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HENRY FORD'S WINGMAN: A PERSPECTIVE ON
THE CENTENNIAL OF *DODGE V. FORD*

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INTRODUCTION	1013
I. THE COUZENS YEARS	1018
II. WHEELS OF JUSTICE	1029
III. THE SIXTEENTH AMENDMENT AND THE GREAT WAR	1036
CONCLUSION	1045

INTRODUCTION

Almost as enigmatic as Henry Ford himself,¹ *Dodge v. Ford Motor Company* has defied understanding for 100 years.² Although it has become fashionable to question its continuing relevance,³ the case retains its claim to our attention at its

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1. DAVID L. LEWIS, 100 YEARS OF FORD 9 (Consumer Guide ed., 2003). Many people . . . have tried to figure out Henry Ford, to find the secret that made his character function in so many spectacularly good and terrible ways. But no matter how hard they have tried, no one seems to have found the schematic for the inner workings of his soul. Instead they discovered an enigma machine

VINCENT CURCIO, HENRY FORD 270 (2013).

2. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (1919).

3. See, e.g., Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951 (2017); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998). One scholar went farther than others in recommending that the case be removed from the curriculum entirely. Lynn A.

centennial.⁴ *Dodge v. Ford* heralded several of the most important developments in corporate law in the past century: It announced the business judgment rule, declaring that “judges are not business experts.”⁵ It presaged recognition of a fiduciary duty owed by majority shareholders not to engage in a pattern of conduct designed to squeeze out minority shareholders,⁶ as well as the recent emergence of the so-called B corporation.⁷ The case “should be celebrated in political economy

Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008).

4. M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again*, in CORPORATE LAW STORIES 37 (J. Mark Ramseyer ed., 2009). “Corporate law casebooks have included excerpts from *Dodge v. Ford* for generations. . . . Casebooks change but *Dodge v. Ford* remains.” Stout, *supra* note 3, at 174.

5. *Dodge*, 170 N.W. at 684. The business judgment rule establishes a rebuttable presumption that, absent proof of fraud, illegality or conflict of interest, the substantive merits of business decisions made by directors are protected from second-guessing by courts, so long as the directors reached their decisions through a deliberative process.

6. A “squeeze out” occurs when a majority stockholder oppresses a minority stockholder through the exercise of control over the payment of dividends (or salary or other terms of employment) as the initial step in an intimidation process designed to influence the minority stockholder to accept an offer to sell the latter’s shares to the majority stockholder at a bargain price. ROBERT C. CLARK, CORPORATE LAW 604 (A.A. Balkema, 2d ed. 1986).

7. A benefit or “B” corporation is a relatively new form of limited liability entity, available in states that have enacted enabling legislation, in which the managers are free to consider the impact of their environmental and other decisions on societal interests, without regard to the effect on maximization of shareholder profit. *See, e.g.*, Joseph K. Grant, *When Making Money and Making a Sustainable and Societal Difference Collide: Will Benefit Corporations Succeed or Fail?*, 46 IND. L. REV. 581 (2013). The ice cream maker Ben & Jerry’s, a “wholly owned autonomous subsidiary of Unilever,” claims to have been among the first to take advantage of this choice of entity. *Ben & Jerry’s Joins the B Corp. Movement!*, BEN & JERRY’S, www.benjerry.com/about-us/b-corp (last visited Jan. 26, 2018). *Dodge* has been cited for the proposition that Ben & Jerry’s directors were obligated to accept Unilever’s rich offer to purchase the company in 2000 by their primary duty to maximize shareholder value, notwithstanding the founders’ efforts to maintain the company’s social mission and independence. Anthony Page & Robert A. Katz, *The Truth About Ben & Jerry’s*, 10 STAN. SOC. INNOVATION REV., Fall 2012, at 41, <https://ssir.org/articles/entry/the-truth-about-ben-and-jerrys>.

as the trial of Socrates in philosophy or that of Galileo in astronomy.”⁸

“Every lawsuit is a potential drama: a story of conflict, often with victims and villains, leading to justice done or denied.”⁹ A high-stakes tale of motors and money, ambition and intrigue, it would be difficult to find a better example of that metaphor than *Dodge v. Ford*.

