Merrick Dodd and the Great Depression: A Few Historical Corrections

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INTRODUCTION

Merrick Dodd is remembered primarily for his role as coprotagonist, with Adolf Berle, in the famous Berle–Dodd debate. Dodd's contribution to that debate—*For Whom are Corporate Managers Trustees?*[1] (the 1932 Article)—has generally been interpreted as the inspiration for modern stakeholder theory. Berle's contribution has generally been viewed as the foundation on which shareholder primacy rests.[2] Both of these views have been clarified by the nuanced work of Bratton and Wachter.[3] Oddly, while scholars have devoted a great deal of attention to Berle's actual life story, there is almost no scholarship that sheds light on Merrick Dodd, the historical person.[4]

In preparing my presentation and intended paper on the Berle–Dodd debate for the Tenth Annual Berle Symposium,[5] I had not planned to spend a great deal of time researching the historical Merrick Dodd. But one thing led to another, and I became increasingly uncertain of my understanding of Dodd. Thus, in July 2018, rather than hand in my nearly completed

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1. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

2. Berle's contribution to the debate was comprised of two articles: Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931), and Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

3. William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins*, 34 J. CORP. L. 99 (2008) (see particularly pages 122–35, 144–52). For further explication, see William W. Bratton, Adolf Berle: American Corporatist (Feb. 16, 2008), *in* 42 SEATTLE U. L. REV. 772 (2019).

4. On the historical Berle, see JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA (1987); NAVIGATING THE RAPIDS, 1918-1971: FROM THE PAPERS OF ADOLF A. BERLE (Beatrice Bishop Berle & Travis Beal Jacobs eds., 1973). The best recent work on the historical Dodd is by Bratton & Wachter, *supra* note 3, even though their primary focus was on Adolf Berle.

5. This paper is part of the printed version of the Tenth Annual Berle Symposium, held in Seattle, Washington, on May 17 and 18, 2018: Symposium, *Berle X: Berle and His World*, 42 SEATTLE U. L. REV. 261 (2019).

paper, I made a pilgrimage to Boston and pored through the E. Merrick Dodd Papers (the Dodd Papers).[6] My focus was on the period up to and shortly after 1932. Frustratingly, most of the Dodd material covered the period from 1932 to his death in 1951;[7] I paid that material somewhat less attention. Equally frustrating, Dodd's correspondence files inexplicably were missing materials for the letters A through H. If there had been any correspondence between Dodd and Berle that was not in the Berle Papers,[8] I would not find it here.

Despite these difficulties and deficits, a much more nuanced picture of the historical Dodd gradually emerged. The summer passed, my earlier intended paper began to morph into several papers (or potentially a book), and Dodd moved from the periphery to the center of my research thoughts and efforts. More questions popped up, and in November I made a second trip to Boston to go through the Dodd Papers (without a time-period prejudice), as well as to make side trips to St. Mark's School, where Dodd took his secondary education,[9] and to the Harvard Archives to review Dodd's academic records at Harvard College and Harvard Law School.[10]

Along the way, I have experienced several "aha!" moments—the discovery of a document shedding important new light on who Merrick Dodd really was, what made him tick, or explained why he had written what he wrote and made the academic choices that he made. Some of these "aha!" moments struck me at the time as being the final missing puzzle piece. Yet other "aha!" moments followed. Whether my current understanding represents a final resting place—the best I can do in reconstructing the historical Merrick Dodd—or a waystation to be followed by more fundamentally important discoveries, I cannot say. But I do know that my initial version of Merrick Dodd, undoubtedly influenced by my pro-Berle starting point, now seems a cartoonish strawman, stuffed with inaccuracies.

Thus, I empathize with Charles Elson and Nicholas Goossen and the efforts they undertook to accurately depict Dodd in their recent article,

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6. The E. (Edwin) Merrick Dodd Papers are part of the Historical & Special Collection, Harvard Law School Library. The files measure 4.59 linear feet and are contained in 11 linear boxes. Boxes 5–9 contain correspondence files [hereinafter the Harvard Law School Library, Correspondence Files].

7. Indeed, the Harvard University catalog search system, HOLLIS, identifies the Dodd Papers as only containing materials from 1932–1951. Fortunately, this is erroneous. Scattered, but important, documents exist dating from the fall of 1928, when Dodd began his career on the Harvard Law School faculty.

8. The Papers of Adolf A. Berle, 1912–1974, are housed at the Franklin D. Roosevelt Presidential Library and Museum in Hyde Park, New York.

9. Dodd attended St. Mark's School in Southborough, Massachusetts from fall 1902 to spring 1906.

10. Dodd attended Harvard College from 1906–1910 and Harvard Law School from 1910–1913.

Merrick Dodd: The Rise and Fall of Corporate Stakeholder Theory.[11] They, too, made a pilgrimage to Cambridge to explore the Dodd Papers.[12] Unfortunately, their foundational "aha!" moments led to mistaken conclusions.

As the title suggests, Merrick Dodd is central to Elson and Goossen's argument that shareholder primacy trumps corporate stakeholder theory in promoting both wealth creation and income security for stakeholders.[13] But the Merrick Dodd they describe is, like the product of my early efforts, the grossest of caricatures—a strawman stuffed with inaccuracies. Dodd is brought into Elson and Goossen's story for only one purpose—to show that modern stakeholder theory is inherently flawed. To do this, they first assert that Merrick Dodd and his father, for whose estate Dodd was then acting as trustee, suffered severe financial losses and hardship as a result of the stock market crash that began in October 1929 and the ensuing Great Depression.[14] They then assert:

> Such developments necessarily weighed heavily on Dodd and greatly influenced his thinking throughout the era. Perhaps consequentially, he identified with "radical"[12] academic thinkers, including John

11. Charles M. Elson & Nicholas J. Goossen, *E. Merrick Dodd and the Rise and Fall of Corporate Stakeholder Theory*, 72 BUS. LAW. 735 (2017).

12. *Id.* at 736 ("We base portions of our commentary on Dodd's personal papers, previously given scant attention in the literature. Based upon review of these papers, we uncovered important information about Dodd and his stakeholder theory that significantly impact the efficacy of his approach.").

