law Review* 17, no. 2 (2013): 493–578. **Bold** added for emphasis.

Mr. Stevenson: Mr. Ford, you are the president of the Ford Motor Company?

Mr. Ford: Yes, sir.

Mr. Stevenson: And have been how long?

Mr. Ford: Five or six years.

Mr. Stevenson: What?

Mr. Ford: Six or seven years, I guess.

Mr. Stevenson: How long?

Mr. Ford: Six or seven years.

Mr. Stevenson: Six or seven years. You are one of the original incorporators?

Mr. Ford: Yes, sir.

Mr. Stevenson: How much of a stock holding did you have in the organization of the company?

Mr. Ford: 25 and one-half per cent., I think.

. . .

Mr. Stevenson: **Now, let us see; you received a letter from Dodge Brothers on or about the 23rd of September, didn't you, asking that this cash, or a large part of it, be distributed as dividends?**

Mr. Ford: I think so.

Mr. Stevenson: Why didn't you answer that letter?

Mr. Ford: I did answer the letter.

Mr. Stevenson: How long afterwards?

Mr. Ford: Shortly after.

Mr. Stevenson: How long after?

Mr. Ford: I don't know, but it is all a matter of record; you can easily find out.

Mr. Stevenson: But I want your recollection of it.

Mr. Ford: I don't recollect.

Mr. Stevenson: Now, you received the letter on the 23rd of September, didn't you?

Mr. Ford: Possibly.

(Papers were produced, and handed to the witness)

Mr. Stevenson: You read that letter and see if that is a copy of your letter.

Mr. Ford: Of my letter?

Mr. Stevenson: Yes.

Mr. Ford: Well, this, you can compare it with our copy.

Mr. Stevenson: If you have got a copy, let us see the copy.

Mr. Stevenson: I will read the first letter, to refresh your recollection, Mr. Ford.

Detroit, Mich., September 23, 1916.
Mr. Henry Ford,
President Ford Motor Company,
Detroit, Mich.
Dear Sir:

We have for some time, as you know, been endeavoring to make an appointment to see you, for the purpose, as you assumed, and informed one of your associates, of discussing the affairs of the Ford Motor Company, from the standpoint of our interest as stockholders, and with a view of securing action by the board of directors looking to a very substantial distribution from its cash surplus as dividends."

Mr. Stevenson: That was true, wasn't it?

Mr. Ford: Yes.

Mr. Stevenson: What I have read; he answered, yes.

Mr. Ford: Yes.

Mr. Stevenson: Not having been able to make --

Mr. Ford: That letter is a correct copy of the letter I had.

Mr. Stevenson: That is a fact, is it not?

Mr. Lucking: What is a fact?

Mr. Stevenson: "We have for some time, as you know, been endeavoring to make an appointment to see you, for the purpose, as you assumed, and informed one of your associates, of discussing the affairs of the Ford Motor Company from the standpoint of our interest as stockholders --"

Mr. Ford: If that is an exact copy of the letter, I received, it is.

Mr. Stevenson: Don't get excited. You knew that Dodge Brothers had been endeavoring to make an appointment to see you about dividends, didn't you?

Mr. Ford: I knew that Dodge Brothers had been making --

Mr. Stevenson: **Had been endeavoring to make an appointment to see you about dividends?**

Mr. Ford: **Before the letter was written?**

Mr. Stevenson: **Yes.**

Mr. Ford: **No, sir.**

Mr. Stevenson: **Didn't you tell Mr. Couzens that you knew that they wanted to see you about the question of dividends, or that they had been phoning, and that you had not seen them?**

Mr. Ford: **I told Mr. Couzens that they wanted to see me about selling their stock to me.**

Mr. Stevenson: You did?

Mr. Ford: Yes.

Mr. Stevenson: When? When did you tell him that?

Mr. Ford: I don't remember when I told him that.

Mr. Stevenson: But you told him that?

Mr. Ford: Yes. I never knew--I never told Mr. Couzens anything about dividends.

Mr. Stevenson: You didn't tell him anything about dividends?

Mr. Ford: Not that I know of.

Mr. Stevenson: What did you think they wanted to see you about? Not about dividends, but to sell their stocks, was it?

Mr. Ford: To sell their stocks.

Mr. Stevenson: Not dividends?

Mr. Ford: No.

Mr. Stevenson: "Not having been able to make an appointment to discuss the matter with you personally, we very much desire to do, we write you this letter upon the subject. "The condition shown by your recent financial statement--showing approximately $60,000,000 of the net profits for the past year, and cash surplus in banks exceeding $60,000,000--it seems to us would suggest,

without the action being requested, the propriety of the board taking prompt action to distribute a large part of the accumulated cash surplus as dividends to the stockholders to whom it belongs."

Mr. Stevenson: Do you recall that[?]

Mr. Lucking: Recall what?

Mr. Stevenson: That part of the letter?

Mr. Ford: If it is a copy of the letter that I received --

Mr. Stevenson: Mr. Lucking says it is.

Mr. Lucking: Yes, Mr. Ford received the letter.

Mr. Ford: If I received the letter --

Mr. Stevenson: You received it, now, Mr. Lucking says so; did you?

Mr. Ford: Yes. I haven't denied that I received the letter.

Mr. Stevenson: Your reply to that letter, Mr. Ford, is dated October 10th?

Mr. Lucking: No, September 23rd.

Mr. Stevenson: No, it is not; it is October 10th.

Mr. Lucking: I beg your pardon; that is right. You are right.

Mr. Stevenson: It is as follows:

Detroit, Mich., Oct. 10th, 1916.
Messrs. John F. Dodge and H. E. Dodge,
care Dodge Brothers Motor Company, Detroit, Mich.

Dear Sirs:

I beg to acknowledge due receipt of your letter of September 23rd."

Mr. Stevenson: Is that right?

Mr. Ford: Yes, sir.

Mr. Stevenson: Then you waited from September 23rd to October 10th before you even acknowledged receipt of the letter, didn't you?

Mr. Ford: Possibly, if it so states there.

Mr. Stevenson:

"-- and to say that it would have been answered before this, but for my absence from town for a considerable length of time, and pressure of other matters. "It seems to me in view of all the conditions of business, and other extensions which have been determined upon for so long a time --"

Mr. Lucking: "Our extensions."

Mr. Lucking: "Our extensions;" not "other." In the bill of complaint, our copy, it says "our extensions."

Mr. Stevenson: Here it says, "and other extensions." It doesn't make much difference; it isn't important, however.

"It seems to me, in view of all the conditions of business, and other extensions, which have been determined upon for so long a time --"

Mr. Lucking: "Our" is the correct word.

Mr. Stevenson: I said "other." It isn't important.

"So long a time past, and to which we have been working, that it would not be wise to increase the dividends at the present time."

Mr. Stevenson: That was your position, wasn't it?

Mr. Ford: Yes.

Mr. Stevenson: What were the dividends at that time, the regular dividend of five per cent, per month, payable quarterly, wasn't it?

Mr. Ford: Yes.

Mr. Stevenson: And when you received this letter, you informed Dodge Brothers, that according to your policy, it wasn't wise to pay any more dividends. Just answer, so the stenographer will get it. Answer.

Mr. Ford: Yes, sir, according to the letter.

Mr. Stevenson: Was that according to the fact?

Mr. Ford: Certainly.

Mr. Stevenson: Certainly; it was according to the fact?

Mr. Ford: Yes.

Mr. Stevenson: **So that you made up your mind not to pay any more dividends except the regular dividends, for the present, at least, hadn't you?**

Mr. Ford: **For the present, yes, sir.**

Mr. Stevenson: For how long? Had you fixed in your mind any time in the future, when you were going to pay --

Mr. Ford: No.

Mr. Stevenson: That was indefinite in the future?

Mr. Ford: That was indefinite, yes, sir.

Mr. Stevenson: And might be some time, might or might not be in the future, as the circumstances might develop?

Mr. Ford: Yes.

Mr. Stevenson: But for the present, on October 10th, the policy that you had decided upon, was not to pay any more dividends, except the regular five per cent. a month?

Mr. Ford: Right then I think so, yes, sir.

Mr. Stevenson: Had you made up your mind to pay at any time in the future?

Mr. Ford: Certainly.

Mr. Stevenson: When?

Mr. Ford: Always.

Mr. Stevenson: Had you in mind to pay it this year?

Mr. Ford: Yes, sir.

Mr. Stevenson: You said a few minutes ago that you had not any definite time in mind in the future, but at some time when the circumstances warranted the paying of dividends; but for this year you had decided not to pay any more than the regular dividend.

Mr. Ford: Not this year; not this year.

Mr. Stevenson: Did you indicate that, had you decided to pay any dividends this year?

Mr. Ford: In the letter, you mean?

Mr. Stevenson: Yes, at the time you wrote the letter.

Mr. Ford: Yes.

Mr. Stevenson: What?

Mr. Ford: No.

Mr. Stevenson: No, you had not; you told them, so far as they could judge from your letter, of your fixed policy not to pay any more dividends but the regular dividend.

Mr. Lucking: I object to that; the letter speaks for itself.

Mr. Ford: It is all in the letter.

Mr. Stevenson: I am asking you what you meant by that letter, Mr. Ford.

Mr. Ford: What we meant by the letter?

Mr. Stevenson: Yes.

Mr. Ford: We meant just what it said.

Mr. Stevenson: That you had decided not to pay any more dividends, but the regular dividends?

Mr. Ford: At that time, yes, sir.

Mr. Stevenson: **And that you had not in mind any definite time in the future, as to when you were going to pay any dividends?**

Mr. Ford: No, I guess not.

Mr. Stevenson: **And you had decided that you were going ahead and spend all the money that was available, for extensions?**

Mr. Lucking: I object to that; it doesn't say that.

Mr. Stevenson: What?

Mr. Ford: We had not spent any money.

Mr. Stevenson: You hadn't spent any money?

Mr. Ford: No.

Mr. Stevenson: On October 10th you had not spent any money?

Mr. Ford: Not very much.

Mr. Stevenson: But you had decided on spending the money?

Mr. Ford: Decided to bring it up to the board.

Mr. Stevenson: **You had decided on spending it, hadn't you?**

Mr. Ford: **As far as I was concerned, yes.**

Mr. Stevenson: **So far as you were concerned; you were pretty nearly "it" in the Ford Motor Company, weren't you?**

Mr. Ford: **No, sir.**

Mr. Lucking: He ought to be; he owns 58 per cent of the stock.

Mr. Stevenson: Take that down.

Mr. Lucking: He ought to be; he owns 58 per cent. of the stock. What do you want? I suppose that every corporation did --

Mr. Stevenson: **I am very glad to have that; he has got a lot of dummies on his board of directors. You admit it. That is just what we have alleged**.

Mr. Ford: You will find out whether I have dummies or not, before we get done.

Mr. Stevenson: We will see as to how much dummies the rest of them are, and when you pull the string, how quick they jump.

. . .

Mr. Stevenson: You are familiar with the pig iron market, of course, and have been during the past few years?

Mr. Ford: Oh, yes.

Mr. Stevenson: You know, don't you, Mr. Ford, that up to the time the war commenced, that the market price of pig iron was less than the cost of production, don't you?

Mr. Ford: We are not going to --

Mr. Stevenson: Just answer the question.

Mr. Ford: We are not going to make pig iron.

Mr. Stevenson: You are not going to make pig iron at all?

Mr. Ford: No, sir.

Mr. Stevenson: How are you going to make any other iron, without making pig iron?

Mr. Ford: Because we are going to try and work out a new scheme.

Mr. Stevenson: You are going to try and work out a new scheme?

Mr. Ford: Yes, sir.

Mr. Stevenson: Tell us, let us know about your new scheme?

Mr. Ford: I did start to tell you a little while ago.

Mr. Stevenson: If I stopped you, start again.

Mr. Ford: Yes. We are going to make iron out of ore, directly out of ore, melted out of ore, and we are going to use it to cast our cylinders, and our castings, and use our scrap, and use our material up, and to make the castings directly from the ore; and we are going to get uniform castings, which has never been got where we melt pig iron in eleven or twelve cupolas at the factory. We take the pig iron and mix it with something, mix it with our borings, and stuff, and we never get a uniform casting. We have a great waste, and a great loss, from our castings, because the cupolas are a very poor thing to melt iron in. The wrought iron comes down first, and we never get a uniform casting. In this new scheme, we are going to melt the iron directly out of the ore, and run it into a mixer, and we are going to get a uniform mixture with proper analysis, and turn it directly right into castings right there, and save a great deal of money by doing it, reduce the cost of the car, and get an absolutely strong iron metal.

Mr. Stevenson: Who is doing that sort of thing now?

Mr. Ford: Nobody.

Mr. Stevenson: Nobody?

Mr. Ford: No.

Mr. Stevenson: **You are going to experiment with the Ford Motor Company's money, to do it, are you?**

Mr. Ford: **We are not going to experiment at all; we are going to do it.**

Mr. Stevenson: Nobody yet has ever done it?

Mr. Ford: That is all the more reason why it should be done.

Mr. Stevenson: Therefore, you are going to undertake to do something that nobody else has done, that nobody else have even tried to do?

Mr. Ford: Oh, certainly. There wouldn't be any fun in it if we didn't.

Mr. Stevenson: **You are going to find some fun in it?**

Mr. Ford: **Yes, certainly.**

Mr. Stevenson: **But at the expense of the Ford Motor Company?**

Mr. Ford: **That is all I am working for at the present time, is to have a little fun, and to do the most good for the most people, and the stockholders.**

Mr. Stevenson: I understand that is the principal thing that you have in mind, doing the most good for the most people?

Mr. Ford: And the stockholders, and everybody.

. . .

Mr. Stevenson: On the production of the 500,000 cars in the fiscal year, 1915, and '16, the Ford Motor Company made a net profit of $60,000,000, in round figures?

Mr. Ford: Yes.

Mr. Stevenson: That was with the manufacturing capacity, so far as the plant and facilities are concerned, as they existed during the year

1915, and '16 of course?

Mr. Ford: Yes.

Mr. Stevenson: And before these enlargements were taken into account, so far as the production was concerned?

Mr. Ford: Yes, sir.

Mr. Stevenson: To what extent have you considered the necessity for increased facilities for production of cars?

Mr. Ford: We expect to increase it double.

Mr. Stevenson: To double; that is, you produced 500,000 cars, with the old plant, as we speak of it, as up to July 31st, 1916?

Mr. Ford: Yes, sir.

Mr. Stevenson: And you are duplicating that plant, or more than duplicating it?

Mr. Ford: About duplicating it.

Mr. Stevenson: Your policy is to increase the production to a million cars per annum?

Mr. Ford: Yes, sir.

Mr. Stevenson: Yes. You are not satisfied with producing five hundred thousand cars per annum?

Mr. Ford: The demand was not satisfied.

Mr. Stevenson: The demand was not satisfied?

Mr. Ford: No.

Mr. Stevenson: **Do you mean that the Ford Motor Company during the year 1915 and '16, when it produced and sold 500,000 cars, could not meet the demand?**

Mr. Ford: **Could not quite meet the demand; and, besides, we left the price --**

Mr. Stevenson: What is that?

Mr. Ford: We left the price as it was the preceding car.

Mr. Stevenson: That is, you left the price in 1915 and '16 the same as the year 1913 and '14?

Mr. Ford: Left the price the same in 1916.

Mr. Stevenson: What?

Mr. Ford: We left the price the same in 1916 as we did in 1915.

Mr. Stevenson: Your fiscal year ends July 31st, 1916?

Mr. Ford: Yes, sir.

Mr. Stevenson: So that year would include from July 31st, 1915, to July 31st, 1916?

Mr. Ford: Yes, sir.

Mr. Stevenson: And you left the price of the car --

Mr. Ford: Yes, sir.

Mr. Stevenson: The same for 1915–16 as for 1914–15?

Mr. Ford: Yes; for the purpose of accumulating money to make these extensions.