Ahead of his time in many ways, Henry Ford was confident that the American people would elect as their President a successful businessman, without pretense to political correctness, or a mechanism to filter the expression of his most outrageous thoughts, or any previous experience in government or the military.¹⁰ Ford would eventually discover that his outspoken pacifism, combined with his rabid anti-Semitism, rendered him unelectable to public office.¹¹

Every founder needs a wingman.¹² For Henry Ford, that role belonged to James Couzens, whose contributions to the

8. DAVID L. LEWIS, *THE PUBLIC IMAGE OF HENRY FORD* 102 (1976) (quoting Raymond-Leopold Bruckberger, a French priest whose insightful reflections on the U.S. have been compared with those of Alexis de Tocqueville).

9. Paul A. Lombardo, *Legal Archaeology: Recovering the Stories Behind the Cases*, 36 J.L. MED. & ETHICS 589 (2008). Although once a subject of controversy, the value of narrative in legal scholarship and education is no longer a matter of dispute. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Jean C. Love, Commentary, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87 (1998). According to Derrick Bell, “People are moved by stories more than by legal theories.” Vincent Harding, *Equality Is Not Enough*, N.Y. TIMES, Oct. 11, 1987, at 7 (reviewing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987)). Since 2005, Foundation Press has published an entire “law stories” series which now contains 37 titles.

10. Adding to the improbability of his suitability for the office, Ford avoided public speaking, never wrote anything of substance, and was likely incapable of digesting complex written memoranda. KEITH SWARD, *THE LEG- END OF THE FORD* 124 (1948); LAWRENCE GOLDSTONE, *DRIVE* 69 (2016).

11. See JOHN B. RAE, *HENRY FORD* 152 (1969). In an interview at the time of the case, Ford said, “The Jew is a mere huckster, a trader, who doesn’t want to produce, but to make something out of what somebody else produces.” Ford published a series of articles and pamphlets that made this and other negative observations about Jews. Henderson, *supra* note 4, at 45. Ford also believed that the Catholic Church was out to get him. VICTOR LASKY, *NEVER COMPLAIN, NEVER EXPLAIN* 30 (1981).

12. Rodney Williams, *Why Every Founder Needs a Wingman*, FORBES (June 1, 2017), <https://www.forbes.com/sites/rodneywilliams/2017/06/01/wing->

early success of the Ford Motor Company are considered equal to those of Ford himself.¹³ The first decade of the company has been described as “The Couzens Years.”¹⁴ Each brought critical skills to the business that the other lacked,¹⁵ but, “[f]or practical purposes, Couzens was boss.”¹⁶

From its inception in 1903 and for a decade thereafter, the spheres of influence in the Ford Motor Company were clear.¹⁷ Henry Ford devoted his attention to product design and production. He ceded control of business operations, including finance and marketing, to Couzens. During this period, and as a direct result of their partnership,¹⁸ the company

man/#6ac944363c33. Originally used to describe a pilot whose aircraft is positioned to provide protective support behind and outside the right wing of the leading aircraft in a formation, the term “wingman” has acquired a secondary meaning in entrepreneurship parlance as the person who occupies the number two role in the organizational structure, particularly critical to the success of a start-up business in its formative stage. *Id.*

13. “[B]ut for Couzens and his organization and domination of sales and finance, Ford Motor Company would not have lasted long.” FORD R. BRYAN, HENRY’S LIEUTENANTS 67 (2003) (quoting Charles E. Sorensen) (Bryan, a historian, is a descendant of the Ford family). LEWIS, *supra* note 8, at 12. Couzens’ influence on Ford has been described as “incalculable.” ANNE JARDIM, THE FIRST HENRY FORD: A STUDY IN PERSONALITY AND BUSINESS LEADERSHIP 51–52 (1970).

14. CURCIO, *supra* note 1, at 64. “Everyone in the company, including Henry Ford, acknowledged [Couzens] as the driving force during this period.” RAE, *supra* note 11, at 154 (quoting John Kenneth Galbraith).

15. GOLDSTONE, *supra* note 10, at 148. “Ford by himself could not have managed a small grocery store, and Couzens could not have assembled a child’s kiddie car. Yet together they built an organization that astounded the world.” BRYAN, *supra* note 13, at 69. “Couzens . . . understood everything about the car business except how a car worked.” RICHARD SNOW, I INVENTED THE MODERN AGE 128 (2013). “The genius of the two men so perfectly complemented each other that it is doubtful if there ever was a more perfect alliance in the annals of industrial history.” Flynn Wayne, *A Master Builder of Business Efficiency*, THE NATIONAL MAGAZINE, Apr.–Sept. 1915, at 820, 823.