13. *Id.* at 735 ("The public's best hope is an active and vital corporate sector, with investors continuing to provide the requisite capital to ensure corporate success. The stakeholder approach, which diminishes equity value and availability, harms the very group it was designed to protect. We all benefit through a robust corporate economy and brighter economic future."). For a nuanced and insightful consideration of the social role played by shareholder primacy, see Marc T. Moore, *A Necessary Social Evil: The Indispensability of the Shareholder-Value Corporation*, 40 SEATTLE U. L. REV. 427 (2017). Moore concludes:

> The somewhat uncomfortable truth for many observers is that, for better or worse, the American system of shareholder capitalism, and its pivotal corporate governance principle of shareholder primacy, are ultimately products of our own collective (albeit unintentional) civic design. And, until academics and policymakers are capable of coordinating their respective energies in the direction of somehow alleviating U.S. worker-savers' significant dependence on corporate equity as a source of non-occupational wealth gains, they would be well advised to heed Professor Berle's warning that "[n]othing is accomplished, either as a matter of law or of economics, merely by saying that the claim of this group [i.e., shareholders] ought not to be 'emphasized.'" In the meanwhile, the shareholder-oriented corporation—despite its many purported evils—is likely to remain a socially indispensable phenomenon. To those who rue this prospect, it might be retorted, "better the devil you know than the devil you don't."

Id. at 464. For a stakeholder-oriented perspective, written specifically to rebut Elson & Goossen's article, see Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 Bus. Law. 337 (2018).

14. Elson & Goossen, *supra* note 11, at 737.

> Maynard Keynes, who had considerable influence on Dodd's perspective. Clearly, Dodd's 1932 article, which spurred a significant movement for corporate social responsibility was, in part, an emotive outgrowth of the personal toll wrought by the Great Depression.
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> Around the same time, John Maynard Keynes began to develop his general theory of economics and employment, which precipitated a new governmental approach to economics. Dodd's promotion of the stakeholders at the expense of the shareholders can be seen as, perhaps, a related derivation of Keynesian economics, which was in the developmental stages in the 1920s.
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> . . . .
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> We believe Dodd [in his 1932 Article] rejected the reasonable and intuitive [shareholder value maximization] approach of the *Dodge* court because of his personal experiences during, and in the wake of, the Great Depression. His primary argument for subordinating the shareholder's role in the corporate agenda is seemingly an emotional plea to make societal interests the focal point of the corporation.[15]

These factual assertions and conclusions are simply wrong. As I show in Part I, Dodd did not suffer financially as a result of the stock market crash that began in October 1929 or from the ensuing Great Depression. Rather, the available evidence indicates that Dodd was unusually well-situated after Black Tuesday and throughout the early 1930s. Nor, as I discuss in Part II, did Dodd's father likely "lose all his money." Moreover, as I illustrate in Part III, the available evidence does not support an inference that John Maynard Keynes strongly or directly influenced Dodd's views in the 1932 Article. In each Part, I fully present relevant details drawn from the Dodd Papers so that the reader may assess for herself the persuasiveness of my analysis and interpretation. I then offer concluding thoughts.

I. WHAT WAS DODD'S FINANCIAL SITUATION AS HE WROTE THE 1932 ARTICLE?

A. Elson and Goossen's Claim

Elson and Goossen claim that "[i]n the wake of the stock market crash of 1929, Dodd fell into financial trouble"[16] so severe that it impacted and at least partially explains Dodd's views in the 1932 Article. Since Dodd's work on the 1932 Article was substantially completed by the end

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15. *Id.* at 737–38, 740.
16. *Id.* at 737.

of 1931,[17] the essence of this claim is that the stock market crash and ensuing depression caused Dodd to fall into financial trouble which persisted until at least the end of 1931 when he was finishing up the 1932 Article.

Elson and Goossen cite only two pieces of evidence for this claim.

> In a letter dated October 29, 1929—a date now known as Black Tuesday, due to panic trading and a precipitous drop in the market—Dodd requested the complete withdrawal of funds from a financial institution in Lincoln, Nebraska. The bank initially refused to pay and, consequently, set off a chain of correspondence that lasted more than a year, ultimately ending with Dodd receiving his money. He also quibbled, albeit politely, with HLS Dean Roscoe Pound regarding salary.[18]

Elson and Goossen do not explain why or how these two episodes support the inference that Dodd fell into financial trouble in the aftermath of Black Tuesday. Nor do they provide further detail concerning the underlying documents on which they rely or any information as to what Dodd's financial situation was before Black Tuesday. I address these shortcomings in this Part.

In subpart B of this Part, I discuss Dodd's financial situation before the events culminating on Black Tuesday. In subpart C, I assess what can be learned from Dodd's attempt, beginning on Black Tuesday, to withdraw bank funds. Subpart D analyzes Dodd's letter to Roscoe Pound seeking a salary adjustment. Subpart E then details the evidence that indicates that Dodd did not fall into financial trouble in the lead up to his writing of the 1932 Article, but instead fared very well.

B. Dodd's Financial Situation Immediately Before Black Tuesday

Dodd joined the Harvard Law School faculty in the fall of 1928. His contractual agreement called for an annual salary of $6000 for academic years 1928–1929 and 1929–1930.[19] Thus, immediately before Black Tuesday, Dodd made a comfortable living from his teaching position; his salary equated to $87,383.72 in 2018 dollars.[20] In contrast, in 1929 the

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17. Dodd may have both begun and fully developed the thesis for the 1932 Article during the month of December 1931. *See* Letters from E. Merrick Dodd, Jr. to Professor Frank W. Taussig (Dec. 8, 1931 & Dec. 22, 1931) (on file with the Harvard Law School Library, Correspondence Files).

18. Elson & Goossen, *supra* note 11, at 737.

19. Letter from E. Merrick Dodd, Jr. to Roscoe Pound (Oct. 7, 1930) (on file with the Harvard Law School Library, Correspondence Files).

20. Calculated using the following formula: [*2018 value = 1929 value x (2018 CPI/1929 CPI)*], with 1929 value being Dodd's $6,000 salary, and CPI values being 17.2 for 1929 and 250.5 for 2018. Formula as specified at *Consumer Price Calculator Information*, FED. RES. BANK OF MINN., https://

average American worker earned $1,446.28 annually, the equivalent of $21,063.55 in 2018 dollars.[21] Additionally, Dodd was a participant in the Harvard University pension plan.[22] Thus, Dodd's position at Harvard gave him security and a comfortable living most Americans would have considered enviable.