Mr. Stevenson: You found that even with the old price, and the increased production to 500,000 cars a year, you were unable to keep up with the demand for the car?

Mr. Ford: Just about.

Mr. Stevenson: Just about?

Mr. Ford: Yes.

Mr. Stevenson: So far as your experience of 1915 and '16 was concerned, you had good reason to believe that you could duplicate the production and sell it at the same price during the next year, didn't you?

Mr. Ford: Yes, but that isn't our policy.

Mr. Stevenson: Well, that is, you are satisfied you could do that?

Mr. Ford: No, we couldn't do it.

Mr. Stevenson: What is that?

Mr. Ford: No, we couldn't do it; not keep the same price.

Mr. Stevenson: Not, and produce the same number of cars?

Mr. Ford: Not and keep the same price.

Mr. Stevenson: Why not?

Mr. Ford: Because the price was too high.

Mr. Stevenson: Well, you could not meet the demand the year before, you say?

Mr. Ford: That has been always our policy, to reduce the price.

Mr. Stevenson: I am not asking you about your policy now; I am asking you about the facts. You have told us both ways about it. You told me first that you had no reason to think that you could not sell 500,000 more cars this year, at the same price you sold them last year?

Mr. Lucking: No, he did not.

Mr. Ford: I didn't say that.

Mr. Stevenson: Which way, then, will you have that?

Mr. Ford: Perhaps I did not understand it.

Mr. Stevenson: What is that?

Mr. Ford: Perhaps I didn't understand it.

Mr. Stevenson: You didn't understand it?

Mr. Ford: I perhaps didn't understand what you meant.

Mr. Stevenson: Didn't you tell me that you were unable to meet the demand last year?

Mr. Ford: No, I didn't tell you we were unable to meet the demand last year.

Mr. Stevenson: You didn't tell me that? Let's test it. Just go back there and see what he said.

(Testimony was read by the reporter).

Mr. Ford: I will let you do a lot more of the talking, and I will be careful about answering.

Mr. Stevenson: Oh, you will! Now, will you tell us which way it is.

Mr. Ford: You ask the questions and I will tell you.

Mr. Stevenson: You said, in answer to my question, that you produced 500,000 cars, and that they did not meet the demand; was that true, or wasn't it?

Mr. Ford: When?

Mr. Stevenson: The year that this financial statement that we have referred to, covered and represented.

Mr. Ford: 1916 was the financial statement.

Mr. Stevenson: Do you call that the 1916 business?

Mr. Ford: Yes.

Mr. Stevenson: We will call it the 1916 business; then, for the year of 1916, you produced 500,000 cars, and you sold them?

Mr. Ford: Yes, sir.

Mr. Stevenson: And you said that didn't meet the demand, those 500,00[0] cars?

Mr. Ford: Not quite.

Mr. Stevenson: Not quite; so that you had no reason to believe, from the experience of 1916, that you could not sell 500,000 more cars in 1917?

Mr. Ford: No.

Mr. Stevenson: At the same price, had you?

Mr. Ford: Yes, sir, we did.

Mr. Stevenson: What reason did you have?

Mr. Ford: The price was too high.

Mr. Stevenson: Why was the price too high, if you were able to sell them?

Mr. Ford: Because we looked ahead to know what we could sell the next year.

Mr. Stevenson: How could you know what you could sell the next year?

Mr. Ford: Just from the way we run our business.

Mr. Stevenson: Tell us that secret, how you judge, when you were able to do it in 1916, you were not able to meet the demand, that you could not do it the next year?

Mr. Ford: The only thing that makes anything not sell is because the price is too high.

Mr. Stevenson: Was the price any higher than it was in 1913?

Mr. Ford: It was about the same price; I don't remember.

Mr. Stevenson: Three years ago the price was higher than it was in 1916, wasn't it? Wasn't it?

Mr. Ford: Yes, I think so.

Mr. Stevenson: It was higher still in 1910?

Mr. Ford: Yes, sir.

Mr. Stevenson: Now, didn't every customer of the Ford Motor Company who bought a car in 1916 get just as good a car, and just as good value as they did in 1912 when they paid a higher price?

Mr. Ford: What are we there for?

Mr. Stevenson: Just answer the question? I am not asking what you were there for.

Mr. Ford: I don't understand the question.

Mr. Stevenson: Read it, please.

(The question was read by the reporter).

Mr. Lucking: Yes, and they sold more of them, to, because they reduced the price.

Mr. Stevenson: Just put that in.

Mr. Lucking; Because they reduced the price, and they sold more.

Mr. Stevenson: What do you say to that, Mr. Ford?

Mr. Ford: I don't quite understand what you are trying to get at.

Mr. Stevenson: You say that you sold 500,000 cars in 1916?

Mr. Ford: Yes, sir.

Mr. Stevenson: And you sold in 1912 a less number of cars, at a higher price, in 1912?

Mr. Ford: Yes, sir.

Mr. Stevenson: In 1913?

Mr. Ford: Yes.

Mr. Stevenson: And you sold a less number of cars in 1910 at a still higher price?

Mr. Ford: Yes; and, I think, six or seven years ago, the same car, we got $900 for it.

Mr. Stevenson: Now then, I ask you if every customer of the Ford Motor Company of 1916 did not get just as good a car, and just as good value as the customer who paid a higher price in 1912 and '13?

Mr. Ford: He got a better car.

Mr. Stevenson: He got a better car, and he got it for a less price?

Mr. Ford: Yes, sir.

Mr. Stevenson: **And yet you say that you could not conscientiously think of making as much profit as you were making in 1916, in selling the Ford Motor Company car, didn't you?**

Mr. Lucking: When has he said that[?]

Mr. Stevenson: In Mr. Pipp's editorial.

Mr. Lucking: You better read his exact words.

Mr. Ford: I don't remember.

Mr. Stevenson: Don't you recall that?

Mr. Ford: I don't understand you.

Mr. Stevenson: You don't recollect that?

Mr. Ford: I don't say that. I don't understand what you are trying to get at.

Mr. Stevenson: You don't? Whose statement was that, yours or Mr. Pipp's.

Mr. Ford: A combination statement, I guess.

Mr. Stevenson: A combination. You ought to recollect what part of it was yours, wouldn't you.

Mr. Ford: I don't try to recollect anything that I want to forget. I only try to touch the high spots.

Mr. Stevenson: Just the high spots?

Mr. Ford: Just the high spots.

(Interruption).

Mr. Stevenson: **What I have reference to, Mr. Ford, is the statement contained in your published statement in the Evening News a week or so ago. "Bear in mind, every time you reduce the price of the car, or reduce the quality, you increase the possible number of purchasers. There are many men who will pay $360 for a car who would not pay $440. We had, in round numbers, 500,000 buyers of cars on the $440 basis; and I figure on the $360 basis, we can increase the sales to possibly 800,000 cars for the year; less profit on each car, but more cars, more employment of labor; and anyway, we will get all the total profits that we ought to make. And, let me say right here, that I do not believe we should make such awful profits on our cars. A reasonable profit is right, but not too much. It has been my policy to force the price of the car down as fast as production would permit."**

And so forth. Is that your statement?

Mr. Ford: Yes.

Mr. Stevenson: **Then your conscience would not let you sell cars at a price that you did last year, and make such awful profits? That is what you said, isn't it?**

Mr. Ford: **I don't know that my conscience has got anything to do with the case.**

Mr. Stevenson: **Why did you say that it wasn't right to get such awful profits, if it wasn't your conscience?**

Mr. Ford: **It isn't good business.**

Mr. Stevenson: It isn't good business. That is what you were thinking about, was it?

Mr. Ford: **It isn't good business for the institution.**

Mr. Stevenson: Was that all you thought about when you said it was not right?

Mr. Lucking: That is objected to as immaterial.

Mr. Stevenson: **Another place, "Dodge Brothers say I ought to continue to ask $440 a car. I don't believe in such awful profits." That is what you stated, wasn't it? "I don't believe it is right." Was that your testament, or wasn't it, or was that Mr. Pipps?**

Mr. Ford: You seem to be using the News for a Bible; I guess that's all right.

Mr. Stevenson: That seems to be your Bible.

Mr. Ford: Yes, sure.

Mr. Stevenson: Yes, sure it does. Does that express your sentiments now?

Mr. Ford: It did then.

Mr. Stevenson: Have you changed your sentiments since then?

Mr. Ford: I don't know; I haven't thought about it since.

Mr. Stevenson: You haven't thought about it since. You don't know now whether these are your sentiments or not?

Mr. Ford: No, not altogether.

Mr. Stevenson: When would you be able to tell whether you have changed your sentiments, or not?

Mr. Ford: My mind changes quite often.

Mr. Stevenson: What is that?

Mr. Ford: My mind changes quite often.

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

Mr. Ford: Well, I guess I do, yes.

Mr. Stevenson: You still do?

Mr. Ford: Yes.

Mr. Stevenson: And for that reason you were not satisfied to continue to make such awful profits?

Mr. Ford: We don't seem to be able to keep the profits down.

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

Mr. Ford: **Organized to do as much good as we can, everywhere, for everybody concerned.**

Mr. Stevenson: Do you know anything in the law that discusses anything about doing people good, in connection with the manufacture of automobiles, or any other manufacturing business?

Mr. Ford: I don't know very much about law.

Mr. Stevenson: You don't know much about it. You didn't object, in the beginning, to have pretty satisfactory profits, did you?

Mr. Ford: We needed them.

Mr. Stevenson: You said that Dodge Brothers drew out $5,000,000 in dividends, didn't you?

Mr. Ford: Yes, sir.

Mr. Stevenson: While they drew out five million dollars, you drew out twenty-five million dollars, didn't you, and more, too, thirty million dollars?

Mr. Ford: Yes.

Mr. Stevenson: We will go back to that just a minute. You started out with a model of a car?

Mr. Ford: Yes, sir.

Mr. Stevenson: That is what you started with, wasn't it, Mr. Ford?

Mr. Ford: Yes, sir.

Mr. Stevenson: Yes; and a pretty poor model at that, wasn't it?

Mr. Ford: It seemed to sell, all right; it would sell, though.

Mr. Stevenson: **Sold after it was made; but who made it?**

Mr. Ford: **We made the first model ourselves.**

Mr. Stevenson: **Who made the first cars that you sold?**

Mr. Ford: **Dodge Brothers made part of them.**

Mr. Stevenson: Dodge Brothers made the car?

Mr. Ford: Made part of it.

Mr. Stevenson: **What part of it did they make?**

Mr. Ford: **The motor**.

Mr. Stevenson: **What else?**

Mr. Ford: **The frame.**

Mr. Stevenson: **They made the whole thing, except the tires and the body, didn't they?**

Mr. Ford: **From our drawings, yes.**

Mr. Stevenson: And they made a car you were able to sell, too, didn't they?

Mr. Ford: From our drawings.

Mr. Stevenson: From your drawings; they made a car that you were able to sell?

Mr. Ford: Yes, sir.

Mr. Stevenson: You didn't pay any attention to it. And where was your plant, your big plant, in those days?

Mr. Ford: Which days?

Mr. Stevenson: When you started the business in 1903?

Mr. Ford: On Mack avenue.

Mr. Stevenson: What kind of a plant did you have?

Mr. Ford: A barn, I guess.

Mr. Stevenson: You had a barn. Mr. Streelow's carpenter shop, wasn't it?

Mr. Ford: I guess it was.

Mr. Stevenson: **Mr. Streelow's carpenter shop. Dodge Brothers made the completed car, except the rubber tires and the body; and that was taken up to Mr. Streelow's carpenter shop, and the body was put on the car, and then your selling agent sold it?**

Mr. Ford: **Yes, sir.**

Mr. Stevenson: **That was the history of it, wasn't it; Dodge Brothers had to equip their plant to produce those cars, too, didn't they?**

Mr. Ford: I guess they must have.

Mr. Stevenson: **And jeopardized everything they had in the world, didn't they, in the start, to make those cars, didn't they?**

Mr. Ford: If you think so, yes.

Mr. Stevenson: What is that? I am asking you what you think about it; you know about it.

Mr. Ford: I don't know what they jeopardized.

Mr. Stevenson: You don't know what they jeopardized?

Mr. Ford: No.

Mr. Stevenson: **You didn't jeopardize anything, did you? Didn't have anything to jeopardize, did you?**

Mr. Ford: Well --

Mr. Stevenson: What is that?

Mr. Ford: **We had our drawings and plans to jeopardize.**

Mr. Stevenson: You did? How were you going to jeopardize those?

Mr. Ford: We gave them up to be manufactured.

Mr. Stevenson: Is that the way you jeopardized them?

Mr. Ford: If they jeopardized anything, we jeopardized those.

Mr. Stevenson: Didn't they have to equip a machine shop to manufacture those cars?

Mr. Ford: I guess they did.

Mr. Stevenson: You guess they did; you know they did, don't you, Mr. Ford?

Mr. Ford: Yes.

Mr. Stevenson: And they had to buy machinery?

Mr. Ford: Yes.

Mr. Stevenson: And wasn't the extent of the purchases they had to make on that account, in their situation, jeopardizing everything they had, if that had not been a success?

Mr. Lucking: I object to that; that is ancient history.

Mr. Ford: You can find that all upon the records.

Mr. Stevenson: You can find it on the records?

Mr. Ford: Yes.

Mr. Stevenson: What is upon the record about the Dodge Brothers jeopardizing their business in undertaking the manufacture of these cars, that had never been developed at all?

Mr. Ford: You can find out what they done.

Mr. Stevenson: What is that?

Mr. Ford: You can find out what they did.

Mr. Stevenson: You can find out what they did?

Mr. Ford: Yes.

Mr. Stevenson: You know what they did, don't you?

Mr. Ford: I guess I did at the time.

Mr. Stevenson: Have you forgotten what they did?

Mr. Ford: Quite a lot of it; yes, sir.

Mr. Stevenson: A lot of it?

Mr. Ford: Yes, sir.

Mr. Stevenson: **You have forgotten, have you, that they produced the cars that were sold, to bring the money to make the Ford Motor Company a success, have you?**

Mr. Ford: **No, sir.**

Mr. Stevenson: No. There isn't any doubt about that, is there?

Mr. Ford: No.

Mr. Stevenson: **Yes, you talk in this article as though they were stealing something from you, when they wanted a part of what belongs to them. They have got or they own a ten per cent interest in your property, in that property, don't they?**

Mr. Ford: Yes, sir.

Mr. Stevenson: They didn't steal it, did they? I said, they didn't steal it, did they?

Mr. Ford: **I didn't say that anyone stole anything.**

Mr. Stevenson: **What? You tried to make out that they were ingrates because they wanted a share of the profits that belonged to their property, didn't you?**

Mr. Lucking: I object to that. The article hasn't any such language in it at all.

Mr. Stevenson: Well, we will construe this matter at a later period. Have you ever been offered anything for your property[?]

Mr. Lucking: He has had phoney offers, perhaps. I object to this as immaterial.

The Court: Answer the question.

Mr. Stevenson: Answer the question, Mr. Ford.

Mr. Ford: I have had some phoney offers, I suppose.

Mr. Stevenson: "Phoney offers"?

Mr. Ford: Yes, sir.

Mr. Stevenson: What was the kind of phoney offer that you had? You heard Mr. Lucking say "phoney offers," didn't you?

Mr. Ford: Certainly.

Mr. Stevenson: And so you say "phoney offer"?

Mr. Ford: Yes, sir.

Mr. Stevenson: Who made the offer?

Mr. Ford: I don't remember who made it.

Mr. Stevenson: What was the offer?

Mr. Ford: Well, there have been offers at different times.

Mr. Stevenson: What were the offers at different times, then?

Mr. Ford: I don't remember.

Mr. Stevenson: Can't you recollect anything about what you were offered?

Mr. Ford: No.

Mr. Stevenson: Was it a hundred million?

Mr. Ford: It may have been over that.

Mr. Stevenson: Was it two hundred million?