16. BRYAN, *supra* note 13, at 69. In an interview with a journalist, Couzens described his role as follows: “They used to tell it around the automobile shows and so forth that Couzens is the brains of the organization. Couzens is the front door. If you want anything you will have to see Couzens.” HARRY BARNARD, INDEPENDENT MAN: THE LIFE OF SENATOR JAMES COUZENS 65 (1958).

17. See ALLAN NEVINS, FORD: THE TIMES, THE MAN, THE COMPANY 244 (1954).

18. “A lot of industry observers, then and now, felt the Ford Motor Company would not have survived, much less prospered without James Couzens.” RICHARD BAK, HENRY AND EDSEL 88 (2003). John W. Anderson, an attorney

“prospered beyond all expectations and . . . met with unparalleled success.”¹⁹

Like Ford, Couzens also believed he could have been President. “I can never become King of England,” he observed, “but if I had been born in the United States, I could be president.”²⁰ Because his mother gave birth to him in Canada, however, Couzens would have to be content to become one of the wealthiest industrialists of his generation, mayor of Detroit, and a U.S. Senator.

Couzens is less well-remembered than he deserves.²¹ This is partly the result of a strategic business decision that Henry Ford be the public face of the company that bore his name.²² That decision likely met little resistance from Couzens: although he was a generous philanthropist who gave away most of his fortune, he refused to perpetuate his memory by permitting buildings or institutions to be named for him.²³

This Article seeks to open a window into *Dodge v. Ford* by focusing on the pivotal role played by Couzens at the Ford Motor Company during its fraught formative years.²⁴ Following

and one of a dozen original shareholders, said “it was due to [Couzens’] efforts that the company became a success.” SWARD, *supra* note 10, at 46. “Without the bulldog driving energy of Couzens . . . the Ford company would have fallen apart almost before it had been put together.” CHARLES E. SORENSEN, *MY FORTY YEARS WITH FORD* 84 (1956).

19. Linda Kawaguchi, *Introduction to Dodge v. Ford Motor Co.: Primary Source and Commentary Material*, 17 CHAPMAN L. REV. 493, 576 (2014) (quoting trial court decision in *Dodge*).

20. BARNARD, *supra* note 16, at 20.

21. LEWIS, *supra* note 1, at 34.

22. In his role as chief craftsman of the Ford image, Couzens personally directed the company’s campaign to enhance Ford’s reputation as pioneer and inventor in the pre-1914 period. LEWIS, *supra* note 8, at 62–63. “Ford was an unrivaled master of public relations, and his actions and statements were carefully crafted into a message about the virtues of the automobiles he was selling. Buying a Ford meant not only buying a particular car, but also buying an idea and an image.” Henderson, *supra* note 4, at 53.

23. See LEWIS, *supra* note 1, at 35. Couzens was indignant when the University of Michigan, without his consent, named a dormitory for nursing students “Couzens Hall.” BARNARD, *supra* note 16, at 189. In his largest single gift of \$10 million establishing the Children’s Fund of Michigan, Couzens stipulated that the money be expended, and the institution go out of business, within 25 years. *Id.* at 188–89.

24. Couzens’ personal and official papers from 1903 to 1940, spanning his career as industrialist and politician, were conveyed to the Library of Congress by the administrators of the estate of his son, Frank. *The James Couz-*

the Introduction, Part I explores the backstory of *Dodge v. Ford*. Part II describes the proceedings at the trial and appellate court levels, from which the principals appear to have been strangely disassociated. Context is critical to a full understanding of most legal disputes, and *Dodge v. Ford* is no exception.²⁵ Part III argues that, perhaps more than the facts and legal doctrine involved, *Dodge v. Ford* is a product of the surrounding circumstances at the historical moment when the case arose.

I.

THE COUZENS YEARS

By the close of the 19th century, Henry Ford had become well-known in the Detroit area for experimenting successfully with cars designed for racing.²⁶ He thought it might be possible to parlay his fame into developing a scalable motorized vehicle for public consumption.²⁷ His earliest backer in this venture was Alexander Y. Malcolmson, a Detroit coal dealer, whose initial investment was equal to Ford's.