Moreover, Dodd had financial means in addition to his salary, a fact alluded to in correspondence with his life insurance broker, N.S. Vail, who wrote both to remind Dodd of the premium due on Dodd's existing $25,000 life insurance policy and to inquire as to whether Dodd would like more coverage.[23]

> Thanks for the reminder with regard to my payment of premium. With regard to the matter of further insurance, my present inclination is against it. My present insurance, *plus other sources of income which are not dependent upon my own labor*, is, while not wholly ample for all emergencies, sufficient to assure a reasonable degree of safety to myself and my wife.[24]

And, there is further evidence that Dodd was comfortably situated as Black Tuesday approached. First, in the summer of 1928, immediately before joining the Harvard faculty, Dodd and his wife, Winifred, spent three months honeymooning in Europe, an option only available to those with substantial financial flexibility.[25] Second, Dodd made a substantial second-home real estate purchase shortly after moving to Boston. As childhood friend and Harvard Law School faculty colleague Zechariah Chafee later recalled, around 1929 and likely before Black Tuesday, Dodd

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www.minneapolisfed.org/community/financial-and-economic-education/cpi-calculator-information [https://perma.cc/48U7-VS33], and CPI data as specified at *Consumer Price Index–, 1913*, FED. RES. BANK OF MINN., https://www.minneapolisfed.org/community/financial-and-economic-education/cpi-calculator-information [https://perma.cc/JV68-C9F7].

21. 1929 average worker income determined by using the formula [*1929 value = 1998 value x 1929 CPI/1998 CPI*], with 1998 value being $13,076 (the 1929 average household income in 1998 dollars), 1929 CPI being 17.2 and 1998 CPI being 163. *Consumer Price Calculator Information*, *supra* note 20; *Consumer Price Index, 1913–*, *supra* note 20. 1929 average household income in 1998 dollars data, Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1, 8 tbl.II (2003). 2018 value of 1929 average worker calculated using the formula [*2018 value = 1929 value x (2018 CPI/1929 CPI)*] with 1929 value being the average worker's 1929 salary—$1,446.28—and CPI values being 17.2 for 1929 and 250.5 for 2018. *Consumer Price Calculator Information*, *supra* note 20; *Consumer Price Index, 1913–*, *supra* note 20.

22. Letter from Merrick Dodd to N.S. Vail (July 12, 1929) (on file with the Harvard Law School Library, Correspondence Files, Box 8, File 7).

23. Letter from N.S. Vail to Professor Edwin M. Dodd, Jr. (June 29, 1929) (on file with the Harvard Law School Library, Correspondence Files).

24. *Id.* (emphasis added).

25. Letter from Merrick Dodd to Professor Austin T. Wright (Oct. 1, 1928) (on file with the Harvard Law School Library, Correspondence Files).

"and his wife wisely used the proceeds of a profitable investment to buy an old house in Newcastle, New Hampshire, near Portsmouth. . . . Their place extended to the shore, with a lovely view and opportunities for sailing and swimming."[26] In all, the property comprised thirty acres.[27]

C. Did Dodd's Attempt to Withdraw a Bank Certificate Beginning on Black Tuesday Reflect Personal Financial Distress?

Elson and Goossen point to Dodd's effort to withdraw funds deposited in The Nebraska Central Building and Loan Association (the Association), initiated by a withdrawal request written on Black Tuesday, to indicate that the Great Depression put Dodd in personal financial distress. Elson and Goossen create the impression that Dodd was in a panic to get his money out of the bank and assert that after the bank refused to pay, Dodd battled for over a year to get his money.[28]

The relevant correspondence creates a very different impression.

On Tuesday, October 29, 1929, Dodd wrote to the Association as follows: "I desire to withdraw the amount paid on my certificate No. 62957 of stock in your association. I should like to know whether it is necessary to indorse the certificate before sending it to you for cancellation."[29]

W. M. Folsom, Secretary of the Association, quickly replied by letter dated Monday, November 4, 1929:

> We have your letter of October 29th stating that you wish to withdraw your certificate #62957, and we have placed your request on file to pay this withdrawal about the first of November [sic] as we are requiring the thirty days notice for withdrawal in keeping with our by-laws. It will not be necessary for you to endorse your certificate but send it in to us for cancellation before the date of withdrawal.[30]

Two things are readily apparent from this initial exchange. First, as Dodd almost certainly knew, his request for withdrawal was subject both to the surrender of his certificate and to a thirty days' notice requirement.

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26. Zechariah Chafee, Jr., *Edwin Merrick Dodd*, 65 HARV. L. REV. 379, 382 (1952).

27. Letter from Merrick Dodd to New Hampshire State Forestry Department (Sept. 15. 1938) (on file with the Harvard Law School Library, Correspondence Files).

28. *See supra* text accompanying note 11.

29. Letter from E. Merrick Dodd, Jr. to Nebraska Central Building and Loan Association (Oct. 29, 1929) (on file with the Harvard Law School Library, Correspondence Files, Box 6, Folder 8) (In this letter, but not subsequent ones, Dodd misaddressed the Association as "Lincoln, Neb., Building and Loan Association.").

30. Letter from W. M. Folsom to E. Merrick Dodd, Jr. (Nov. 4, 1929) (on file with the Harvard Law School Library, Correspondence Files). Folsom obviously meant that the withdrawal could occur about the first of December, rather than the first of November, as that would be the end of the required thirty days' notice provision.

Thus, Dodd could not have expected an immediate influx of cash from his withdrawal request, with Monday, December 2, 1929 being the earliest payment date he could reasonably expect.[31]

Second, contrary to Elson and Goossen's account, *the Association did not refuse to honor Dodd's withdrawal request*. Rather, they put it on file for payment in very early December of 1929, with the only pre-condition being that Dodd mail in his certificate before that date.

However, Dodd did not follow up on his initial withdrawal request. He did not mail in his certificate in November or December of 1929. Nor did he mail in his certificate in January, February, March, April, or May of 1930. This is not the action of someone who desperately needs his funds.