Mr. Ford: Might have been; I think it was somebody who wanted to know if I would take two hundred million dollars for it.

Mr. Stevenson: Two hundred million dollars for your interest in it?

Mr. Ford: Yes, sir.

Mr. Stevenson: Who was that somebody?

Mr. Ford: I don't remember.

Mr. Stevenson: Where was it?

Mr. Ford: I think it was in the factory.

Mr. Stevenson: What did you reply to them when you were asked if you would take two hundred millions dollars for your 58 per cent?

Mr. Ford: I said that it wasn't for sale.

Mr. Stevenson: You wouldn't take it?

Mr. Ford: No; it wasn't for sale.

Mr. Stevenson: Did you consider it worth that?

Mr. Ford: I di[d]n't say anything of the kind. I said it was not worth--and I said it was not for sale.

Mr. Stevenson: It wasn't for sale. You didn't say anything about what it was worth?

Mr. Ford: No.

Mr. Stevenson: But when you were asked if you would take two hundred million dollars, you said you would not?

Mr. Ford: I said it wasn't for sale.

Mr. Stevenson: It wasn't for sale. You intended that as a refusal of any further negotiations, didn't you?

Mr. Ford: I just simply said it wasn't for sale.

Mr. Stevenson: It wasn't for sale; what do you mean by that?

Mr. Ford: You can draw it out just the same as I can draw it.

Mr. Stevenson: Did you understand that this party was willing to pay you two hundred million dollars for your interest?

Mr. Ford: I didn't give it any thought.

Mr. Stevenson: Didn't give it any thought, just said it wasn't for sale?

Mr. Ford: Yes, sir.

Mr. Stevenson: Why wasn't it for sale? You started in to make money, didn't you?

Mr. Ford: Because I wanted something to work at.

Mr. Stevenson: You started in it to make money, didn't you? That was what the company was organized for, wasn't it?

Mr. Ford: I didn't give it very much thought.

Mr. Stevenson: You didn't give it any thought?

Mr. Ford: About making the money.

Mr. Stevenson: You got a lot of money out of it, didn't you?

Mr. Lucking: I object to that.

Mr. Ford: Yes, I have.

Mr. Stevenson: You are still making money, I suppose?

Mr. Ford: Just because we didn't have money in mind, I guess.

Mr. Stevenson: Just because you didn't have money in mind. What is your policy about this business, Mr. Ford?

Mr. Ford: In what respect?

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

Mr. Ford: **To do as much as possible for everybody concerned.**

Mr. Stevenson: **What do you mean by "doing as much good as possible?"**

Mr. Ford: **To make money and use it, give employment, and send out the car where the people can use it.**

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

Mr. Ford: **I suppose I have, and incidentally make money.**

Mr. Stevenson: **Incidentally make money?**

Mr. Ford: Yes, sir.

Mr. Stevenson: **But your controlling feature, so far as your policy, since you have got all the money you want, is to employ a great army of men at high wages, to reduce the selling price of**

your car, so that a lot of people can buy it at a cheap price, and give everybody a car that wants one?

Mr. Ford: **If you give all that, the money will fall into your hands; you can't get out of it.**

Mr. Stevenson: You think, if you do all that, it will fall into your hands? How many people are there in the United States?

Mr. Ford: You ought to know.

Mr. Lucking: I object to that as immaterial.

Mr. Stevenson: Don't you know?

Mr. Ford: About a hundred million, I guess.

Mr. Stevenson: What proportion of them are men who are in business, or earn a living by labor? About one-fifth?

Mr. Ford: About that, I guess.

Mr. Stevenson: About a fifth?

Mr. Ford: Yes.

Mr. Stevenson: So, out of the entire population of the United States, there are, in round numbers, twenty million of people who are men, laboring men, mechanics, farmers, business men, clerks, and other people, who earn their living, and some people who don't. That is about right, isn't it?

Mr. Ford: Yes, I guess so.

Mr. Stevenson: Yes. How many Ford cars are there on the market in the hands of the public now?

Mr. Ford: I don't know.

Mr. Stevenson: About how many?

Mr. Ford: I know about how many we have sold.

Mr. Stevenson: About how many have you sold?

Mr. Ford: A million and a half, about, I guess.

Mr. Stevenson: A million and a half?

Mr. Ford: Yes.

Mr. Stevenson: Then, if you are going to produce a million cars a year, one out of every twenty of the men in this nation, whether they are laboring men or mechanics, whatever they be, have got to buy a Ford car, haven't they?

Mr. Lucking: **I object to this discussion of business policies. This is up to the board of directors of this company, if the court please.**

Mr. Stevenson: **This is the board of directors right here.**

Mr. Lucking: It isn't up to you, anyhow.

(The question is repeated.)

Mr. Lucking: I object to that as simply a problem in mathematics. Counsel can figure it out just as well as the witness.

Mr. Stevenson: **Here is a man, if your honor please, who says he won't distribute any dividends, because he is going to put his money into --**

Mr. Lucking: He hasn't said anything of the kind.

Mr. Stevenson: **--to carry on this business, expand the business. He has started out on a purely reckless, chimerical, hare-brained scheme to spend the money of these stockholders in a plan that will, of its own force, break down and bring ruin and destruction on every man who has any money invested in it. He is ready to go on with this sort of hare-brained policy.**

. . .

Mr. Stevenson: All right. Now, in making this reduction of eighty dollars a car, Mr. Ford, from the price of $440 a car to $360, I suppose you seriously took into account the effect that was going to have on the business and the stockholders?

Mr. Ford: The effect upon the business and the stockholders?

Mr. Stevenson: Yes.

Mr. Ford: We took everything into account.

Mr. Stevenson: Did you take those things into account? You knew that on the face of things, it meant a difference of forty million dollars in the selling price of the car, didn't you?

Mr. Ford: No, I didn't know that.

Mr. Stevenson: You didn't know that. It was a reduction of eighty dollars a car, wasn't it?

Mr. Ford: Yes, sir.

Mr. Stevenson: And you sold 500,000 cars the year before?

Mr. Ford: Yes, sir.

Mr. Stevenson: So that on the same production of 500,000 cars, the price being eighty dollars each less, it would equal forty million dollars, wouldn't it?

Mr. Ford: Not with increased efficiency.

Mr. Stevenson: I am not talking about efficiency. I am talking upon the face --

Mr. Ford: You asked me if I took everything into consideration.

Mr. Stevenson: Now I asked you if you realized that it meant forty million dollars on the same production, difference in the selling price, on the price of the car?

Mr. Ford: I don't know as I ever thought of that.

Mr. Stevenson: Never thought of that?

Mr. Ford: No.

Mr. Stevenson: A little thing like forty million dollars didn't trouble you?

Mr. Ford: Because it isn't forty million dollars, with increased efficiency.

Mr. Stevenson: That was something to be done wasn't it? That was something that you had to do? But, what you actually did by striking down the price of those cars, eighty dollars a car, was to reduce the selling price of the cars as compared with the year before, forty million dollars, wasn't it?

Mr. Lucking: He took most out of his own pocket, didn't he?

Mr. Stevenson: Will you answer the question now, Mr. Ford, after you have had the suggestion from Mr. Lucking?

(The question was read by the reporter.)

Mr. Ford: We reduced the price of the car $80.

Mr. Stevenson: Did you realize that in reducing the price of the car $80 that you were cutting off forty million dollars on the basis of the production and selling price of the year before?

Mr. Ford: No.

Mr. Stevenson: You didn't realize that?

Mr. Ford: No.

Mr. Stevenson: You didn't take that into account at all?

Mr. Ford: No.

Mr. Stevenson: Why didn't you?

Mr. Ford: Because we increased our efficiency.

Mr. Stevenson: How did you increase your efficiency?

Mr. Ford: In every way, in the factory.

Mr. Stevenson: How does the reduction in the price of the car increase efficiency?

Mr. Ford: Reduces the cost of selling, for one thing.

Mr. Stevenson: How much effect would that have on the forty million dollars?

Mr. Ford: Quite a lot.

Mr. Stevenson: How much?

Mr. Ford: I don't know, but a great deal.

Mr. Stevenson: By the way, is it true, Mr. Ford, that the Ford Motor Company have required all of their agents to discontinue the sale of any other car?

Mr. Ford: No, it is not true.

Mr. Stevenson: That is not true?

Mr. Ford: No.

Mr. Stevenson: Are you sure about it?

Mr. Ford: I am sure about that, yes, sir.

Mr. Stevenson: You are sure about that?

Mr. Ford: Yes.

Mr. Stevenson: Was there any circular sent out to that effect?

Mr. Ford: Not that I know of.

Mr. Stevenson: Never heard of that?

Mr. Ford: No.

Mr. Stevenson: Now, then, we will go back to that. You say that you did not take into account the fact that--you recognize it as a fact, don't you, that on the sale of five hundred thousand cars, at $360 each, as compared with $440, that it reduces the selling price by forty million dollars, don't you?

Mr. Ford: It reduces the selling price by $80 upon each car.

Mr. Stevenson: The selling price on 500,000 cars, reduced $80 apiece, is forty million dollars, isn't it?

Mr. Ford: Oh, I guess so, if you figure it.

Mr. Stevenson: Have you any doubt about it?

Mr. Ford: You can figure that out.

Mr. Stevenson: Have you any doubt about that?

Mr. Ford: No.

Mr. Stevenson: You say you never figured it, never considered it at all?

Mr. Ford: We did not consider it in that way. We considered it by making the place more efficient.

Mr. Stevenson: How did you make it more efficient by reducing the price of the car? Just tell us what scheme you have got for increasing the efficiency by reducing the selling price?

Mr. Ford: It costs us less to sell it.

Mr. Stevenson: You have told us about that; what else?

Mr. Ford: Efficiency all through the shop, everywhere.

Mr. Stevenson: Is it efficiency, reducing the commission? Do you call that efficiency?

Mr. Ford: Commission?

Mr. Lucking: He said efficiency all through the shop.

Mr. Stevenson: What efficiency all through the shop is affected by reduction in the price of cars? Tell us, Mr. Ford, please, if you can, in any particular in which the reduction of the price of the car in any way increases or affects the efficiency of the workmen in the plant, or the efficiency of the plant itself. We are waiting, patiently waiting, Mr. Ford, whenever you get ready. Do you want the question repeated?

Mr. Ford: I don't understand the question?

Mr. Stevenson: Just repeat it, Mr. Stenographer.

(The question was read by the reporter.)

Mr. Ford: I don't understand the question.

Mr. Stevenson: You have said Mr. Ford, that you did not take into account the fact that there was forty million dollars cut off the selling price, when you decided on this; but what you did take into account was that there would be increased efficiency.

Mr. Ford: That is right.

Mr. Stevenson: **Now, will you tell us in what particular there would be increased efficiency in the production of the car, because of the reduction of the selling price?**

Mr. Ford: **It makes everybody dig more for the profits.**

Mr. Stevenson: What is that?

Mr. Ford: It makes everybody dig more for the profits.

Mr. Stevenson: Who do you call everybody?

Mr. Ford: The whole factory.

Mr. Stevenson: **The whole factory; what have they got to do with the profits?**

Mr. Ford: **Because they know that we have got to have profits.**

Mr. Stevenson: What is that?

Mr. Ford: They all know we have to have profits.

Mr. Stevenson: Is that the best answer you can give to that?

Mr. Ford: Yes, sir, that will do; that will be all right.

Mr. Stevenson: Is that the best answer you can give?

Mr. Ford: It will do for me.

Mr. Stevenson: What?

Mr. Ford: If it satisfies you, why, it is all right.

Mr. Stevenson: **I am not to be satisfied; I would like to get you to give me some intelligent explanation of what you have done, Mr. Ford, if you can. Your answer doesn't in any way attempt to give anything intelligent on the subject. If you are satisfied with it, I am.**

Mr. Ford: **Perhaps it doesn't give you any intelligence.**

Mr. Stevenson: Perhaps not.

Mr. Ford: Because you are not versed with factory practice, or anything.

Mr. Stevenson: Will you tell us again in what respect the reduction in the price of the car increases efficiency?

Mr. Ford: Because it makes everybody dig for profits.

Mr. Stevenson: Dig for profits. They have no part of the profits, have they, the men in the shop?

Mr. Ford: No, they don't have part of the profits.

Mr. Stevenson: How are they affected by the question of either an increase or reduction; they get so much a day, don't they?

Mr. Ford: They know we have got to make money.

Mr. Stevenson: Are you satisfied with that answer?

Mr. Ford: If it satisfies you.

Mr. Stevenson: Did you communicate with the men in the shop to that effect, that they had to hustle more, because you had reduced the price of the car?

Mr. Ford: Yes, sir.

Mr. Stevenson: They have been hustling about all they could, haven't they? Didn't you claim that the five dollars a day wages, and eight hours a day, that it made them hustle so that they hadn't any hustle left in them at the end of eight hours?

Mr. Ford: Did I claim that?

Mr. Stevenson: Yes.

Mr. Ford: Did I claim that?

Mr. Stevenson: Yes.

Mr. Ford: Where?

Mr. Stevenson: Everywhere. Isn't that the fact?

Mr. Ford: Did I claim it? You I claimed it?

Mr. Stevenson: I don't know whether you did or not; I am asking if you did.

Mr. Ford: No.

Mr. Stevenson: **Didn't you claim that by reason of increasing the pay of your employes, and reducing the number of hours to eight hours, that they hustled as they did not do before, when they were getting less wages?**

Mr. Ford: **I did claim that they took more interest in the institution.**

Mr. Stevenson: Took more interest, and you got better results, more value from their services at five dollars a day, and eight hours, than you got on a less sum, and longer hours?

Mr. Ford: Certainly.

Mr. Stevenson: Yes, sir. Isn't it true that when they hustle for eight hours, the way they have to hustle to get that five dollars a day, that there isn't any hustle left in them at the end of eight hours?

Mr. Ford: **Do you know anything about the way they have to hustle?**

Mr. Stevenson: **I am asking you; I am not on the witness stand; I am not a manufacturer.**

Mr. Ford: **I can see that plainly.**

Mr. Stevenson: I am not professing to take care of all of the people in this world, like you, you know.

Mr. Lucking: You are sneering at these policies that produced all this money in the past.

Mr. Stevenson: I am not sneering at any policy. I believe Mr. Ford is very sincere in his desire to improve the conditions of his men. I am ready at any time to accord him all the credit that it is possible for anybody to have in that line; but I still want to say --

Mr. Lucking: **Do you claim, as the president of this company, and the chief stockholder, that he is under a contract to squeeze every cent he can out of the public, and out of his workmen? Is that your claim?**

Mr. Stevenson: **I haven't made any such claim.**

Mr. Lucking: **That is pretty near it, judging from your bill, and from what you have said here.**

Mr. Stevenson: **I am not called upon to make any claim. I am claiming that it is his duty, as the trustee for the stockholders, to earn all the money that he legitimately can earn for the stockholders.**

Mr. Lucking: **And get every cent he can out of it?**

Mr. Stevenson: **I am not saying every cent; every dollar he legitimately can.**

. . .

Mr. Stevenson: You got a letter from Dodge Brothers on or about the tenth of October?

Mr. Ford: Yes.

Mr. Stevenson: Saying that there were rumors current that you had very ambitious plans with reference to extensions, and that they had already warned you that, in their opinion, you had no right to make any further extensions, and asking you for information?

Mr. Ford: Yes.

Mr. Stevenson: By return mail, as to what you had in contemplation, didn't they?

Mr. Ford: I suppose so.

Mr. Stevenson: Why didn't you answer that letter before you did all these things?

Mr. Lucking: The letter was answered.

Mr. Stevenson: Just a moment. It has never been answered.

Mr. Lucking: The tenth of October.

Mr. Stevenson: Just a minute. It wasn't. I object to your suggesting the answers to the witness, too. I want this to go on the record.

Mr. Lucking: All right.

Mr. Stevenson: Why didn't you answer Dodge's letter and tell them what you proposed to do, if you were going --

Mr. Lucking: I object to that, unless the letter is shown to the witness, what letter you refer to.