Malcolmson had expanded his business through heavy reliance on credit. Strapped for cash, Malcolmson needed to conceal from creditors his financial involvement in a risky start-up venture with the unproven Henry Ford.²⁸ Accordingly,

ens Papers, THE LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.mss/eadmss.ms006020> (last visited Jan. 24, 2018). Consisting of 350 containers of correspondence, articles and speeches, they represent a treasure trove of information, and open a window into the internal decision-making process of the Ford Motor Company during its formative years. As part of the research for this Article, the author inspected the Couzens papers for the period 1903–1919. See Kawaguchi, *supra* note 19, at 496–97 (noting the value of primary source material in understanding the surrounding circumstances of historical cases like *Dodge*).

25. See, e.g., RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY*, at vii (3d ed. 2010). “Rarely do we admit that the official factual account contained in an appellate opinion may have only the most tenuous relationship to the events that actually led the parties to court.” Lombardo, *supra* note 9, at 179.

26. Among his car racing exploits was a world record for speed which has been variably estimated between 90 to more than 100 miles per hour. STEVEN WATTS, *THE PEOPLE’S TYCOON* 81–83 (2005).

27. See LEWIS, *supra* note 8, at 25.

28. Before the Ford Motor Company, Henry Ford had failed in two previous automobile-making ventures, primarily because of his inability to perfect a machine that satisfied his own standards. BRYAN, *supra* note 13, at 68.

Malcolmson made his investment through an account in the name of his principal assistant, James Couzens.²⁹

Born in Chatham, Ontario in 1872,³⁰ in 1890 Couzens had moved to Detroit, where he found work as an inspector and later as manager for the Michigan Central Railroad's freight office.³¹ While serving in that capacity, Couzens met and impressed Malcolmson, a shipper of coal.³² Malcolmson hired Couzens as office manager and financial advisor. In what may have been his greatest contribution to the new company's remarkable success, Malcolmson delegated to Couzens responsibility for personally monitoring Malcolmson's investment with Ford.³³

To save on plant and machinery expenses, Couzens suggested that, rather than manufacture cars, the enterprise should assemble finished vehicles almost entirely from parts supplied by others.³⁴ Ford and Malcolmson arranged for the Dodge brothers to become the principal supplier of parts for the Model A, the first automobile designed by Ford for sale to the public.³⁵ Except for the body, wheels and tires, John F. and Horace E. Dodge made the entire Model A.³⁶ It was priced at \$750-850 (about \$20,000 in today's dollars).³⁷ Upon the incor-

29. BARNARD, *supra* note 16, at 37.

30. In the mid-nineteenth century, Chatham was the last stop on the Underground Railroad. WAYNE, *supra* note 15, at 820.

31. SNOW, *supra* note 15, at 123-24.

32. See Jim & Lisa Gilbert, *James Couzens Was a True Horatio Alger Figure*, CHATHAM DAILY NEWS (Jan. 24, 2014), www.chathamdailynews.ca/2014/01/24/james-couzens-was-a-true-horatio-alger-figure.

33. *Id.*

34. See GOLDSTONE, *supra* note 10, at 156.

35. See CHARLES K. HYDE, *THE DODGE BROTHERS* 30 (2005). The Dodge brothers had previously supplied engines to Ford's competitor, Ransom Olds. *Id.* From 1903 until 1914, when they started their own company, the Dodge brothers provided components exclusively for Ford. Their relationship did not go smoothly. The supply contract with the Dodges was renegotiated annually. The Dodge brothers regarded the yearly haggling over prices with Ford and Couzens as a source of aggravation. *Id.* at 59. For his part, Ford complained about the poor quality of components produced by the Dodges, and parts shortages resulting from their inability to keep pace with Ford's requirements. *Id.* at 41; ROBERT LACEY, *FORD: THE MEN AND THE MACHINE* 80 (1986).

36. HYDE, *supra* note 35, at 35-36.

37. CURCIO, *supra* note 1, at 43. Each sale generated \$150 in profit. GOLDSTONE, *supra* note 10, at 168.

poration of the company, the Dodge brothers agreed to accept 50 shares each, constituting a 10 percent ownership interest, in exchange for writing off overdue payments of \$7,000 and extending Ford \$3,000 in credit.³⁸

The Ford Motor Company was incorporated on June 16, 1903 by a dozen original shareholders with \$19,500 cash on hand.³⁹ Ford and Malcolmson each received 255 shares representing 25.5%.⁴⁰ Couzens' initial ownership interest of 25 shares constituted 2.5%. Couzens invested his entire life's savings of \$400, and borrowed most of the balance of the \$2,500 purchase price from Malcolmson.⁴¹ As the only two employees of the company who owned shares, Ford and Couzens were considered partners by themselves and others,⁴² and regarded their fellow stockholders as parasites.⁴³