In fact, it was not until Saturday, June 14, 1930 that Dodd again wrote to the Association seeking a withdrawal of his deposit. By this point, it would certainly have been reasonable for the Association to assume and take the position that Dodd's original withdrawal request had lapsed, and that seems to be the position that both Dodd and the Association took.[32]

By letter dated June 17, 1930, the Association replied, enclosing "a withdrawal notice which you will kindly fill out, sign and return one copy to this office."[33] Once again the Association did not refuse to honor Dodd's withdrawal request but noted that the Association had experienced a flood of withdrawal requests in March, which was causing a delay of approximately four-to-six months in honoring these demands.[34]

The Association's June 17, 1930 letter concluded by asking Dodd to consider submitting his withdrawal notice at a later date, after the

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31. If he posted his withdrawal letter on Tuesday, October 29, 1929, Dodd could not have expected the bank to be in receipt before Thursday, October 31, making Monday, December 2 the earliest possible date on which the thirty days' notice requirement would be fulfilled.

32. The Dodd Papers contain no copy of Dodd's letter of June 24, 1930. What we know of that letter is by virtue of the reference to it made in the Association's letter to Dodd dated June 17, 1929, *infra* note 33 ("We acknowledge receipt of your letter of June 14th, asking for withdrawal of certificate 62957.").

33. Letter from Homer K. Burket, the Association's President, to E. Merrick Dodd, Jr. (June 17, 1930) (on file with the Harvard Law School Library, Correspondence Files). The Association then required a formal withdrawal notice.

34. *Id.* The letter noted in relevant part:

> Since the withdrawal of funds must be paid from the Association's monthly cash receipts it creates an impossible situation for the prompt payment of withdrawals thirty days after date of notice, and each withdrawing stockholder must await his or her turn. Therefore it has become necessary for the Association to follow the Nebraska statutes which provide that withdrawals shall be paid as soon after the thirty days notice as the funds in the treasury of the Association will permit. At the present time it is impossible to approximate the time required before reaching the payment of your withdrawal, but it will be from four to six months.

Id.

Association had caught up with the withdrawal demands: "Stockholders must realize that these are unusual times and the Association cannot pay out more money than it receives, so we will be very glad to have you withhold your application until some later date as we can assure you will receive your interest."[35]

Dodd did not reply for several days. Given his emotional ties to Lincoln, Nebraska, where he was a member of the University of Nebraska law faculty from 1922 to 1928 and where he had met and married his wife, Winifred, it is not surprising that he would at least consider the Association's request for abeyance.

On June 27, 1930, Dodd submitted his withdrawal notice to the Association, but noted:

> I have considered the request made in your letter of June 17, that I do not ask at this time for the withdrawal of my certificate. I can well understand that this is an inconvenient time for you and if it were possible for you to make any agreement with your certificate holders generally to give you an extension of time, I would be willing to be a party to the agreement.[36]

As with his initial request for withdrawal made on Black Tuesday, but never perfected, nothing about Dodd's second request for withdrawal reflects an urgent need for money. After making the formal withdrawal request on June 17, Dodd dutifully waited more than five months before again contacting the Association: on December 4, 1930 he politely inquired as to the status of his withdrawal.[37]

By letter dated December 13, 1930, nearly six months after Dodd had perfected his withdrawal request, the Association transmitted a check for $1,812.68, representing payment in full of the principal and interest due on Certificate #62957.[38] This amount equated to slightly more than three months of Dodd's then-salary at Harvard.

I can understand Elson and Goossen's excitement at finding the initial letter Dodd wrote on October 29, 1929. Surely, they must have thought, it is more than a coincidence that Dodd penned this letter on Black Tuesday, and that it is beyond reasonable to infer that events on Black Tuesday and the days leading up to it caused Dodd to begin the process to

35. *Id.*

36. Letter from E. Merrick Dodd, Jr. to Nebraska Central Building and Loan Association (June 27, 1930) (on file with the Harvard Law School Library, Correspondence Files, Box 6, Folder 8).

37. Letter from E. Merrick Dodd, Jr. to Nebraska Central Building and Loan Association (Dec. 4, 1930) (on file with the Harvard Law School Library, Correspondence Files, Box 6, Folder 8).

38. Letter from W. M. Folsom, Secretary of the Association, to E. Merrick Dodd, Jr., (Dec. 13, 1930) (on file with the Harvard Law School Library, Correspondence Files, Box 6, Folder 8).

withdraw his money from the Association. I make the same inference, but not the subsequent inference that financial difficulty can also be inferred. No evidence exists that Dodd held investments that had been acquired on margin or with borrowed funds, which, because of the precipitous decline in stock prices, would soon expose him to margin calls or similar loan repayments that he was having, or would have, difficulty meeting. Nor does any evidence exist that Dodd experienced another sudden need for cash immediately prior to Black Tuesday. And, as outlined above, both Dodd's halting requests for withdrawal and the fact that his funds could not be received for at least thirty days after notice of withdrawal, militate against an inference that Dodd's withdrawal request was motivated by immediate financial distress. Instead, the most reasonable inference is that Black Tuesday caused Dodd to have some concern for the safety of his Nebraska bank deposits (a concern proven prescient by the mini-bank run the Association experienced in March of 1930) and that he sought to move these funds to a safer location.

D. Did Dodd's 1930 Letter to Roscoe Pound Regarding Dodd's Salary Indicate Personal Financial Distress?

Elson and Goossen assert that we can infer that Dodd experienced financial difficulty during the Great Depression from the fact that Dodd "quibbled . . . with Harvard Law School Dean Roscoe Pound regarding Dodd's salary."[39] Perhaps in the abstract one could draw a weak inference that one who quibbled with their boss over a salary matter might need more money because they were in financial difficulty. But more likely inferences can be drawn from the mere fact that someone "quibbled" over a salary decision, including that the quibbler could have felt that she is underpaid, that others similarly situated are being paid more, or that she had been promised a raise that is inexplicably being withheld. Indeed, the available evidence shows that a reason other than financial difficulty explains why Dodd reached out to Dean Roscoe Pound.