Mr. Stevenson: Give us the letter of October 11th.

Mr. Lucking: I haven't got it here. You use your copy out of your bill.

Mr. Stevenson (reading):

Detroit, Mich., Oct. 11, 1916.
Mr. Henry Ford,
President Ford Motor Company,
Detroit, Mich.

Dear Sir:

"We are in receipt of your esteemed favor dated October 10th, acknowledging receipt of our letter of September 23, 1916, and have noted contents of the same.

"Inasmuch as all the directors of the company are accessible and a considerable time has already passed, we would thank you to advise us that an early meeting of the board will be convened to consider the request made by us contained in our letter referred to, dated September 23d.

"Rumors are current to the effect that the company has very ambitious plans for the expansion of the operations of the company under consideration and negotiations looking to carrying them into effect that would involve the disbursement of a large part of the cash assets of the company.

"We would thank you very much to advise us by early mail as to whether there is any foundation for the rumors referred to and what plans for the extension or expansion of the operations of business of the company that would absorb any considerable part of the company's present resources, are under consideration and the status of any negotiations relating thereto. In short, as stockholders, we would ask to be advised promptly as to what plans for the enlargement of the plants, property or operations are underway or under consideration.

"Of course it would be idle to have the board of directors consider the question of disbursing the cash assets of the company in dividends if, before the board has considered our request, the same have been appropriated in the directions referred to.

"We would respectfully urge that we be given a prompt and full reply to this letter."

Mr. Stevenson: Why didn't you answer that letter, Mr. Ford?

Mr. Ford: You dig around and see. If you dig deep enough, perhaps, you will find that we did answer it.

Mr. Stevenson: Do you claim that you answered that letter?

Mr. Ford: You can dig around and find it.

Mr. Stevenson: Do you claim that you answered that letter?

Mr. Ford: I think that we answered the letter, yes, sir.

Mr. Stevenson: Mr. Ford, you did not answer the letter; I would ask you for a copy of it.

Mr. Lucking: I beg your pardon; it was answered.

Mr. Stevenson: This is what you claim is the answer, is it (indicating book to Mr. Lucking)?

Mr. Lucking: These two letters and the enclosed minutes and estimates and so on, yes.

Mr. Stevenson: Then, Mr. Ford, I will call your attention to that (indicating papers).

Mr. Ford: Yes, I signed that.

Mr. Lucking: Better look it over, to refresh your recollection.

Mr. Ford: You say it is all right?

Mr. Lucking: Look them over, Mr. Ford. Refresh your recollection.

Mr. Ford: There is a lot of stuff here to look over; it is supposed to be kept in one place.

Mr. Stevenson: **On or about the tenth of November you got the letter that I read, asking you to inform the Dodge Brothers as to what you had in contemplation, about spending this money, didn't you?**

Mr. Ford: **Yes**.

Mr. Stevenson: And you said you replied to that letter, and you referred to your letters of November second and November third as replies?

Mr. Ford: Yes.

Mr. Stevenson: **That is, after you had passed the resolution of the board of directors authorizing the expenditure of money, you then told them what you had done?**

Mr. Ford: **Yes**.

Mr. Stevenson: **Instead of giving them the information that they asked for before the money was appropriated, as they asked, you went ahead and appropriated the money and then told them what you had done. That was the effect of it, wasn't it?**

Mr. Ford: It is all there.

Mr. Stevenson: That was the effect of it, wasn't it?

Mr. Ford: It is all there; you can dig it out, and put it in your own language.

Mr. Stevenson: I am going to have you dig it out, Mr. Ford.

Mr. Ford: You can put it in any language you like.

Mr. Stevenson: You got a letter on October 11th asking you for information as to what you purposed, didn't you?

Mr. Ford: It is all there; dig it out.

Mr. Stevenson: Did you get that or didn't you?

Mr. Ford: I suppose I did, if it says so there.

Mr. Stevenson: If Mr. Lucking says so, I suppose you did?

Mr. Ford: No.

Mr. Stevenson: No?

Mr. Ford: No, if it says so there.

Mr. Stevenson: Says so where?

Mr. Ford: Right in that letter there.

Mr. Stevenson:

> "Answering your letter of recent date." That is the letter of November second. The letter of recent date was Dodge Brothers' letter to you, of October 11th, wasn't it? I will repeat what he said:
>
> "We would thank you very much to advise us by early mail as to whether there is any foundation for the rumors referred to, and what plans for the extension or expansion of the operations of business of the company that would absorb any considerable part of the company's present cash resources, are under consideration, and the status of any negotiations relating thereto."

Mr. Ford: Yes.

Mr. Stevenson: "In short, as stockholders, we would ask to be advised promptly as to what plans for the enlargement of the plants, property or operations, are under way, or under consideration. Of course, it would be idle to have the board of directors consider the question of disbursing the cash assets of the company in dividends if, before the board had considered our request, the same have been appropriated in the direction referred to."

Mr. Ford: Yes.

Mr. Stevenson: Now, then, you waited until the second of November, after you had gone on and appropriated more than twenty million dollars of this money, before you replied to that letter, didn't you?

Mr. Lucking: No, that is not so.

Mr. Stevenson: Just a minute.

Mr. Lucking: As to the amount.

Mr. Stevenson: What?

Mr. Ford: Just what it says.

Mr. Stevenson: Just a moment, now. Put this all upon the record. Mr. Lucking suggests everything for this man to answer.

Mr. Lucking: Why did you say twenty million?

Mr. Stevenson: This man echoes just what you suggest, and I want it all on the record.

Mr. Lucking: That is not so; I object to such complicated questions, as to conceal a number of factors in them that the witness is apt to overlook.

Mr. Stevenson: We will separate. The furnace plant; you appropriated eleven million dollars for the furnace plant, didn't you?

Mr. Ford: I guess we did, if it says so there.

Mr. Stevenson: Without answering Dodge Brothers' letter, so that you might be stopped from doing that, you went ahead and replied to his letter after you had done what he had requested you not to do, didn't you?

Mr. Ford: I don't know.

Mr. Stevenson: You got a request on October 11th to advise him as to what you had in contemplation, didn't you?

Mr. Ford: I guess we did.

Mr. Stevenson: You ignored it until after you had done what he was protesting against, didn't you?

Mr. Ford: I don't know.

Mr. Stevenson: What?

Mr. Ford: It is all there, whatever you can find out.

Mr. Stevenson: Isn't that the fact, that your reply, the first reply to that letter, was under date of November second, when you sent him a copy of the proceedings of the board [of] directors, appropriating all this money; that was the first reply you made to that letter?

Mr. Ford: I don't remember; it is all there. Dig it up.

Mr. Stevenson: We will have you dig it up now, Mr. Ford.

Mr. Ford: All right, dig away.

Mr. Stevenson: If you are so anxious to save time you better answer this question, because I am going to have an answer.

Mr. Ford: All right.

Mr. Stevenson: Or else I will have you on the record to show just what kind of a prevaricator you are.

Mr. Lucking: I think that is an outrageous statement of counsel.

Mr. Stevenson: It is an outrageous proceedings for this witness, and for you both.

Mr. Lucking: It is an outrageous statement, which you will regret in five minutes.

Mr. Stevenson: No, I won't regret it in fifty-five minutes. I want an answer to that question, Mr. Ford.

Mr. Lucking: This i[s] purely argumentative from the facts. He has given you the facts.

Mr. Stevenson: Will you read the question.

(The question was read as follows):

[Q:] Isn't that the fact, that your reply, the first reply to that letter, was under date of November second, when you sent him a copy of the proceedings of the board of directors, appropriating all this money; that was the first reply you made to that letter, wasn't it?"

Mr. Lucking: Divide it into three different questions.

Mr. Stevenson: I want an answer to that question.

Mr. Ford: Separate it so that I can understand it, and I will answer you.

Mr. Stevenson: I am not responsible for your understanding. You can understand the plain English language.

Mr. Ford: You are the only one that can talk plain English language, are you?

Mr. Stevenson: No, not the only one; but you seem to be the only one who is not willing to understand it. Now, repeat that question.

(The same question was again repeated by the Stenographer.)

Mr. Lucking: To that particular letter?

Mr. Ford: Whatever replies I made they are all right there.

Mr. Stevenson: Will you answer the question? Repeat the question.

(The same question was repeated by the Stenographer.)

Mr. Ford: Are those dates all right, Mr. Lucking?

Mr. Lucking: I think they are, Mr. Ford.

Mr. Ford: Well, then, all right. That is it.

Mr. Stevenson: All right. Mr. Lucking tells us again.

Mr. Ford: I don't know the dates.

Mr. Stevenson: Perhaps your own letter will indicate those dates just as well (handing paper to witness).

Mr. Ford: Well, if it is dated, that is all there is to it.

Mr. Stevenson: Look at it, Mr. Ford.

Mr. Ford: I say it, yes.

Mr. Stevenson: Then on the second of November was the first time that you replied to the letter of October eleventh?

Mr. Ford: Yes, sir.

Mr. Stevenson: Now we have got it.

Mr. Lucking: If you had asked the question simply in the first place, you would have got it without so much argumentative stuff in it.

Mr. Stevenson: It was simple enough so that he finally understood it.

Mr. Lucking: As you finally put it.

Mr. Stevenson: It was the same question exactly, repeated, and he answered it.

Mr. Lucking: The first answer has a certain date; that is simple; but when you sprung a lot of argument, you confused it.

Mr. Stevenson: I am not responsible for what you regard as simple, Mr. Lucking. I asked you whether you did not, before you appropriated this money, why you did not answer that letter as requested?

Mr. Ford: I don't know that.

Mr. Stevenson: You don't know that. You say on the sixteenth of October, after this letter of October eleventh was written to you by Dodge Brothers, you had concluded the arrangement with Riter-Conly, of Pittsburgh, for expending a million dollars. You have said that, haven't you?

Mr. Ford: Yes.

Mr. Stevenson: And after the receipt of their letter, you went right ahead and concluded an arrangement to spend that million dollars, without replying to their letter, or giving them any information about it; that is true, isn't it?

Mr. Ford: If it is there, it is true.

Mr. Stevenson: I am not asking you if it is there; isn't that true?

Mr. Ford: I suppose it is.

Mr. Stevenson: **Yes. Why didn't you give the information to Dodge Brothers, stockholders, that they asked for?**

Mr. Ford: **I guess we were working it out so that we could give them the information.**

Mr. Stevenson: **You were working it out. You waited until after the board of directors had appropriated the money before you informed them, didn't you?**

Mr. Lucking: I object to this; it has been gone into four or five times.

Mr. Stevenson: **Mr. Ford, you never advised Dodge Brothers of your New York venture, either, did you?**

Mr. Ford: **I didn't know that they were directors.**

Mr. Stevenson: But you knew that they were stockholders, didn't you?

Mr. Ford: Yes, sir.

Mr. Stevenson: And you knew that they asked you for information, too, didn't you?

Mr. Ford: About the New York --

Mr. Stevenson: About all the proposed expenditures. That is what they asked you for, wasn't it?

Mr. Ford: It must be, certainly.

Mr. Stevenson: **Do you claim that as trustee, as president and managing officer and trustee for the stockholders, it is not your duty to inform the stockholders about what you propose to do, when they ask it?**

Mr. Ford: **I don't know.**

Mr. Stevenson: You don't know whether it is your duty or not? Do you say that?

Mr. Lucking: What was that question?

(The question was read.)

Mr. Stevenson: Answer the question.

Mr. Ford: I don't understand it.

Mr. Stevenson: Repeat it.

(The question was read by the reporter.)

Mr. Ford: I informed the directors.

Mr. Stevenson: But you won't inform stockholders when they ask for information?

Mr. Ford: They can find out anything they want.

Mr. Stevenson: How are they going to find it out? Isn't the proper way to find out to ask you for information?

Mr. Ford: Yes, come up and find out.

Mr. Stevenson: They did ask you for information, didn't they?

Mr. Ford: Yes.

Mr. Stevenson: They didn't get it until after you had appropriated the money, did they?

Mr. Ford: Perhaps not.

Mr. Stevenson: You know they did not, don't you?

Mr. Ford: Possibly not.

Mr. Stevenson: I am not asking you possibly; you know that they didn't get the information until after you had appropriated the money?

Mr. Ford: Yes.

Mr. Stevenson: You may just as well answer the question, and not dodge it in the beginning, you know.

Mr. Ford: Yes.

Mr. Stevenson: **You don't have very much regard for stockholders, anyway, do you?**

Mr. Ford: **I have shown quite a regard.**

Mr. Stevenson: You have?

Mr. Ford: I have paid them lots of dividends.

Mr. Stevenson: **You have called them parasites, on occasions, haven't you?**

Mr. Ford: **Not Mr. Dodge, no, sir; not Dodge Brothers; I learned that word from Mr. Dodge.**

Mr. Stevenson: **You learned that from Dodge?**

Mr. Ford: **Yes. He called all people that did not work, parasites.**

Mr. Stevenson: You called your stockholders parasites?

Mr. Ford: No, I did not.

Mr. Stevenson: But you didn't mean Mr. Dodge?

Mr. Ford: No, never.

Mr. Stevenson: Who did you refer to?

Mr. Lucking: I object to that as an unnecessary bit of dirt.

Mr. Stevenson: **I purpose to show that this man has absolutely shown incapacity to appreciate his relation to the stockholders of this corporation.**

Mr. Ford: Do you claim that I called the stockholders parasites?

Mr. Stevenson: Yes, I do, in a published statement.

Mr. Ford: A published statement?

Mr. Stevenson: What? Do you say that you did not?

Mr. Ford: I may have been quoted.

Mr. Stevenson: Do you say you did not?

Mr. Ford: **I never called anyone a parasite.**

Mr. Stevenson: **"Ford is building his tractor plant on Dearborn site. Will use building where 'gasoline horse' was designed. Two other structures to form nucleus of works. Employes to share profits; no stockholders or parasites."**

Mr. Ford: I told that man not to put that word in, parasites.

Mr. Stevenson: You told him not to?

Mr. Ford: Yes, sir.

Mr. Stevenson: You used the word, and then told him not to put it in?

Mr. Ford: He used it.

Mr. Stevenson: But didn't you use it first?

Mr. Ford: No, I didn't use it; I told him not to put it in. He wrote the articles.

Mr. Stevenson: And you told him not to put the word "parasites," in?

Mr. Ford: Yes.

Mr. Stevenson: "The old Wagner brickyard in the southeast corner of the village, is the site of the tractor plant which is already under way, with several score of workmen busy on buildings. The first of two new building is completed, and the other is progressing rapidly. Will be no 'parasites.' With the announcement Friday of the beginning at Dearborn, Mr. Ford gave the following outline of the directing force behind the project: 'In the new tractor plant there will be no stockholders, no directors, no absentee owners, no parasites,' he said."

Mr. Ford: Well, I told him not to use the word "parasites."

Mr. Stevenson: Didn't you use those words?

Mr. Ford: No, sir.

Mr. Stevenson: You didn't use those words?

Mr. Ford: No, sir; I never used them.

Mr. Stevenson: Why did you tell him not to use them, if you didn't use them?

Mr. Ford: Because he put them in, and I didn't want him to use it.

Mr. Stevenson: Where did he put it in?

Mr. Ford: He put it in the article, that he was preparing.

Mr. Stevenson: He submitted the article that he prepared, to you, did he?

Mr. Ford: Yes.

Mr. Stevenson: And you told him not to use "parasites?"

Mr. Ford: Yes.

Mr. Stevenson: The next day you say you sent word over to Mr. Dodge that you didn't mean that he was a parasite, didn't you?

Mr. Lucking: Who was it said that?

Mr. Stevenson: Didn't you send Mr. Wills over to Mr. Dodge the next day to tell him that when you used the term "parasite," that you didn't refer to him?

Mr. Ford: I don't remember anything about it.

Mr. Stevenson: Who do you refer to?