Ford and Couzens often worked 16-hour days, seven days a week.⁴⁴ Couzens was responsible for keeping track of expenses for parts, salaries and rent. By July 11, 1903, the bank balance had been reduced to \$223.65.⁴⁵ Luckily a check for \$850 in payment of the sale of the first Model A to Dr. Ernst Pfennig, a Chicago dentist, arrived on July 15.⁴⁶ Sales for the

38. HYDE, *supra* note 35, at 34.

39. *Id.* at 33. They consisted of Ford, Malcolmson, Couzens, the Dodges, law partners Horace Rackham and John W. Anderson (Malcolmson's attorneys who prepared the incorporation documents and the contract with the Dodges to manufacture Ford components), Vernon Fry (a member of Malcolmson's church), Charles Bennett (a friend of Malcolmson), John S. Gray (Malcolmson's uncle), Charles Woodall (Malcolmson's bookkeeper), and Albert Strelow (supplier of the first assembly plant). LORIN SORENSEN, *THE FORD ROAD* 22-23 (1978).

40. Malcolmson contributed working capital. Ford's shares were issued in consideration for his contribution of his patents, designs and ideas. LEWIS, *supra* note 8, at 19.

41. He borrowed \$100 from his sister, Rosetta Hauss, an amount equal to a third of her life's savings. Couzens wanted his sister to be the thirteenth shareholder, but Ford objected to the idea of a female shareholder. BARNARD, *supra* note 16, at 41-42. Instead Couzens held one of his shares as nominee for his sister. *Id.* at 42.

42. *Id.* at 5-6.

43. SORENSEN, *supra* note 39, at 28; LEWIS, *supra* note 1, at 34.

44. NEVINS, *supra* note 17, at 244, 400.

45. WATTS, *supra* note 26, at 88.

46. SORENSEN, *supra* note 39, at 25. It was long believed that Dr. Pfennig was a medical doctor. His historic purchase was cited to support the narrative that physicians were among the first to perceive the professional benefit of owning a horseless carriage. In preparation for the 75th anniversary of the

period from July 16 to September 30, 1903 amounted to \$132,482, on which the company realized a net profit of \$36,958.⁴⁷

Like Malcolmson, Ford was impressed with Couzens' business acumen.⁴⁸ Possessed with "the soul of an accountant,"⁴⁹ Couzens would eventually come to oversee all of the company's business affairs, including sales, advertising, public relations, and negotiations with dealers and suppliers. As vice president and treasurer, Couzens made sure revenue was collected and bills were paid.⁵⁰ The spectacular success of the company in its formative years has been attributed to the fact that neither Ford nor Couzens interfered in the other's sphere of influence.⁵¹ "To Ford, looking back from the vantage point of many years later, 'the business went along almost as by magic,' and for this, Couzens was almost solely responsible."⁵²

Ford Motor Company in 1978, researchers located Dr. Pfennig's granddaughter who corrected the record. LACEY, *supra* note 35, at 74.

47. Benson Ford, Typewritten Notes for THE NEW HENRY FORD, The James Couzens Papers [hereinafter Couzens Papers] (on file with the Library of Congress and with author). Couzen's tally after the first nine and one-half months of operation showed the sale of 658 units for a net profit of \$98,851. LACEY, *supra* note 35, at 74–75.

48. CURCIO, *supra* note 1, at 94 ("He was as much of a genius in business as Ford was in everything else. It was because of him that Ford stopped experimenting with improvements on the Model A and got it into production, which started the meteoric rise in the company's fortunes. It was Couzens' tightfisted and brilliant guidance of those fortunes that turned the company into an unprecedented business success in under a dozen years.").

49. *Id.* at 39. Personality was not Couzens' strong suit. See David L. Lewis, *Introduction* to HARRY BARNARD, INDEPENDENT MAN: THE LIFE OF SENATOR COUZENS, at xv (Wayne State Univ. Press 2002) (1958) ("Able, exacting, truculent, he had a don't-tread-on-me attitude reinforced by outspokenness and a terrible temper."). Couzens has been described as brusque of manner, and often overbearing, vain, and self-interested. SWARD, *supra* note 10, at 43. See also BAK, *supra* note 18, at 50 ("Couzens . . . was so humorless it was later said of him that the ice on the Great Lakes broke when he cracked his annual smile.").