The only evidence Elson and Goossen cite is Dodd's letter to Pound, dated October 7, 1930, which I quote in full:

> Dear Mr. Pound,
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> As I told you the other day, I have recently received a notice from the Bursar that by vote of the Corporation my salary for the present year will be $6,000. This is plainly an error since the agreement between us at the time when I came here in 1928, was that my salary should be raised to $9,000 after two years. I understand from our recent

39. Elson & Goossen, *supra* note 11, at 737.

> conversation that inasmuch as all $9,000 salaries at the law school have been raised to $10,000, the agreement that I should have $9,000 this year would under existing circumstances, entitle me to $10,000.
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> It is my understanding that the error was not made by the Bursar but was due to the fact that when the Law School Budget was made out your letter containing the agreement with me with regard to salary was overlooked.
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> I should greatly appreciate it you could find a way to rectify this mistake.[40]

As the text of the October 7 letter makes clear, Dodd and Pound have already discussed the matter and are on the same page. Dodd's letter serves both to sum up what they previously discussed and to provide Pound with a document that he can place in his files or attach to any corrective requests he will send to the Harvard Corporation as he goes about rectifying what is obviously a mistake. Moreover, Dodd's wording indicates that Pound not only will attempt to fix the mistake of not raising Dodd's salary to the previously agreed $9,000 but may also attempt to get the salary increased to $10,000, which would put Dodd at the place on the Harvard faculty pay scale that Pound had intended when contracting with Dodd. In other words, Pound apparently agreed that the original promise of $9,000 should be honored and may have agreed that he also wanted to honor its spirit by raising Dodd's salary to $10,000—the level of those previously at the $9,000 level. It can hardly be thought that the difference between a $6,000 and $9,000 salary, a prospective and expected increase of fifty percent, is a quibble. Nor can any inference be drawn that Dodd was arguing with Pound, either in the original conversation that the October 7 letter references or in the letter itself. The only reasonable inference is that Dodd brought to Pound's attention an obvious bureaucratic error and that the two of them were united in the intention to have the error cured.

Importantly, as there is no further correspondence in the Dodd Papers concerning this matter, it is reasonable to infer that Dodd received at least the promised raise to $9,000 annually, effective in the fall of 1930, and may well have been increased to $10,000 annually. Thus, not only does Dodd's interaction with Pound about salary matters support no reasonable inference that Dodd was in financial distress, it does support a reasonable inference that his financial situation was about to dramatically improve.

40. Letter from E. Merrick Dodd, Jr. to Roscoe Pound, Dean of Harvard Law School (Oct. 7, 1930) (on file with the Harvard Law School Library, Correspondence Files).

E. Dodd's Financial Situation as He Wrote the 1932 Article

In October 1929, Dodd was employing his human capital as a Professor at Harvard Law School, earning a salary of $6,000, which equates to $87,383.72 in 2018 dollars. As the previous subpart concluded, Dodd almost certainly received a raise of $3,000 effective September 1930, and very possibly an increase of $4,000. Using the more conservative figure and assuming that his salary was not increased in the fall of 1931, Dodd's salary at the end of 1931 was $9,000, which equates to $148,322.37 in 2018 dollars.[41] Viewed from the perspective of 1931 alone, Dodd's substantial salary increase from $6,000 to at least $9,000 occurred as consumer prices were falling, by 2.7 percent in 1930 and 8.9 percent in 1931. From the perspective of a laborer, then, Dodd was in the rare position at the close of 1931, as compared to October 1929, in having a secure job at a substantially higher salary while consumer prices were collapsing.[42]

Dodd, of course, had real estate and capital assets that would have declined in value during this period, but there is no evidence that Dodd liquidated any assets at the reduced market value which such sales would have entailed. Nor is there any evidence that any decline in investment income that Dodd may have experienced had an adverse effect on his financial situation. Indeed, the most reasonable inference is that Dodd's substantially increased salary more than offset any decline in his investment income.

In support of that inference, we know that Dodd and his wife did not sell their second home in New Hampshire, bought in 1929, but instead "rebuilt the house with much thought and created an unusually beautiful garden [where] they spent many happy summers and week-ends, constantly extending delightful hospitality to Faculty couples and other friends."[43] The availability and use of cash to substantially rebuild a summer home is consistent with increasing—not decreasing—disposable income and economic well-being.

We also know that near the end of 1931 Dodd declined an offer to teach at Northwestern Law School during the summer of 1932, giving as

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41. Calculated using the formula [*2018 value = 1931 value x (2018 CPI/1931 CPI)*], with 1931 value being Dodd's $9,000 salary and CPI values being 15.2 for 1929 and 250.5 for 2018. Formula as specified at *Consumer Price Calculator Information*, *supra* note 20; *Consumer Price Index, 1913–*, *supra* note 20.

42. *Consumer Price Index, 1913–*, *supra* note 20.

43. Chafee, *supra* note 25, at 381.

his excuse, "I feel I am in danger of going stale from too much teaching."[44] This is not the decision of one short on money.

Though it falls later than the end of 1931, Dodd's comment in his 1935 Harvard Law School Class Report is instructive:

> At present my principal occupations are seeking to keep ahead of my students in Cambridge, and to keep ahead of the insects which devour the fruit trees at my summer and weekend home. My favorite recreation is trying to make headway in a small knockabout against a five-knot tide with a four-knot breeze.[45]

We also know that Dodd initiated a sabbatical leave request in December 1934 and was granted it for the fall semester of the 1936–1937 academic year.[46] Dodd and his wife used the sabbatical and part of the preceding summer to take a trip around the world, which concluded in mid-January of 1937. The trip included a one-month tour of India, where Dodd made sure to hire a manservant and stay in the finest hotels; the Dodds continued on with trips on multiple steam ships, with stops in Java, Batavia, Hong Kong, Japan, and Hawaii, before landing in San Francisco.[47]

These post-1931 indications of Dodd's financial well-being, if not affluence, involved expenditures of time and money made before the death of his parents, and constitute strong evidence that Dodd's economic circumstances had continued to be quite favorable despite the post-1931 buffetings of the Great Depression. Thus, it is beyond reasonable to conclude that at the close of 1931, not only was Merrick Dodd *not* in financial distress, he was both better off financially than in October 1929 and that his financial situation was one of which most Americans would have been envious.