Mr. Ford: I didn't refer to anybody; I told him not to use the word.

Mr. Stevenson: You told him not to use the word; who was the man that told you not to use the [this] word?

Mr. Ford: Well, he was a newspaper man in Dearborn, at Dearborn there.

Mr. Stevenson: What is that?

Mr. Ford: I have forgotten his name. I think his name is Woodworth, or Woodruff.

Mr. Stevenson: Woodworth or Woodruff; you told Mr. Woodruff, after he submitted the article to you, to strike that out?

Mr. Ford: Yes.

Mr. Stevenson: And he didn't strike it out?

Mr. Ford: No. Are you able to control newspaper articles?

Mr. Stevenson: You saw it when it was published, didn't you?

Mr. Ford: I saw it, I guess probably I saw it when it was published.

Mr. Stevenson: Did you retract it in any way, or give any explanation?

Mr. Ford: No, I don't think I did.

Mr. Stevenson: What?

Mr. Ford: I don't think so.

Mr. Stevenson: You let it stand, published as it was, referring to your stockholders as parasites?

Mr. Ford: Yes, sir.

Mr. Stevenson: That is what you did, didn't you?

Mr. Ford: I must have, yes.

Mr. Stevenson: You didn't attempt to make any correction of it?

Mr. Ford: No, I would be pretty busy at that sort of thing.

Mr. Stevenson: You would?

Mr. Ford: Yes.

Mr. Stevenson: You think after the reporter had misquoted you, and made you say that you regarded or characterized your stockholders as parasites, that it was not up to you to correct it?

Mr. Lucking: I object to that; I submit that we have enough of this. Your honor has got control over it; you can have it stopped.

Mr. Ford: Well, he is only tiring himself out, roaring, anyway.

. . .

Mr. Stevenson: In all these plans of expansion and increase and reduction of price, and increased amount of production, who, if any person, has been the one to advocate those policies? Who is the one?

Mr. Ford: I have, generally.

Mr. Stevenson: You made about 500,000 cars last year?

Mr. Ford: Yes.

Mr. Stevenson: What were you making, say, three years ago, if you remember?

Mr. Ford: Two hundred; I don't remember just exactly. It is all on the --

Mr. Stevenson: Can't we have the accurate figures on that?

Mr. Lucking: Yes, we can get it accurately. I just wanted to see who it was that poured these millions in.

Mr. Stevenson: I am not objecting to it.

Mr. Stevenson: **Did the increase of production increase your profits?**

Mr. Ford: **Yes.**

Mr. Stevenson: **In spite of the reduction in price?**

Mr. Ford: **Yes.**

Mr. Stevenson: **Did you have opposition to this increase of production?**

Mr. Ford: **Yes, I have always had more or less opposition.**

Mr. Stevenson: **I mean among yourselves?**

Mr. Ford: **Yes, among our directors.**

Mr. Stevenson: Honest differences about it?

Mr. Ford: Honest differences, yes.

Mr. Stevenson: Was your action in reducing the price this year any different from what you have done many times before?

Mr. Ford: No, sir.

Mr. Stevenson: What has been the uniform result up to this time?

Mr. Ford: Well, we have always made lots of money.

Mr. Stevenson: What is that?

Mr. Ford: We have always made lots of money out of it.

Mr. Stevenson: How long ago was it that you were making about 25,000 cars a year?

Mr. Ford: Five or six years, I guess; somewhere about eight or nine years, I guess.

Mr. Stevenson: This is 1916?

Mr. Ford: Yes. I think we made 18,000 in 1906.

Mr. Stevenson: When you were making 25,000 a year, what was your next proposed jump in amount?

Mr. Ford: I think 75,000.

Mr. Stevenson: Who was it that proposed that?

Mr. Ford: I did.

Mr. Stevenson: Was it opposed?

Mr. Ford: Yes, I guess it was opposed.

Mr. Stevenson: Was there any institution in the world making 25,000 cars, except yourselves, at that time?

Mr. Ford: I don't think so.

Mr. Stevenson: You proposed to jump to 75,000?

Mr. Ford: Yes.

Mr. Stevenson: The wise-heads shook their heads, did they, at that time?

Mr. Ford: I think they did.

Mr. Stevenson: The wise ones shook their heads?

Mr. Ford: The wise ones shook their heads at 10,000.

Mr. Stevenson: How did your jump from 25,000 to 75,000 turn out?

Mr. Ford: Very profitably, I guess.

Mr. Stevenson: Did the country absorb the cars?

Mr. Ford: Yes, sir.

Mr. Stevenson: Bought the cars, did they?

Mr. Ford: Yes, sir.

Mr. Stevenson: You reduced the price, did you?

Mr. Ford: Reduced the price.

Mr. Stevenson: **Who was it decided upon the policy of making a single standard article, cheap-priced article?**

Mr. Ford: **I did.**

Mr. Stevenson: Who has pursued that policy? Who in your in--situation has been in favor of that policy constantly, consistently?

Mr. Ford: Well, I don't know; I always have, and Mr. Rackham always has, I guess, and Mr. Klingensmith.

Mr. Stevenson: Has there been diversity of opinion about it?

Mr. Ford: Yes; always been some opposition and diversity of opinion about it.

Mr. Stevenson: When it came to a year ago this last summer, at which time, I understand, you fixed prices, do you not, in the midsummer, about August?

Mr. Ford: Yes.

Mr. Stevenson: **Did you reduce the price a year ago?**

Mr. Ford: **No, we did not reduce it a year ago.**

Mr. Stevenson: Why not?

Mr. Ford: **Well, we wanted to make a little extra money to go on with these expansions.**

Mr. Stevenson: **These very extensions?**

Mr. Ford: These very extensions.

Mr. Stevenson: Was that talked in the company? You understood that, all of you?

Mr. Ford: Talked among the engineers; yes, sir.

Mr. Stevenson: Among your directors, is what I want.

Mr. Ford: Yes.

Mr. Stevenson: The raising of that money?

Mr. Ford: Yes.

Mr. Stevenson: With Mr. Wills?

Mr. Ford: Mr. Wills is factory manager, has been associated with me right from the very start, the first man that ever came with me in the business.

Mr. Stevenson: Does he hold any official position in the company?

Mr. Ford: No.

Mr. Stevenson: An able man?

Mr. Ford: Very able man.

Mr. Stevenson: What is his salary?

Mr. Ford: $80,000 a year.

Mr. Stevenson: Is he worth it?

Mr. Ford: Yes, sir.

Mr. Stevenson: Is he worth the money?

Mr. Ford: Yes, sir.

Mr. Stevenson: In order to hold his services, have you paid him privately, in addition to that, out of your own pocket?

Mr. Ford: Yes, we have always divided up some of the profits.

Then you have not asked the company to pay that?

Mr. Ford: No.

Mr. Stevenson: Does Mr. Wills recommend these extensions?

Mr. Stevenson: Hadn't we better have Wills?

Mr. Stevenson: Can't have everybody at once. Has he recommended these?

Mr. Ford: I think he has.

Mr. Stevenson: Do you know whether he has, whether he endorses them?

Mr. Ford: We have been so busy talking about the plans that I don't know whether the has given the policy of it very much thought.

Mr. Stevenson: Take the extension at Highland Park; has he had anything to do with those?

Mr. Ford: Oh, yes.

Mr. Stevenson: **Why are you wanting to put up additional buildings at Highland Park?**

Mr. Ford: **To make more cars, make them cheaper, make more profits, extend further.**

. . .

Mr. Stevenson: In your conversations with Messrs. Rackham and Couzens, in which you had informally agreed upon this dividend, was anything said with respect to a future dividend?

Mr. Ford: Yes, we talked for some time about a dividend after the first of the year; talked for months.

Mr. Stevenson: What has been your policy with respect to having or not having ample cash?

Mr. Ford: Always had the policy to have ample cash.

Mr. Stevenson: If you have been more conservative this year in the matter of dividends, will you state your reasons, or are you any more conservative than you have been?

Mr. Ford: We have not been any more conservative.

Mr. Stevenson: **It appears that in some previous years, especially the last three years, since Messrs. Dodge have been out, that you have paid some quite large dividends?**

Mr. Ford: **Yes.**

Mr. Stevenson: What are the facts about that, in the matter of your judgment, and other members of the board?

Mr. Ford: It has been against my judgment.

Mr. Stevenson: Why?

Mr. Ford: Because I have felt as though we ought to extend more, because we need the extensions.

Mr. Stevenson: Have you so expressed yourself to the other members of the board?

Mr. Ford: Always.

Mr. Stevenson: But you yielded your judgment, did you, at times?

Mr. Ford: Yes.

Mr. Stevenson: In the matter of those very large dividends?

Mr. Ford: Always, yes.

Mr. Stevenson: Those matters have been discussed in your board, have they?

Mr. Ford: They have been discussed.

Mr. Stevenson: And individually among members of the board?

Mr. Ford: Individually, yes, and private.

Mr. Stevenson: Have you any settled policy of withholding dividends?

Mr. Ford: None that I know of.

Mr. Stevenson: Except as you may deem for the best interest of this company?

Mr. Ford: Yes.

Mr. Stevenson: Can you withhold dividends from Mr. Dodge, or the Messrs. Dodge, without withholding them from yourself?

Mr. Ford: Not that I know of.

Mr. Stevenson: **Is it affecting your action in any respect, or desire to injure them in any way?**

Mr. Ford: **Not a particle.**

Mr. Stevenson: Have there always been honest differences of opinion in your board, as to just what should be done?

Mr. Ford: Yes.

Mr. Stevenson: Not only with dividends, but expansion? [A]nd all of those questions?

Mr. Ford: Yes.

Mr. Stevenson: Sometimes one succeeded in the matter of having his view adopted, and sometimes another?

Mr. Ford: Yes.

. . .

Mr. Stevenson: Mr. Ford, calling your attention to paragraph 12 of the bill of complaint, readings as follows: "That notwithstanding the enormous earnings for the fiscal year ending July 31, 1916, namely, approximately sixty million dollars, the said Ford Motor Company has not since declared any special dividends, and the said Henry Ford, president of said company, has declared it to be the settled policy of the Company not to pay in the future any special dividends, but to put back into the business for the future all of the earnings of the company, other than the regular dividend of five per cent. monthly." Is it true that you have at anytime or place declared it to be the settled policy of the company not to pay any special dividends in the future?

Mr. Ford: No sir.

Mr. Stevenson: The following paragraph quotes from a statement purporting to be in the public press, not giving the date.

Mr. Stevenson: It is in the article that contains the financial statement.

Mr. Lucking: Do you remember the date?

Mr. Stevenson: It is August first, or thereabouts. August thirty-first.

Mr. Lucking: Of this year?

Mr. Stevenson: Yes, of this year.

Mr. Stevenson: You were quoted as follows:

"'My ambition,' declared Mr. Ford, 'is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.'"

Is that correct?

Mr. Ford: **That is correct, yes.**

Mr. Stevenson: That is correct. Just what proportion of those profits you put back in at any time, what is that determined by?

Mr. Ford: By the board of directors.

Mr. Stevenson: By any fixed policy of any kind?

Mr. Ford: No.

Mr. Stevenson: Except what conditions warrant?

Mr. Ford: No fixed policy.

Mr. Stevenson: Reading from paragraph 14 of bill:

> "That said Henry Ford has stated directly to your orators, personally, in substance, that as all of the stockholders of the company has received back in dividends more than they had invested that they were not entitled to receive anything additional to the regular dividend of five per cent. per month.["]

Did you ever declare anything like that?

Mr. Ford: No, never.

Mr. Stevenson: Further quoting:

> "And that it was not his policy to have larger dividends declared in the future, and that the profits and earnings of the company would be put back into the business for the purpose of extending its operation and increasing the number of its employes, and that inasmuch as the profits are to be represented by investment in plants and capital investment, the stockholders would have no right to complain."

Did you every [sic] say anything of that kind?

Mr. Ford: **Well, I have always been against large profits, myself. I don't think we ought to earn such enormous profits, myself; I may be overruled by the board, as I am many times; but I, myself, do not believe in such exorbitant profits.**

Mr. Stevenson: **But did you ever, if so, where and when, if you can remember, did you say that they were not entitled to receive anything additional to the five per cent. a month?**

Mr. Ford: No, I never did.

Mr. Stevenson: Reading from Subdivision 16 of the Bill: "That the said Henry Ford, dominating and controlling the policy of said Company." Is that correct, that you dominate and control the policy of the Company?

Mr. Ford: I don't think so; I put everything I can up to the board of directors.

. . .

Mr. Stevenson: In answer to Mr. Lucking, you have said that you had never decided upon any policy of withholding dividends, and putting the money all back into the plant, didn't you?

Mr. Ford: Yes, sir.

Mr. Stevenson: Was that true?

Mr. Ford: Yes, sir. Whatever I said there.

Mr. Stevenson: Which time did you say it correctly? You recollect this published statement in your favorite newspaper, the News, on August 31?

Mr. Lucking: What year.

Mr. Stevenson: 1916. Do you recall that?

Mr. Ford: Yes.

Mr. Stevenson: Who prepared that interview?

Mr. Ford: It was prepared by a number, Mr. Pipp and a few more.

Mr. Stevenson: A few more?

Mr. Ford: Yes.

Mr. Stevenson: After it was prepared, it was submitted to you for your approval?

Mr. Ford: I don't know as it was.

Mr. Stevenson: Was it read over to you?

Mr. Ford: I don't know as it was.

Mr. Stevenson: Do you stay it was not?

Mr. Ford: I would not say, either way.

Mr. Stevenson: Before or after publication, did you read it, either one; I don't ask you which.

Mr. Ford: I think I read part of it after publication.

Mr. Stevenson: After publication did you find you were correctly quoted?

Mr. Ford: I did not give it any thought;

Mr. Stevenson: I will read from that interview with you, as follows:

> "With regards to dividends, the company paid sixty per cent. on its capitalization of two million dollars, or $1,200,000.00, leaving over $58,500,000.00 to re-invest for the growth of the company?["]

Mr. Ford: Yes.

Mr. Stevenson: Was that what you stated?

Mr. Ford: I don't know as I stated it myself; don't know as I said anything about it.

Mr. Stevenson: (Reading): "This is Mr. Ford's policy at the present time, and it is understood the other stockholders cheerful[l]y accede to this plan."

Mr. Ford: I thought they did accede to it.

Mr. Stevenson: Was that your policy? That was your policy, understanding that the stockholders acceded to it, was it?

Mr. Ford: Yes.

Mr. Stevenson: Let us have no misunderstanding about it.

Mr. Stevenson: **I read again, so that there may not be no misunderstanding, Mr. Ford: "With regard to dividends, the company paid sixty per cent. on its capitalization of two million dollars, or $1,200,000.00, leaving 58,500,000.00 to re-invest for the growth of the company. This is Mr. Ford's policy at present, and it is understood that the other stockholders cheerfully accede to this plan." Where you correctly quoted?**

Mr. Ford: **No, I don't think I was. I think I said part of that.**

Mr. Stevenson: **What part did you say?**

Mr. Ford: **I don't know what part; perhaps half or so.**

Mr. Stevenson: **Then immediately following: "'My ambition,' declared Mr. Ford, 'is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes.' ['']To do this, we are putting the greatest share of our profits back into business.'"**

Mr. Ford: **I don't know as I said greatest. I said, a great share of it, good share of it.**

Mr. Stevenson: Mr. Lucking read that to you about half an hour ago, and you said it was correct?

Mr. Ford: Yes.

Mr. Stevenson: Then I read it to you; now you are in doubt about it what do you say about that? Mr. Lucking read those very words to you from the bill of complaint, that we filed here, and in reading it you said that was correct. Was it correct, or incorrect?

Mr. Ford: Correct, I guess.

Mr. Stevenson: Correct. Will that be the last word on that, or will you change that?

Mr. Ford: I cannot tell. When I get better posted, I may know more about it. I don't quite understand it.

Mr. Stevenson: You said to me a moment ago that understanding that the stockholders acceded to your plan to pay $1,200,00.00, leaving fifty-eight million five hundred thousand dollars to re-invest, for the growth of the company, that that was your policy. Do you change that now?

Mr. Ford: Change it?

Mr. Stevenson: Do you change that, or do you say that is correct?

Mr. Ford: I just said that we expect to invest part of it.

Mr. Stevenson: I am asking you for the literal words that are in this interview of yours.

Mr. Ford: That is a newspaper article that I never read over.

Mr. Stevenson: You said Mr. Pipp came there and got it?

Mr. Ford: Yes. I don't think I ever saw it afterwards.

Mr. Stevenson: Didn't you tell us a few minutes ago that you did read it afterwards?

Mr. Ford: Read part of it; I don't know whether I read that part or not.

Mr. Stevenson: You don't know whether you did or not?

Mr. Ford: No.

Mr. Stevenson: Didn't you tell me just a few minutes ago that this was your policy, and that you understood that the stockholders cheerfully acceded to your policy? Just a few minutes ago, didn't you say that?

Mr. Ford: I think I did.

Mr. Stevenson: Is it true?

Mr. Ford: True, if you want it so, yes.

Mr. Stevenson: Well, it is quite immaterial to me which way you put it; you have put it so many ways, that I have lost all interest in which way you put it.

Mr. Ford: All right.

Mr. Stevenson: Mr. Ford, does the Ford Motor Company have a publication of your own, haven't you?

Mr. Ford: Yes.

Mr. Stevenson: What do you call it?

Mr. Ford: Ford Times, I guess you have reference to. We have two or three.

Mr. Stevenson: **Now we find this on page 106, under date of October, 1916: "With regards to dividends, the company paid sixty per cent. on its capitalization of two million dollars, or $1,200,000.00 leaving over $58,500,000 to re-invest for the growth of the company. This is Mr. Ford's policy at present, and it is understood that the other stockholders cheerfully accede to this plan." Is that correct?**

Mr. Ford: **I never saw that before.**

Mr. Stevenson: You did not?

Mr. Ford: No.

Mr. Stevenson: **They would have not publish anything in your Bible that you did not say, would they?**

Mr. Ford: **They might.**

Mr. Stevenson: They reproduced this from your other Bible? the News?

Mr. Ford: That is possibly what they did.

Mr. Stevenson: They reproduced this.

Mr. Ford: But I never saw it.

Mr. Stevenson: And it was so accurate that they put it in your own bible, out of the News?

Mr. Ford: I never saw it.

Mr. Stevenson: You never saw it?

Mr. Ford: I never saw it.

Mr. Stevenson: Do you repudiate it?

Mr. Ford: Well, I say that it was put in there without my knowledge.

Mr. Stevenson: Do you repudiate it? Does it correctly express your sentiments, or doesn't it?

Mr. Lucking: You ought to put in the whole quotation. Just about the greatest part of our profits.

Mr. Ford: Greatest part; I guess that is all right.

Mr. Stevenson: You heard Mr. Lucking say that.

Mr. Ford: That is what I said before, a portion of it.

Mr. Stevenson: You heard Mr. Lucking say, "the greatest part."

Mr. Ford: I say, a portion of it.

Mr. Stevenson: Did you hear Mr. Lucking?

Mr. Ford: I was reading from the article. You handed it to me, and I was reading from the article.

Mr. Stevenson: Did you hear Mr. Lucking?

Mr. Ford: Yes, sir.

Mr. Stevenson: I will read both paragraphs, Mr. Ford.

Mr. Ford: Go ahead.

Mr. Stevenson: "With regards to dividends, the company paid sixty per cent on its capitalization of two million dollars, or $1,200,000.00." That is correct?

Mr. Ford: Yes.

Mr. Stevenson: "Leaving over $58,500,000.00 to re-invest for the growth of the company." That is correct?

Mr. Ford: Yes.

Mr. Stevenson: Now, did you gentlemen get that answer?

Mr. Ford: I say that is correct, as you read it there.

Mr. Stevenson: "This is Mr. Ford's policy at present, and it is understood that the other stockholders cheerfully accede to this plan."

Mr. Ford: Yes.

Mr. Stevenson: That is correct. Will you please answer a little louder. I will get further away, so you can talk at me. If you and I will about split, and you talk a little louder, and I talk not quite so loud, perhaps we would get it about right.

Mr. Ford: Change it from a roar down into --

Mr. Stevenson: It has not disturbed you very much, has it?

Mr. Ford: Not very much.

Mr. Stevenson: (reading): "'My ambition,' declared Mr. Ford, 'is to employ still more men.'"

Mr. Ford: That is correct.

Mr. Stevenson: "'To spread the benefits of this industrial system to the greatest possible number.'"

Mr. Ford: That is correct.

Mr. Stevenson: "'To help them build up their lives, and their homes.'" Do you balk at that?

Mr. Ford: Yes, that goes with it, I guess.

Mr. Stevenson: Is that correct?

Mr. Ford: Well, it is so stated there.

Mr. Stevenson: **Does that express the views that you expressed at the time?**

Mr. Ford: **That was not written by me. It was written in a newspaper, written for a story.**

Mr. Stevenson: This other story was not written for you, was it? Mr. Pipp came up to your office, spent two or three hours, prepared a nice story, read it over to you, published it, and you were pleased with it, weren't you?

Mr. Ford: I read part of it, yes.

Mr. Stevenson: You were pleased with it?

Mr. Ford: Yes, I guess I was pleased with it.

Mr. Stevenson: Was that any different when Mr. Pipp wrote this article for you last August?

Mr. Ford: I don't remember much about that article.

Mr. Stevenson: Not much about it?

Mr. Ford: No.

Mr. Stevenson: **Now, I will go back again: "'My ambition,' declared Mr. Ford, 'is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back into the business.'"**

Mr. Ford: **Yes, the greatest share of the profits back into the business. That is all right.**

Mr. Stevenson: Now, we understand that.

Mr. Ford: Yes, that is all right.

Mr. Stevenson: Those quotations are correct?

Mr. Ford: That is all right, yes.

Mr. Stevenson: You don't think you will want to change this now?

Mr. Ford: No, I don't think I will want to change this.

Appendix B – Full *Dodge v. Ford* Opinion

204 Mich. 459, Supreme Court of Michigan.

DODGE et al.

v.

FORD MOTOR CO. et al.

No. 47.

Feb. 7, 1919.

Appeal from Circuit Court, Wayne County, in Chancery; George S. Hosmer, judge.

Argued before OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ.

Opinion

OSTRANDER, C. J.

The authorized capital stock of the defendant company is $2,000,000. Its capital, in July, 1916, invested in some form of property, including accounts receivable, was $78,278,418.65, and, less liabilities other than capital stock, was more than $60,000,000. Besides this, it had and was using as capital nearly $54,000,000 in cash or the equivalent of cash. It is contended by plaintiffs that because the statute has prescribed that the total authorized capital stock shall be not less than $1,000, and not more than $25,000,000 (now $50,000,000), the capital of any corporation organized under the act may not lawfully exceed $25,000,000 (now $50,000,000). In the argument presented by them the term 'capital' is used as meaning:

'The aggregate of the sums subscribed and paid in or secured to be paid in by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums; or, if losses have been incurred, then it is the residue after deducting such losses.'

Pointing out that the shares of stock are at all times representative of the capital, whatever it may be, it is said that the learned trial judge decided that——

'It was the legislative intent to prohibit a corporation having a capital in excess of the maximum limitation, whether that excess was acquired by contributions from stockholders or from profits on those contributions.'

And, in the judgment of counsel for plaintiffs, the essence of the reasoning employed by the trial judge may be and is stated by them in this language:

'Looking at the statute, the history of the times, and the constitutional provision respecting corporations, it appears that the limitation in question was put in the statute because it was believed

that mischief would result unless a restriction was placed upon corporate capital; that it was the intent of the statute to prevent this mischief; that to permit corporations to increase their capital, at pleasure, from undivided profits, would frustrate that intent and give to old corporations powers, rights, and privileges which were not given to new corporations, and thus make corporations unequal before the law, contrary to the intent of the provision in our Constitution respecting corporations to place them all on a basis of equality.'

It was the opinion of the three judges to whom was presented the application for a temporary restraining order that the statute, in the language referred to, does not limit the amount of capital—that portion of the assets of a corporation regardless of their source, utilized for the conduct of the corporate business for the purpose of deriving gains and profits—which a corporation organized under the act may lawfully possess.

The term 'capital stock,' in its primary sense, means the fund, property, or other means contributed or agreed to be contributed by shareholders as the financial basis for the prosecution of the business of the corporation, being made directly through stock subscriptions or indirectly through the declaration of stock dividends. The capital stock of a corporation is always representative of the net assets of the corporation, whatever they may be, and so a share of stock may be worth more or less than its par value, because it is representative of an aliquot part of the net assets of the corporation. The section of the statute with which we are dealing relates to the organization of corporations, and, plainly, it is the legislative intent that no more than $50,000,000 of capital shall be, in the first instance, aggregated and embarked in business under this law. It has been the policy of the state, unlike that of most of the states, to limit the aggregate of capital which, in the first instance, may be employed in corporate enterprises; but the history of legislation is not evidence of a continuing state policy which limits the capital assets of corporations. Act No. 41, Public Acts of 1853, authorized the formation of manufacturing corporations. It contained the provision:

'The amount of the capital stock in every such corporation shall be fixed and limited by the stockholders in their articles of association, and shall, in no case, be less than ten thousand dollars, nor more than five hundred thousand dollars, and shall be divided into shares of twenty-five dollars each. The capital stock may be increased, and the number of shares, at any meeting of the stockholders called for that purpose: Provided, that the amount so increased shall not, with the existing capital, exceed five hundred thousand dollars.'

In 1875, Act No. 89, this law was amended. As to corporations engaged in mining or manufacturing iron, steel, silver, lumber, or copper, the maximum limit of capital stock was fixed at $2,500,000, as to any other manufacturing corporation the limit was $500,000, and it was expressly subject to these limitations that the capital stock was permitted to be increased. At the same session, Act No. 187 was passed for the incorporation of manufacturing companies. The minimum limit of capital stock was fixed at $10,000, which might be increased by stockholders; the maximum limit being $2,500,000. In 1881, Act No. 257, the maximum was increased to $5,000,000. Act No. 232 of the Public Acts of 1885 was a revision of laws for incorporating manufacturing companies. By its terms the articles of incorporation were required to state the amount of capital stock, not less that $5,000 or more than $5,000,000, except that corporations for manufacturing cheese or other products of milk might have not less than $1,000 capital stock. The express terms are that, subject to these limitations, the capital stock may be increased or diminished, etc. In argument, significance is attached to the language employed in the act of 1853 authorizing an increase of capital stock, but providing that the amount of the increase 'with the existing capital' shall not exceed the maximum of

$500,000. Significance is also attached to the language in the amending acts which permit an increase of capital stock subject to the limitations as to minimum and maximum of capital stock.

Assuming that the Legislature in passing the law of 1853 had in view the distinction between capital stock and capital, or capital assets, and intended a maximum limitation of the amount of capital, the assumption must, of course, rest upon the language employed in the law. When the Legislature in the latter act omitted the words upon which the assumption is based, no reason is apparent for the conclusion that the limitation of capital was still intended. If the act of 1853 contains evidence of a policy limiting capital assets, the act of 1903 contains no such evidence.

There is no apparent reason for entering upon the task of interpreting or construing language which is self-interpreting, which has a clear, reasonable meaning. The same general implications are to be drawn from the phrase 'not more than,' as from the phrase 'not less than.' We are not called upon to find a reason for the policy of limiting the capital stock or for the failure to also limit the value of the assets which may at any time be employed in the corporate business. We may assume a legislative reason, but may not assume that, because a possible reason may be given for a further limitation, such further limitation must be implied.

The reasons given for a different interpretation of the language, reasons which introduce matter not in the statute, are inconclusive. If the claimed statute limitation exists, it is imperative. It is manifestly impracticable, if not impossible, to limit the use in its business by a corporation, of any size, of its profits, to require that, when organized with the maximum amount of capital stock, all profits shall be set aside. It is conceded, in argument, that there must be some variation, some leeway. But, if any, how much? It may be supposed that the Legislature looked with disfavor upon an initial aggregation of capital exceeding a certain amount. It cannot be supposed that it looked with disfavor upon a profitable corporate existence.

Subscriptions to capital stock may be paid for in property valued by those associating. It may be that a patent is contributed which, until exploited, has only an estimated potential value—no selling value—but, after exploitation, would sell for more than the maximum limit fixed for capital stock. No one would contend that a $50,000,000 manufacturing corporation could not borrow money for the purpose of its business. Of course, if it borrowed, it would owe for the money and, as matter of bookkeeping, would not by borrowing expand its capital assets. But, in fact, at the expense of a small rate of interest, it might add $50,000,000 to the capital actually employed in business.

Experience would not lead to the belief that any manufacturing corporation, of any size, would continue to embark in the enterprise such profits as competition permitted and stockholders were willing to forego, to the public detriment. It happens that the Ford Motor Company has had an unusual, a phenomenal, experience; but this affords no reason for finding the meaning in the statute which plaintiffs insist shall be given to it. That no limit is in terms placed upon the value of assets—capital—which may be employed is a circumstance supporting the conclusion that none was intended.

Any aggregation of capital, from $1,000 to $50,000,000, is now permitted—invited—to be embarked in business under this statute, the corporations formed to compete among themselves, and with foreign corporations admitted to do business in this state. The purpose of any organization under the law is earnings—profit. Undistributed profits belong to the corporation, and, so far as any limitation can be found in this act, may be lawfully employed as capital. If the meaning of the law were more doubtful, it would be prudent, if not imperative, that the Legislature be left to make plain what is supposed to be obscure.

There is little, if anything, in the bill of complaint which suggests the contention that the smelting of iron ore as a part of the process of manufacturing motors is, or will be, an activity ultra vires the defendant corporation. On the contrary, the bill charges that the erection of smelters and such other buildings, machinery, and appliances as are intended to go along with the business of smelting ore, is part of a general plan of expansion of the business of defendant corporation which is in itself unwise and which is put into operation for the purpose of absorbing profits which ought to be distributed to shareholders. Restraint is asked, not because the smelting business is ultra vires the corporation, but because the whole plan of expansion is inimical to shareholders' rights and was formulated and will be carried out in defiance of those rights.

The gray iron parts of a Ford car weigh, in the rough, 268.90 pounds, and when finished 215.71 pounds. This iron, as now made by defendants, costs per car, at the prices of iron when the cause was tried, $11.184. The malleable iron parts weigh, finished, per car, 69.63 pounds, and would cost $6.757. The total cost per car of gray and malleable iron parts is less than $18.

The smelter proposition involves, of course, much more than the initial expenditure for a plant. It involves the use of a large amount of capital to secure the finished product for the cars. Quantities of iron ore must be purchased and carried in stock; coal for the coke ovens must be purchased; the plant must be maintained. If the plant produces the necessary iron, and 800,00 care are made in a year, something more than 270,000,000 pounds of iron ore will be produced, and if, as is claimed by Mr. Ford, the cost is reduced to the company by one-half and better iron made, a saving of $9 or $10 on the cost of each car will be the result. Presumably, this saving will also be reflected in the profits made from sales of parts. Ultimately, the result will be, either a considerable additional profit upon each car sold, or it will permit a reduction in the selling price of cars and parts. The process proposed to be used has not been used commercially.

The contention that the project is ultra vires the defendant corporation appears to have been made upon the application for a preliminary restraining order, and at the hearing on the merits, as a reason for denying the right to invest instead of distributing the money which the proposed plant will cost, with no claim of surprise upon the part of defendants.