44. Letter from E. Merrick Dodd, Jr. to Leon Green, Dean of Northwestern Law School (Dec. 17, 1931) (on file with Dodd Papers, Correspondence Files).

45. *Id.*

46. Letters from E. Merrick Dodd, Jr. to Roscoe Pound, Dean of Harvard Law School (Dec. 4, 1934 & Dec. 11, 1935), (on file with the Harvard Law School Library, Correspondence Files).

47. Letter from Eustice Seligman to Gabrielle Paquin, Dodd's secretary, (Sep. 17, 1936) (on file with the Harvard Law School Library, Correspondence Files) ("Would you mind letting me know where Professor Dodd is spending his sabbatical leave?"); Letter from Gabrielle Paquin to Eustice Seligman (Sep. 18, 1936) (on file with the Harvard Law School Library, Correspondence Files) (detailing Dodd's overall itinerary from letter's date to trip completion); Letter from E. Merrick Dodd, Jr. to Indian State Railways (June 5, 1936) (on file with the Harvard Law School Library, Correspondence Files) (detailing Dodd's planned one month stay in India).

II. DID DODD'S FATHER LOSE ALL HIS MONEY IN THE GREAT DEPRESSION?

Prior to Black Tuesday, Dodd's parents would have been considered "wealthy Bostonians"[48] appropriately included in the Boston Social Register.[49] Dodd's father graduated from Harvard College in 1880 and thereafter became a successful woolen merchant, starting in Boston in 1882, moving to Providence, Rhode Island in 1883, and returning to Boston in 1905. Consistent with his affluence, Dodd's father provided the finest possible education to his children. Both daughters graduated from Bryn Mawr.[50] Daughter Katherine earned an M.D. from Johns Hopkins in 1921 and had a distinguished career as a pediatric physician and educator, primarily at Vanderbilt University.[51] For his surviving younger son, Dexter, who apparently preferred the life of gentleman farmer, Dodd's father provided an apple orchard in New Hampshire. By 1920, at the age of sixty-three, Dodd's father, except for dabbling as a gentleman farmer, was essentially in full retirement.[52]

Elson and Goossen assert that Dodd's father "lost all his money" in the Great Depression. Their only evidence for this is Dodd's letter to Dr. Henry Jackson, dated May 27, 1931, which reads as follows:

> As father is in a sanitarium your letter to him with regard to the Harvard fund has come to me. Father has very little realization of the effect of the business depression upon his property, of which I am trustee, and as his mental condition is such as to make it impossible for him fully to understand business matters I am taking charge of the matter of his subscriptions. I know that he would want to give something to the Harvard fund and am accordingly sending $5 on his behalf.
>
> As you may perhaps know, father is suffering from arterial sclerosis of the brain. In spite of his condition he is almost always so much like himself in the late afternoon and evening as to make his condition scarcely noticeable. This is particularly likely to be the case where he is taken out of himself by such an event as a class dinner. He is counting on attending the class dinner this year and the physician in

48. Dep't of Pediatrics, *Katherine Dodd, M.D. Biography*, VAND. UNIV. SCH. OF MED. (July 23, 2012), https://pediatrics.mc.vanderbilt.edu/interior.php?mid=5607 [https://perma.cc/35VC-CBHQ].

49. *Boston, 1909*, 36 SOC. REG., no. 5, 1921, at 59; *Boston, 1909*, 23 SOC. REG., no. 5, 1908, at 47.

50. HARVARD UNIV., HARVARD COLLEGE, CLASS OF 1880: FORTIETH ANNIVERSARY REPORT, REPORT IX-1920, at 61–62 (1920).

51. Dep't of Pediatrics, *supra* note 48.

52. HARVARD UNIV., *supra* note 50, at 61–62. Dexter's twin brother, Eugene, died of influenza in 1917. *Id.* at 61.

> charge of the sanitarium has decided to let him go provided he is as well as usual on that date. He enjoyed the class dinner last year and his condition has not changed very much since that time.
>
> I am writing all this to you because I think it important that if he does go to the dinner, someone present should understand the situation and you as a physician are peculiarly well qualified to understand it.[53]

From this letter, and this letter alone, Elson and Goossen surmise that Dodd's father "had lost most of his money due to the Great Depression."[54] This is pure conjecture.

As the May 27, 1931 letter notes, despite any damage inflicted to his properties by the stock market crash and related business decline, Dodd's father was still being taken care of in a private sanitarium, not in the Cambridge home where his wife still resided. There is no indication that Dodd's father's estate was not paying for this expense or that Dodd was contributing to this expense.[55] This type of care is indicative of continuing wealth, even if that wealth had been reduced in the nineteen months since Black Tuesday. Moreover, the fact that Dodd's father had continued to attend his Harvard Annual Class Dinners, and that Dodd was "managing his subscriptions" and made a token donation to the Harvard Annual Fund, does not support an inference that Dodd's father's estate was not still fully adequate to provide for the need of Dodd's father and mother in a style to which they had been accustomed.

We know nothing about the extent or details of Dodd's father's property holdings immediately prior to the events of late October 1929 other than that he was considered a wealthy Bostonian. We do not know the mix or amount of the investments that he held immediately before the stock market crash in October 1929. Were Dodd's father's properties diversified across stocks, bonds, life insurance annuities, savings accounts, and real property, or was he heavily tilted in one direction or another? We do not know whether Dodd became trustee of his father's properties before or after Black Tuesday. And we do not know how Dodd's father, or Dodd as his father's trustee, reacted to various stages of the stock market crash; did they sell some or all of the stocks, bonds, and other investments, and if so, when? Or did they continue to hold these properties despite falling capital values? The effect of the market crash on Dodd's father's

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53. Letter from E. Merrick Dodd, Jr. to Dr. Henry Jackson (May 27, 1931) (on file with the Harvard Law School Library, Correspondence Files).

54. Elson & Goossen, *supra* note 11, at 737 (citing Dodd's May 27, 1931 letter to Jackson).

55. To the contrary, Dodd's personal travels and lifestyle in the mid-thirties, see *supra* text accompanying notes 43–47, indicate that he was bearing none of the expense of caring for his parents.

properties would have differed greatly depending on the answer to these questions, which we unfortunately do not know.