Strictly, upon the pleadings, the question of ultra vires is not for decision, and this is not seriously denied. Assuming, however, in view of the course taken at the hearing, it is proper to express an opinion upon the point, it must be said that to make castings from iron ore, rather than to make them from pig iron, as defendant is now doing, eliminating one usual process, is not beyond the power of the corporation. In its relation to the finished product, iron ore, an article of commerce, is not very different from lumber. It is admitted that the defendant company may not undertake to smelt ore except for its own uses. Defendant corporation is organized to manufacture motors and automobiles and their parts. To manufacture implies the use of means of manufacturing as well as the material. No good reason is perceived for saying that as matter of power it may not manufacture all of an automobile. In doing so, it need not rely upon the statute grant of incidental powers. Extreme cases may be put; as, for example, if it may make castings from iron ore, may it invest in mines which produce the ore and in means for transporting the ore from mine to factory? Or, if it may make the rubber tires for cars, may it own and exploit a rubber plantation in Brazil, or elsewhere? No such case is presented, and until presented need not be considered.

. . .

STEERE, FELLOWS, STONE, and BROOKE, JJ., concurred with OSTRANDER, J.

MOORE, J.

I agree with what is said by Justice OSTRANDER upon the subject of capitalization. I agree with what he says as to the smelting enterprise on the River Rouge. I do not agree with all that is said by him in his discussion of the question of dividends. I do agree with him in his conclusion that the accumulation of so large a surplus establishes the fact that there has been an arbitrary refusal to distribute funds that ought to have been distributed to the stockholders as dividends. I therefore agree with the conclusion reached by him upon that phase of the case.

BIRD, C. J., and KUHN, J., concurred with MOORE, J.

Appendix C – Selected Portions of the Sales Agreement between Ben & Jerry's and the Unilever Subsidiary Copnopco

Available via the SEC document management system EDGAR, at:
https://www.sec.gov/Archives/edgar/data/768384/000091205700030913/0000912057-00-030913.txt

PLANS FOR THE COMPANY

THE SURVIVING CORPORATION BOARD

In the Merger Agreement, Conopco has agreed following the Effective Time to maintain a board of directors of the Company (the "Surviving Corporation Board") composed of (i) seven directors from among the current members of the Board of Directors and persons nominated by such continuing directors (collectively, from time to time, the "Class I Directors"), (ii) two members to be appointed by Meadowbrook (the "Class M Directors"), (iii) one member to be appointed by Conopco and (iv) the Chief Executive Officer of the Surviving Corporation; PROVIDED, HOWEVER, that Ineligible Directors (as defined below) may not serve on the Surviving Corporation Board. The Merger Agreement provides that the Surviving Corporation Board shall have primary responsibility with respect to the enhancement of the Social Mission Priorities (as defined below) of the Company, as they may evolve, and the preservation of the essential integrity of the Ben & Jerry's brand-name. Conopco shall have primary responsibility in the area of financial and operational aspects of the Surviving Corporation and in all areas not allocated to the Surviving Corporation Board. The Chief Executive Officer of the Surviving Corporation shall manage the affairs of the Company pursuant to an annual delegation of authority and within the scope of an annual business plan approved by Conopco following good faith discussions with the Surviving Corporation Board. The Chief Executive Officer of the Surviving Corporation shall be designated by Conopco, after good faith consultation with, and the participation in discussions of, the Appointment Committee of the Surviving Corporation Board (consisting of Ben Cohen and Jerry Greenfield, unless they are not directors, in which case such committee shall include one or two directors, as the case may be, from among the Class I Directors and Class M Directors). The Merger Agreement provides that the Company's Articles of Association and the Company's by-laws shall be amended to the extent necessary to implement the foregoing. On July 5, 2000, the Board of Directors was presented with a form of Amended and Restated Articles of Incorporation of the Surviving Corporation, containing close corporation provisions, and a form of Shareholders Agreement between Conopco and the Surviving Corporation, which together implement the foregoing. The Board of Directors adopted a resolution (i) recommending that Conopco, as sole shareholder of the Surviving Corporation, approve such Amended and Restated Articles of Incorporation after the Effective Time of the Merger and (ii) authorizing specified persons to enter into on behalf of the Surviving Corporation such Shareholders Agreement after the Effective Time.

As of the date of this Proxy Statement, individual directors serving on the Board of Directors as of the date of the Merger Agreement have not disclosed to the Company their decisions as to whether to serve on the Surviving Corporation Board as a Class I Director, except that Henry Morgan and Jerry Greenfield have informed the Company that they will not continue as directors of the Surviving Corporation. It is expected that the Surviving Corporation Board will continue to be compensated at levels consistent with such compensation applicable to the Board of Directors.

INELIGIBLE DIRECTORS

Conopco has acknowledged in the Merger Agreement that no Ineligible Director is acting as a representative of the Company in connection with the Transaction Agreements and the transactions contemplated thereby and that any action or failure to act on the part of any Ineligible Director shall not be deemed to be an action or failure to act on the part of the Company, except to the extent that such Ineligible Director's action or failure to act is taken under the instruction of, or with the cooperation or the concurrence of, the Board of Directors. The Merger Agreement defines an "Ineligible Director" as any member on the Board of Directors on the date of the Merger Agreement who (i) fails to tender his or her shares of Company Common Stock pursuant to the Offer, (ii) makes any public statement disparaging Unilever, Conopco, the Company, any Transaction Agreement or any transaction contemplated thereby, (iii) takes any action that, but for the preceding sentence would constitute a breach of the Merger Agreement by the Company or (iv) takes any other action which is intended to cause any transaction contemplated thereby to fail to be completed.

On June 20, 2000, Conopco, the Purchaser and Jennifer Henderson, a director of the Company, entered into a Waiver Agreement, pursuant to which Conopco and the Purchaser waived the requirement under the Merger Agreement that any member of the Board of Directors on the date of the Merger Agreement must tender his or her shares of Company Common Stock pursuant to the Offer in order to serve on the Surviving Corporation Board with respect to Ms. Henderson's failure to tender shares of Company Common Stock owned by her.

OPERATIONS OF THE SURVIVING CORPORATION

The parties have agreed in the Merger Agreement that the Surviving Corporation will not initiate any material headcount reductions for two years following the Effective Time and to maintain for at least five years its corporate presence and substantial operations in Vermont. In addition, the parties have agreed to continue the Company's liveable wage policy following the Effective Time and that a significant amount of the incentive-based compensation of members of the OCEO shall be based on the social performance of the Surviving Corporation.

SOCIAL MISSION

The parties have agreed in the Merger Agreement that the Surviving Corporation Board will have primary responsibility for preserving and enhancing the objectives of the historical social mission of the Company as they may evolve from time to time consistent therewith (the "Social

Mission Priorities"). The Company and Conopco also have agreed that following the Effective Time, they will work together in good faith to develop a set of social metrics to measure the social performance of the Surviving Corporation. The parties also have agreed that the Surviving Corporation will seek to have the rate of increase of such social metrics exceed the rate of increase of sales. The parties have agreed in the Merger Agreement that the Surviving Corporation will establish a new product development unit responsible for special products to be headed by Ben Cohen for so long as he is an employee of the Surviving Corporation.

The parties have agreed in the Merger Agreement that the Surviving Corporation will establish a social venture fund (the "Social Venture Fund") to be administered by a committee of the Surviving Corporation Board that shall oversee the Social Venture Fund (the "Social Venture Committee"), to provide venture financing to (i) vendors owned by women, minorities or indigenous people, (ii) vendors which give priority to a social change mission, and (iii) such other third-party entrepreneurial businesses within the scope of the Company's social mission priorities. The Surviving Corporation shall fund such entity pursuant to an agreement to be made between the Surviving Corporation and the Social Venture Fund after the Effective Time on such terms and conditions as they and the Social Venture Committee shall approve. The Surviving Corporation shall make available to the Social Venture Fund an aggregate amount of $5 million. The terms of any agreement relating to the Social Venture Fund shall limit the financial responsibility of the Surviving Corporation to the foregoing cash contributions.

THE FOUNDATION

The parties have agreed in the Merger Agreement that, immediately prior to the Effective Time, the Surviving Corporation shall, and Conopco shall cause the Surviving Corporation to, make a one-time contribution of not less than $5 million to the Foundation so long as (i) the Foundation does not significantly change its charitable purpose, (ii) none of the trustees of the Foundation disparages the Surviving Corporation, its products or its management and (iii) any replacement or additional trustee of the Foundation appointed before the date of payment is reasonably satisfactory to Conopco. The parties have also agreed to continue following the Effective Time the Company's practice of making charitable contributions by making contributions, for a minimum of ten years, of $1.1 million per year adjusted annually (i) by multiplying such amount by the ratio of the U.S. Producer Price Index for the month of December of the year in which the determination is made to the U.S. Producer Price Index for December 1999 and (ii) by multiplying the product of such calculation by the ratio of the equivalent gallon sales of frozen dessert products bearing the Ben & Jerry's brand-name sold by any person in such year to the equivalent gallon sales of such products sold in 1999; PROVIDED, HOWEVER, that such ratio shall never be less than one. The Surviving Corporation Board shall have the responsibility for allocating annual contributions among the Foundation, local community charitable initiatives (with the support and oversight of employee Community Action Teams) and charitable institutions selected by the OCEO. The Surviving Corporation Board may allocate a portion of such contributions to the Foundation so long as (i) the Foundation does not significantly change its charitable purpose, (ii) none of the trustees of the Foundation disparages the Surviving Corporation, its products or its management and (iii) any replacement or additional trustee of the Foundation is reasonably satisfactory to Conopco. After such ten-year period, the Surviving Corporation shall continue to make contributions as calculated in accordance with the first sentence of this paragraph unless the activities and performance of the Foundation cease to be reasonably acceptable to Unilever, and provided that the Foundation meets the other requirements set out in the previous sentence.

Bibliography

Aaker, David. "The Good News: Unilever's New CEO Will Stay the Course." *Aaker On Brands,* December 4, 2018. https://www.prophet.com/2018/12/the-good-news-unilevers-new-ceo-will-stay-the-course/.

Abzug, Rikki and Natalie J. Webb. "Rational and Extra-Rational Motivations for Corporate Giving: Complementing Economic Theory with Organization Science." *New York Law School Law Review* 41 nos. 3 and 4 (1997): 1035–1058.

Adams, Mike and Philip Hardwick. "An Analysis of Corporate Donations: United Kingdom Evidence." *Journal of Management Studies* 35, no. 5 (1998): 641–654.

Alchian, Armen A. and Harold Demsetz. "Production, Information Costs, and Economic Organization." *American Economic Review* 62, no. 5 (1972): 777–795

Alexander, Mystica M. "Benefit Corporations-The Latest Development in the Evolution of Social Enterprise: Are They Worthy of a Taxpayer Subsidy." *Seton Hall Legislative Journal* 38, no. 2 (2014): 219–280.

Amato, Louis H. and Christie H. Amato. "The Effects of Firm Size and Industry on Corporate Giving." *Journal of Business Ethics* 72, no. 3 (2007): 229–241.

Ashton, Douglas C. "Revisiting Dual-Class Stock." *John's Law Review* 68, no. 4 (Fall 1994): 863–960.

Atkinson, Lisa and Joseph Galaskiewicz. "Stock Ownership and Company Contributions to Charity." *Administrative Science Quarterly* 33, no. 1 (1998): 82–100.

Bainbridge, Stephen. "Understanding Dual Class Stock Part I: An Historical Perspective." September 9, 2017. https://www.professorbainbridge.com/professorbainbridgecom/2017/09/understanding-dual-class-stock-part-i-an-historical-perspective.html.

Balsam, Steven, Jeff Boone, Harrison Liu and Jennifer Yin. "The Impact of Say-on-Pay on Executive Compensation." *Journal of Accounting and Public Policy* 35, no. 2 (2016): 162–191.

Barnard, Jayne W. "Corporate Philanthropy, Executives' Pet Charities and the Agency Problem." *New York Law School Law Review* 41, nos. 3 and 4 (1997): 1147–1178.

Baron, David P. "Private Politics, Corporate Social Responsibility, and Integrated Strategy." *Journal of Economics & Management Strategy* 10, no. 1 (2001): 7–45.

Bartkus, Barbara R., Sara A. Morris and Bruce Seifert. "Governance and Corporate Philanthropy: Restraining Robin Hood?" *Business & Society* 41, no. 3 (2002): 319–344.

Bauguess, Scott W., Myron B. Slovin and Marie E. Sushka. "Large Shareholder Diversification, Corporate Risk Taking, and the Benefits of Changing to Differential Voting Rights." *Journal of Banking & Finance* 36, no. 4 (2012): 1244–1253.

Bergström, Clas and Kristian Rydqvist. "Differentiated Bids for Voting and Restricted Voting Shares in Public Tender Offers." *Journal of Banking & Finance* 16, no. 1 (1992): 97–114.

Berle, Adolph A. Jr. "Corporate Powers as Powers in Trust." *Harvard Law Review* 44, no. 7 (May 1931): 1049–1107.

Bjuggren, Per-Olof , Johan E. Eklund, and Daniel Wiberg. "Ownership Structure, Control and Firm Performance: The Effects of Vote-Differentiated Shares." *Applied Financial Economics* 17, no. 16 (2007): 1323–1334.

Blair, Margaret M. "A Contractarian Defense of Corporate Philanthropy." *Stetson Law Review* 28, no. 1 (Summer 1998): 27–50.

Boatsman, James R. and Sanjay Gupta. "Taxes and Corporate Charity: Empirical Evidence from Microlevel Panel Data." *National Tax Journal* (1996): 193–213.

Brown, William O., Eric Helland and Janet Kiholm Smith. "Corporate Philanthropic Practices." *Journal of Corporate Finance* 12, no. 5 (2006): 855–877.

Bucholtz, Ann K., Allen C. Amason and Matthew A. Rutherford. "The Mediating Effect of Top Management Discretion and Values on Corporate Philanthropy." *Business & Society* 38, no. 2 (1999): 167–187.

Burkart, Mike and Samuel Lee. "One Share-One Vote: The Theory." *Review of Finance* 12, no. 1 (2008): 1–49.

Burrough, Bryan and John Helyar. *Barbarians at the Gate: The Fall of RJR Nabisco*. New York: HarperCollins Publishers, 2010.

Butler, Henry N. and Fred S. McChesney. "Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation." *Cornell Law Review* 84, no. 5 (1999): 1195–1226.

Carroll, Archie B. "A Three-Dimensional Conceptual Model of Corporate Performance." *Academy of Management Review* 4, no. 4 (1979): 497–505.

Cha, Ariana Eunjung. "Solar Energy Firms Leave Waste Behind in China." *Washington Post*, March 9, 2008. https://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030802595.html.

Clark, Leo L. and Edward C. Lyons. "The Corporate Common Good: The Right and Obligation of Managers to Do Good to Others." *University of Dayton Law Review* 32, no. 2 (Winter 2007): 275–304.

Coffey, Betty S. and Gerald E. Fryxell. "Institutional Ownership of Stock and Dimensions of Corporate Social Performance: An Empirical Examination." *Journal of Business Ethics* 10, no. 6 (1991): 437–444.

Cohen, Ben, Jerry Greenfield and Meredith Maran. *Ben Jerry's Double Dip: How to Run a Values Led Business and Make Money Too*. New York: Simon and Schuster, 1998.

Condon, Zoe. "A Snapshot of Dual-Class Share Structures in the Twenty-First Century: A Solution to Reconcile Shareholder Protections with Founder Autonomy." *Emory Law Journal* 68, no. 2 (2018): 335–368.

Cornforth, Christopher. "Understanding and Combating Mission Drift in Social Enterprises." *Social Enterprise Journal* 10, no. 1 (2014): 3–20.

Correa, Ricardo and Ugur Lel. "Say-on-Pay laws, Executive Compensation, Pay Slice, and Firm Valuation around the World." *Journal of Financial Economics* 122, no. 3 (2016): 500–520.

Dalessandro, Dina. "The Development of Social Enterprise and Rise of Benefit Corporations: A Global Solution?" *Hastings Business Law Journal* 15, no. 2 (Summer 2019): 219–318.