All we can say with some degree of confidence is that the stock market crash and ensuing Great Depression would likely have had a negative impact on the capital value of Dodd's father's overall investment portfolio. To the extent composed of publicly traded stock, the capital loss realized would likely have been substantial—the Dow Jones Average on October 23, 1929 was 326.51.[56] On December 31, 1931, it rested at 77.90,[57] representing a decline from October 23, 1929 of slightly more than seventy-five percent. But return on investment via corporate dividends did not decline precipitously during this period; on average, dividends actually increased during 1930 before falling somewhat below 1929 levels in 1931.[58] So if the estate continued to hold its corporate securities, the decline in investment income by the end of 1931 would have been much less severe than the decline in capital value.

We know some of Dodd's father's estate was in real property and that almost certainly declined in market value.[59] Likely some of his investments were in life insurance, corporate bonds, and government securities. These investments would on average have fared better than investments in stock.[60] Whatever the magnitude of the capital losses realized on paper, there is no reason to assume that Dodd triggered the recognition of these losses by sale or other disposition.

In any event, the decline in value of Dodd's father's estate, measured from October 1929 to the end of 1931, is misleading in one important respect. The senior Dodd had retired by 1920, at the age of sixty-two, a wealthy man.[61] While there was a post-war depression from 1920–1922, the years from 1922 to September 1929 had been exceptionally profitable

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56. MAURY KLEIN, RAINBOWS END: THE CRASH OF 1929 xiv (2001).

57. *Dow Jones Industrial Average History (DJIA/Dow 30)*, FED PRIME RATE, http://www.fedprimerate.com/dow-jones-industrial-average-history-djia.htm [https://perma.cc/GG4N-XEMW].

58. CQ Press, *Dividends and Wages in Periods of Depression*, CQ RESEARCHER, https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1931072000 [https://perma.cc/W9YZ-5CWS]. Because dividends were largely maintained "[w]hen the Dow hit a low of 41.22 on July 8, 1932, for example, the dividend yield of the overall stock market was close to 14 percent, according to data compiled by Robert J. Shiller, the Yale economics professor." Mark Hulbert, *25 Years to Bounce Back? Try 4½*, N.Y. TIMES, Apr. 25, 2009, at BU5.

59. HARVARD UNIV., *supra* note 50, at 61.

60. Chris Farrell, *Investing During a Great Depression*, MARKETPLACE (Sept. 30, 2008, 4:11 PM), https://www.marketplace.org/2008/09/30/your-money/ask-money/investing-during-great-depression [https://perma.cc/6J6U-UPW3]; CQ Press, *Life Insurance in the Great Depression*, CQ RESEARCHER, https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1933051900 [https://perma.cc/4N75-CPUP].

61. Dep't of Pediatrics, *supra* note 48; HARVARD UNIV., *supra* note 50, at 50.

for investors, particularly in the stock market. On December 31, 1920, the Dow Jones rested at 71.95; on December 31, 1931, it ended at 77.90.[62]

While Dodd's estate had undoubtedly grown significantly in paper value during 1920s, its value at year end 1931 was probably similar to its value in 1920. He had been a wealthy man then, and he was likely still a wealthy man as 1932 dawned.

III. DID DODD WRITE THE 1932 ARTICLE UNDER THE INFLUENCE OF JOHN MAYNARD KEYNES?

Elson and Goossen conclude that Dodd wrote his 1932 Article under the sway of John Maynard Keynes's views, as primarily expressed in Keynes's 1926 pamphlet, *The End of Laissez-Faire*. Their evidence for this is beyond thin. They argue that John Maynard Keynes "had considerable influence on Dodd's perspective"[63] and his views expressed in the 1932 Article.[64] To support this inference, Elson and Goossen note that in 1938, Dodd included Johan Maynard Keynes's seminal 1936 book, *The General Theory of Employment, Interest and Money*, on a list of recommended book purchases for the Harvard Law Library.[65] Inclusion of a 1936 book on a 1938 list of recommended library purchases is slim evidence of what Dodd knew about Keynes and his work in 1932.

There is, however, a more telling document in the Dodd Papers—Dodd's book review of *The General Theory of Employment, Interest and Money*.[66] In that review, Dodd makes the following revealing admission:

> This book is addressed to the economist rather than to the general reader and much of it is extremely difficult for the layman to understand, particularly on a hasty reading which is all that I have given it. . . . *So far as I can make out*, it is Keynes' theory that the chief cause of . . . unemployment is that savings do not result in new

62. *Dow Jones Industrial Average History (DJIA/Dow 30)*, *supra* note 57.

63. Elson & Goossen, *supra* note 11, at 737–38.

64. *Id.* at 744–45.

65. *Id.* at 744; Memorandum from E. Merrick Dodd, Jr. to Mr. James, Harvard Law Sch. Library (Dec. 14, 1938) (on file with the Harvard Law School Library, Correspondence Files).

66. The manuscript for Dodd's review of Keynes's *The General Theory of Employment, Interest and Money*, is contained in Dodd's Papers, Manuscript Files, in the file for the names that begin in the range K through Ke. The manuscript is typed, double-space, and nine typed lines more than three pages in length. My search of the Index of Legal Periodicals and the Book Review Digest did not locate this review. Perhaps it was never published, but it seems more likely since Dodd kept it with his other published reviews, that it was published in a newspaper or magazine outside the scope of those digests.

> investment in instruments of production to anything like the same extent as the classical economist assumed.[67]

From this remarkably candid acknowledgment, we know that Dodd believed himself a layman when it came to economics. We can infer from this, and his use of the modifying clause, "as far as I can make out," that he did not pretend to possess the economic grounding needed to fully appreciate Keynes's work. Importantly, in the book review Dodd shows no familiarity either with Keynes's earlier work or with the work of any other contemporary economists. His only foil for understanding Keynes appears to be a general understanding of classical economics.[68] Thus, from the two direct references to Keynes's work found in the Dodd Papers, the only reasonable inference is that Dodd was not under the sway of Keynes in 1936, much less in 1932.

However, Elson and Goossen also claim to see similarities between the 1932 Article and views expressed by Keynes in his 1926 pamphlet. They first summarize the views of Keynes in question:

> In his legendary 1928 [sic] essay, *The End of Laissez Faire*, Keynes spoke of the "sociali[z]ed" large public corporation, where in extreme examples, the rights of the shareholders, "in excess of their conventional dividend, have already sunk to the neighborhood of zero." In that work, Keynes expressively de-emphasized the role of the corporation as a protective agent for the investor, but suggested instead that it had become an integral piece of the social fabric.[69]

They then assert:

> Dodd repeated this theme in his 1932 article, where he cleverly critiqued the prevailing corporate theory:
>
>> Business—which is the economic organization of society—is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the property rights of its owners are thereby curtailed.[70]

However, this totally misrepresents the cited passage, which was part of Dodd's prediction that the *Lochner*-era majority, and its striking down of state legislation seeking to regulate industry in the public interest, could

67. *Id.* (emphasis added).
68. *Id.*
69. Elson & Goossen, *supra* note 11, at 738. John Maynard Keynes, *The End of Laissez-Faire*, was actually first published as a pamphlet by Hogarth Press in 1926.
70. Elson & Goossen, *supra* note 11, at 738 (citing Dodd, *supra* note 1, at 1162).

not long survive. Central to the *Lochner*-era doctrine was the division of business corporations into two sharply distinct types—public and private—the former subject to substantial regulation in the public interest and the latter protected from much regulation by the due process clause.[71] As Dodd noted, "[t]here is no doubt that property employed in a business now classified as a public utility is private property only in a qualified sense." with railroads, for example, being subject to regulation of its rates, services, labor relations, and issuance of stocks and other securities.[72] Dodd then predicted that the sharp distinction between public and private business corporations was likely coming to an end and "that the law is approaching a point of view that regards all business as affected with a public interest."[73] The passage Elson and Goossen cite is, then, but Dodd's view of the consequence logically flowing from a decision to view all business corporations as having public obligations, and the sources cited in his analysis and argument are entirely drawn from legal cases and the writings of legal scholars.

Finally, and more generally, Elson and Goossen see Dodd's 1932 Article as consistent with, and a reflection of, views they attribute to Keynes:

> Keynes viewed management as having a greater vested interest in the company than the shareholders, and he believed that shareholders did not have the necessary knowledge to understand the corporation's internal workings. He hoped that this separation of ownership from control would free management from a sole obligation to the shareholders, so management could divert profits and human capital to societal issues. Keynes thought that a proper return warranted rewarding human capital and viewed the income received from an equity interest as parasitic because the investor made no continuing sacrifice to benefit the corporation. He argued that the investor eventually became functionless.[74]

But the 1932 Article contains no similar analysis of the corporation and certainly no characterization of shareholder returns as "parasitic." Rather, Dodd merely advocated that fiduciary duty should not be interpreted so strictly as to prevent society from observing the results of an experiment: Would allowing corporate managers to voluntarily assume social responsibility be a workable and socially advantageous system?

71. Dodd, *supra* note 1; Walton H. Hamilton, *Affectation With Public Interest*, 39 YALE L.J. 1089, 1095 (1930).

72. Dodd, *supra* note 1, at 1149.

73. *Id.*

74. Elson & Goossen, *supra* note 11, at 744.

> It may well be that any substantial assumption of social responsibility by incorporated business through voluntary action on the part of its managers can not [sic] reasonably be expected. Experience may indicate that corporate managers are so closely identified with profit-seeking capital that we must look to other agencies to safeguard the other interests involved, or that the competition of the socially irresponsible makes it impracticable for the more public-spirited managers to act as they would like to do, or that to expect managers to conduct an institution for the combined benefit of classes whose interests are largely conflicting is to impose upon them an impossible task and to endow them with dangerous powers. The question with which this article is concerned is not whether the voluntary acceptance of social responsibility by corporate managers is workable, but whether experiments in that direction run counter to fundamental principles of the law of business corporations.[75]

Keynes's views undoubtedly were swirling in the air breathed in late 1931 by thought leaders among American economists. But Dodd and Elson have not connected any dots directly between Keynes's ideas and the 1932 Article. The most reasonable inference from the available record is that Dodd was not a student of, or under the influence of, Keynes's ideas as of the writing of the 1932 Article.

CONCLUDING THOUGHTS

If Dodd's views in the 1932 Article cannot be traced to financial trauma experience by Dodd or his father in the Great Depression, or to the influence of Keynes, from whence did his views derive? The obvious place to look, of course, is the 1932 Article, and there we see Dodd telling us that he was influenced by the mainstream ideas swirling in America in late 1931—the business commonwealth views of Owen Young and Gerard Swope,[76] and the pragmatic and pro-business leader work of Harvard Business School Dean Wallace Donham in *Business Adrift*.[77]

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75. Dodd, *supra* note 1, at 1162.

76. *Id.* at 1153–58. On Owen Young and Gerard Swope and business commonwealth corporatists, see Bratton & Wachter, *supra* note 3, at 123–28.

77. Dodd, *supra* note 1, at 1155-56. Dodd discusses the views of Wallace Donham, the then Dean of Harvard Business School, set forth in WALLACE DONHAM, BUSINESS ADRIFT (1931); he cites with approval Donham's conclusion that:

> The only way to defend capitalism is through leadership which accepts social responsibility and meets the sound needs of the great majority of our people. Such leadership will seek to form constructive plans framed not in the interest of capital or capitalism but in the interest of the American people as a whole. . . . The responsibility of capital for leadership is overwhelming. To a large extent in this industrial civilization of ours the potential leadership of the country is concentrated in industry.

Id. (citing DONHAM, *supra* note 77, at 38).

The Dodd Papers, however, provide scholars with an opportunity to do more in understanding Dodd than simply trace the sources he cites to their logical endpoints. As Elson and Goossen note, “Dodd’s papers provide modern legal and finance scholars, as well as business lawyers, with much to consider as they wrestle with the historic and continuing battle between shareholder and stakeholder primacy.”[78] Indeed, my research convinces me that the Dodd Papers offer a uniquely valuable vantage point from which to assess both the Berle–Dodd debate and Dodd’s other contributions to corporation law scholarship. My observations in this regard, however, must wait for another day.

78. Elson & Goossen, *supra* note 11, at 736.