DeAngelo, Harry and Linda DeAngelo. "Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock." *Journal of Financial Economics* 14, no. 1 (1985): 33–69.

DeMott, Deborah A. "The Biggest Deal Ever." *Duke Law Journal* 25, no. 1 (February 1989): 26.

Denis, David J. and Diane K. Denis. "Majority Owner-Managers and Organizational Efficiency." *Journal of Corporate Finance* 1, no. 1 (1994): 91–118.

Dimitrov, Valentin and Prem C. Jain. "Recapitalization of One Class of Common Stock Into Dual-Class: Growth and Long-Run Stock Returns." *Journal of Corporate Finance* 12, no. 2 (2006): 342–366.

Dodd, E. Merrick Jr. "For Whom Are Corporate Managers Trustees?" *Harvard Law Review* 45, no. 7 (May 1932): 1145–1163.

Donaldson, Thomas and Lee E. Preston. "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications." *Academy of Management Review* 20, no. 1 (1995): 65–91.

Drennan, William A. "Charitable Donations of Intellectual Property: The Case for Retaining the Fair Market Value Tax Deduction." *Utah Law Review* 2004, no. 3 (2004): 1045–1154.

Edmondson, Brad. *Ice Cream Social: The Struggle for the Soul of Ben & Jerry's.* San Francisco, CA: Berrett-Koehler Publishers, 2014.

Eisenberg, Melvin Aron. "Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure." *Stetson Law Review* 28, no. 1 (Summer 1998): 1–26.

Elhauge, Einer. "Sacrificing Corporate Profits in the Public Interest." *New York University Law Review* 80, no. 3 (June 2005): 733–869.

Entine, Jon. "Rain-forest Chic," *The Globe and Mail Report on Business Magazine*. October 1995. http://archives.jonentine.com/articles/rainforest_chic.htm.

Fisch, Jill E. "Panel Four: Corporate Philanthropy from the Perspective of Corporate and Securities Law: Questioning Philanthropy from a Corporate Governance Perspective." *New York Law School Law Review* 41, nos. 3 and 4 (1997): 1091–1106.

Fischel, Daniel R. "Organized Exchanges and the Regulation of Dual Class Common Stock." *University of Chicago Law Review* 54, no. 1 (Winter 1987): 119–152.

Friedman, Milton. "A Friedman Doctrine–The Social Responsibility of Business Is to Increase Profits." *New York Times.* Aug. 19, 1988.

Gergen, Mark P. "The Case for a Charitable Contributions Deduction." *Virginia Law Review* 74, no. 8 (November 1988): 1393–1450.

Glover, Stephen I. and Aarthy S. Thamodaran. "Capital Formation: Debating the Pros and Cons of Dual Class Capital Structures." *Insights: The Corporate & Securities Law Advisor* 27, no. 3 (March 2013): 1–9.

Grossman, S.J. and O. D. Hart. "The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration." *Journal of Political Economy* 94, no. 4 (1986): 691–719.

Haley, Usha C.V. "Corporate Contributions as Managerial Masques: Reframing Corporate Contributions as Strategy to Influence Society." *Journal of Management Studies* 28, no. 5 (1991): 485–510.

Harris, M. and A. Raviv. "Corporate Governance—Voting Rights and Majority Rules." *Journal of Financial Economics*, 20 (1988): 203–235.

Henderson, M. Todd. "The Story of Dodge v. Ford Motor Company: Everything Old Is New Again." in *Corporate Law Stories*, edited by J. Mark Ramseyer, 37–76. New York, NY: Thompson Reuters/Foundation Press, 2009.

Henderson, M. Todd and Anup Malani. "Corporate Philanthropy and the Market for Altruism." *Columbia Law Review* 109, no. 3 (April 2009): 571–628.

Hess, David, Nikolai Rogovsky and Thomas W. Dunfee. "The Next Wave of Corporate Community Involvement: Corporate Social Initiatives." *California Management Review* 44, no. 2 (Winter 2002): 110–125.

Hill, Frances R. "Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits." *New York Law School Law Review* 41, nos. 3 and 4 (1996–1997): 881–944.

Hiller, Janine S. "The Benefit Corporation and Corporate Social Responsibility." *Journal of Business Ethics* 118, no. 2 (2013): 287–301.

Hillman, Amy J. and Gerald D. Keim. "Shareholder Value, Stakeholder Management, and Social Issues: What's the Bottom Line?" *Strategic Management Journal* 22, no. 2 (2001): 125–139.

Hochman, Harold M. and James D. Rodgers. "The Optimal Tax Treatment of Charitable Contributions." *National Tax Journal* 30, no. 1 (March, 1977): 1–18.

Howell, Jason W. "The Survival of the US Dual Class Share Structure." *Journal of Corporate Finance* 44 (2017): 440–450.

Husted, Bryan W. "A Contingency Theory of Corporate Social Performance." *Business & Society* 39, no. 1 (2000): 24–48.

Gompers, Paul A., Joy Ishii and Andrew Metrick. "Extreme Governance: An Analysis of Dual-Class Firms in the United States." *The Review of Financial Studies* 23, no. 3 (May 2009): 1051–1088.

Jarrell, Gregg A. and Annette B. Poulsen. "Dual-Class Recapitalizations as Antitakeover Mechanisms: The Recent Evidence." *Journal of Financial Economics* 20 (1988): 129–152.

Jensen, M.C. and W. H. Meckling. "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure." *Journal of Financial Economics* 3, no. 4 (1976): 305–360.

Jog, Vijay M. and Allan L. Riding. "Price Effects of Dual-Class Shares." *Financial Analysts Journal* 42, no. 1 (1986): 58–67.

Jones, Kevin. "Selling vs. Selling Out." *Stanford Social Innovation Review*, February 27, 2009. https://ssir.org/articles/entry/selling_vs_selling_out.

Kahn, Faith Stevelman. "Pandora's Box: Managerial Discretion and the Problem of Corporate Charity." *UCLA Law Review* 44, no. 3 (February 1997): 579–676.

Karpoff, Jonathan M., Paul H. Malatesta and Ralph A. Walkling. "Corporate Governance and Shareholder Initiatives: Empirical Evidence." *Journal of Financial Economics* 42, no. 3 (1996): 365–395.

Kawaguchi, Linda. "Introduction to Dodge v. Ford Motor Co.: Primary Source and Commentary Material." *Chapman Law Review* 17, no. 2 (2013): 493–578.

Kelley, Ross. "The Emerging Need for Hybrid Entities: Why California Should Become the Delaware of 'Social Enterprise Law'." *Loyola of Los Angeles Law Review* 47, no. 2 (2014): 619–[viii].

Knauer, Nancy J. "The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity." *DePaul Law Review* 44, no. 1 (Fall 1994): 1–98.

Knoeber, Charles R. "Golden Parachutes, Shark Repellents, and Hostile Tender Offers." *American Economic Review* 76, no. 1 (1986): 155–167.

Ladd, Benjamin E. "A Devil Disguised as a Corporate Angel? Questioning Corporate Charitable Contributions to 'Independent' Directors' Organizations." *William and Mary Law Review* 46, no. 6 (2005): 2153–2191.

Lan, Gil. "Benefit Corporations: A Persisting and Heightened Conflict for Directors." *Journal of Law and Business Ethics* 21 (2015): 113–124.

Lebowitz, Shana. "On the 10th Anniversary of TOMS, Its Founder Talks Stepping Down, Bringing in Private Equity, and Why Giving Away Shoes Provides a Competitive Advantage." *Business Insider*, June 15, 2016. http://www.businessinsider.com/toms-blake-mycoskie-talks-growing-a-business-while-balancing-profit-with-purpose-2016-6.

Levitt, Theodore. "The Dangers of Social Responsibility." *Harvard Business Review* 36, no. 5 (1958): 41–50.

Li, Kai, Hernán Ortiz-Molina and Xinlei Zhao. "Do Voting Rights Affect Institutional Investment Decisions? Evidence from Dual-Class Firms." *Financial Management* 37, no. 4 (2008): 713–745.

Masulis, Ronald W., Cong Wang and Fei Xie. "Agency Problems at Dual-Class Companies." *The Journal of Finance* 64, no. 4 (2009): 1697–1727.

McDonnell, Brett. "Benefit Corporations and Strategic Action Fields or (The Existential Failing of Delaware)." *Seattle University Law Review* 39, no. 2 (Winter 2016): 263–290.

McKinnon, Christopher C. "Dual-Class Capital Structures: A Legal, Theoretical & Empirical Buy-Side Analysis." *Michigan Business & Entrepreneurial Law Review* 5, no. 1 (Fall 2015): 81–98.

McWilliams, Abagail and Donald Siegel. "Corporate Social Responsibility: A Theory of the Firm Perspective." *Academy of Management Review* 26, no. 1 (2001): 117–127.

Mescon, Timothy S. and Donn J. Tilson. "Corporate Philanthropy: A Strategic Approach to the Bottom Line." *California Management Review* 29, no. 2 (1987): 49–61.

Miller, Geoffrey. "Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases." *Michigan State Law Review* 2009, no. 4 (Winter 2009): 831–847.

Mulvaney, Dustin. "Solar Energy Isn't Always as Green as You Think: Do Cheaper Photovoltaics Providing Solar Energy Come with a Higher Environmental Price Tag?" *Washington Post*, November 13, 2014. https://spectrum.ieee.org/green-tech/solar/solar-energy-isnt-always-as-green-as-you-think.

Murray, J. Haskell. "Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes." *American University Business Law Review* 2, no. 1 (2012): 1–54.

---. "Defending Patagonia: Mergers and Acquisitions with Benefit Corporations." *Hastings Business Law Journal* 9, no. 3 (Spring 2013): 485–516.

Navarro, Peter. "Why Do Corporations Give to Charity?" *Journal of Business Ethics* 61, no. 1 (January 1988): 65–93.

Neumann, R. "Price Differentials Between Dual-Class Stocks: Voting Premium or Liquidity Discount?" *European Financial Management* 9, no. 3, (2003): 315–332.

Orlitzky, Marc, Frank L. Schmidt and Sara L. Rynes. "Corporate Social and Financial Performance: A Meta-Analysis." *Organization Studies* 24, no. 3 (2003): 403–441.

Page, Anthony and Robert A. Katz. "Freezing out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon." *Vermont Law Review* 35, no. 1 (Fall 2010): 211–250.

---. "The Truth About Ben [&] Jerry's," *Stanford Social Innovation Review*, Fall 2012. https://ssir.org/articles/entry/the_truth_about_ben_and_jerrys.

Parthiban, David, Matt Bloom, and Amy J. Hillman. "Investor Activism, Managerial Responsiveness, and Corporate Social Performance." *Strategic Management Journal* 28, no. 1 (2007): 91–100.

Pearce, John A. "The Rights of Shareholders in Authorizing Corporate Philanthropy." *Villanova Law Review* 60, no. 2 (2015) 251–282.

Plerhoples, Alicia E. "Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation." *Tennessee Journal of Business Law*, 13, no. 2 (Spring 2012): 221–266

---. "Social Enterprise as Commitment: A Roadmap." *Washington University Journal of Law & Policy* 48, no. 1 (2015): 89–138.

Porter, Michael E. and Mark R. Kramer. "The Competitive Advantage of Corporate Philanthropy." *Harvard Business Review* 80, no. 2 (December 2002): 56–69.

Ramachandran, J., K. S. Manikandan and A. Pant. "Why Conglomerates Thrive (Outside the US)." *Harvard Business Review* 91, no. 12 (2013): 110.

Ribuffo, Leo P. "Henry Ford and 'The International Jew'." *American Jewish History* 69, no. 4 (1980): 437–477.

Roberts, Peter W. and Grahame R. Dowling. "Corporate Reputation and Sustained Superior Financial Performance." *Strategic Management Journal* 23, no. 12 (2002): 1077–1093.

Rowley, Tim and Shawn Berman. "A Brand New Brand of Corporate Social Performance." *Business & Society* 39, no. 4 (December 2000): 397–418.

Rydqvist, Kristian. "Dual-Class Shares: A Review." *Oxford Review of Economic Policy* 8, no. 3 (1992): 45–57.

Saiia, David. H., Archie B. Carroll and Ann K. Buchholtz. "Philanthropy as Strategy: When Corporate Charity Begins at Home." *Business & Society* 42, no. 2 (2003): 169–201.

Seligman, Joel. "Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy." *George Washington Law Review* 54, no. 5 (1985): 687–724.

Shapira, Roy. "Corporate Philanthropy as Signaling and Co-optation." *Fordham Law Review* 80, no. 5 (April 2012): 1889–1940.

Simpson, Janice. "Ice Cream: They All Scream for It." *Time*, August 10, 1981.

Smart, Scott B., Ramabhadran S. Thirumalai and Chad J. Zutter. "What's in a Vote? The Short-and Long-Run Impact of Dual-Class Equity on IPO Firm Values." *Journal of Accounting and Economics* 45, no. 1 (2008): 94–115.

Smart, Scott B. and Chad J. Zutter. "Control as a Motivation for Underpricing: A Comparison of Dual- and Single-Class IPOs." *Journal of Financial Economics* 69, no. 1 (2003): 85–110.

Solomon, Steven Davidoff. "New Share Class Gives Google Founders Tighter Control." *New York Times*, April 13, 2012. https://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/.

Sorkin, Andrew Ross. "Ex-Corporate Lawyer's Idea: Rein In 'Sociopaths' in the Boardroom." *New York Times,* July 29, 2019. https://www.nytimes.com/2019/07/29/business/dealbook/corporate-governance-reform-ethics.html.

Peter A. Stanwick and Sarah D. Stanwick. "The Relationship between Corporate Social Performance, and Organizational Size, Financial Performance, and Environmental Performance: An Empirical Examination." *Journal of Business Ethics* 17, no. 2 (1998): 195–204.

Stein, Jeremy C. "Takeover Threats and Managerial Myopia." *Journal of Political Economy* 96, no. 1 (1988): 61–80.

Sugin, Linda. "Theories of the Corporation and the Tax Treatment of Corporate Philanthropy." *New York Law School Law Review* 41, nos. 3 and 4 (1997): 835–880.

Thomas, Randall S., Alan R. Palmiter and James F. Cotter. "Dodd-Frank's Say On Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?" *Cornell Law Review* 97, no. 5 (2012): 1213–1266.

Turban, Daniel B. and Daniel W. Greening. "Corporate social performance and organizational attractiveness to prospective employees." *Academy of Management Journal* 40, no. 3 (1997): 658–672.

U.S. Congress. House. Committee on Ways and Means. *General Tax Reform, Public Hearings Before the Committee on Ways and Means.* 93rd Cong., 1st Sess., April 9 and April 11–12, 1973.

U.S. Congress. Senate. Committee on Finance, *Report of the Committee on Finance United States Senate (to Accompany H.R. 13270).* 91st Cong., 1st Sess., 1969, S. Rep. No. 91–552, 14.

Useem, Michael. "Market and Institutional Factors in Corporate Contributions." *California Management Review* 30, no. 2 (1988): 77– 88.

Waddock, Sandra A. and Samuel B. Graves. "The Corporate Social Performance-Financial Performance Link." *Strategic Management Journal* 18, no. 4 (1997): 303–319.

Wang, Jia and Betty S. Coffey. "Board Composition and Corporate Philanthropy." *Journal of Business Ethics* 11, no. 10 (1992): 771–778.

Wartick, Steven L. and Philip L. Cochran. "The Evolution of the Corporate Social Performance Model." *Academy of Management Review* 10, no. 4 (October 1985): 758–769.

Werbel, James D. and Suzanne M. Carter. "The CEO's Influence on Corporate Foundation Giving." *Journal of Business Ethics* 40, no. 1 (2002) 47–60.

Williams, Robert J. and J. Douglas Barrett. "Corporate Philanthropy, Criminal Activity, and Firm Reputation: Is There a Link?" *Journal of Business Ethics* 26, no. 4 (2000): 341–350.