50. See SWARD, *supra* note 10, at 44 ("[Couzens's] office was the nerve center through which all Ford dealers and shippers and suppliers had to clear.").

51. See GOLDSTONE, *supra* note 10, at 224. The physical distance they maintained from each other may have been the product of mutual antipathy. *Id.* See also SNOW, *supra* note 15, at 130 ("[N]o photograph of the two together betrays the slightest sense of mutual geniality.").

52. JARDIM, *supra* note 13, at 52.

Both men were self-made, meticulous perfectionists and were equally strong-willed.⁵³ Ford, who obsessed about every minor detail, was continually seeking to improve the design of his automobiles and the processes of production.⁵⁴ Although he appreciated Couzens' ability, Ford believed the heart of an enterprise was its product, and the business office was a necessary evil to be tolerated.⁵⁵

Unlike Ford, Couzens could be pragmatic when circumstances required. Tasked with responsibility for the timely payment of bills, Couzens was mindful of the desperate need for cash in the company's early days.⁵⁶ Rather than wait for Ford to produce a perfect model, Couzens insisted on shipping products first, and later sending Ford mechanics by train to make repairs for customers with overheating engines, disintegrating brakes and the like.⁵⁷ Couzens reportedly accompanied Ford to the train station and personally nailed shut the doors to a boxcar, to make sure that Ford did not interfere with an early shipment of vehicles that he considered unready for sale.⁵⁸

While Ford concentrated his efforts on the design of a series of models, Couzens established a network of 7,000 dealers that was critical to the early success of the company.⁵⁹ Couzens insisted that Ford dealerships were spotlessly clean. It was

53. See BARNARD, *supra* note 16, at 35, 51. Theirs was an unlikely partnership given that Ford previously had never demonstrated the ability to work closely with other strong men. See LACEY, *supra* note 35, at 79.

54. Ford's failure to get his product to market was one of the reasons for his two previous business failures. See BRYAN, *supra* note 13.

55. ALLAN NEVINS & FRANK ERNEST HILL, *FORD: EXPANSION AND CHALLENGE, 1915–1933*, at 11 (1957).

56. Although the business was cash-poor in its infancy, Couzens forbade discounting, believing that maintaining the car at one price to every buyer was a fixed principle of business honesty. Wayne, *supra* note 15, at 825.

57. *The Real Secret Behind Entrepreneur Henry Ford*, MABU (Mar. 28, 2016), <https://www.agencymabu.com/real-secret-behind-entrepreneur-henry-ford/>.

58. "Stop shipping and we go bankrupt," Couzens reportedly said. As a former freight car inspector, nobody knew his way around a railroad yard better than Couzens. See SNOW, *supra* note 15, at 126.

59. See BAK, *supra* note 18, at 88. Dealers paid 50% of the purchase price upon ordering units, with the balance due at shipment. See WATTS, *supra* note 26, at 94. During a Wall Street panic in 1907, Couzens shipped unordered vehicles from the factory to dealers and insisted upon payment, effectively borrowing capital from dealers under pressure to sell cars quickly. See SWARD, *supra* note 10, at 45.

Couzens' idea to keep the service department enclosed and separate from the showroom, so that prospective buyers would not be distracted by the complaints of owners of defective cars in need of repair.⁶⁰ He instructed Ford dealers to arrange for disabled vehicles to be taken into the shop after dark so as not to draw attention to the unreliability of the Model A.⁶¹

Ford acquiesced to Malcolmson's pressure to build cars for the upscale market.⁶² The Model B was priced at \$2,000, and the 6-cylinder Model K at \$2,800.⁶³ Meanwhile, the car Ford wanted to build was a light-weight,⁶⁴ sturdily-built vehicle, at a price point affordable to 95% of the population, capable of lasting five years (double the industry standard) and of being repaired by nonskilled tradesmen.⁶⁵

Couzens sided with Ford in his conflict with Malcolmson over the direction of the business.⁶⁶ In what may have been his most important contribution during the company's first decade, Couzens was reportedly responsible for engineering the ouster of the man who had given both Ford and Couzens their start.⁶⁷ Malcolmson sold his quarter interest to Ford in 1907 for \$175,000.⁶⁸ Ford wound up owning 58.5% of the shares.⁶⁹ As part of the reorganization, Couzens purchased shares held

60. See LEWIS, *supra* note 8, at 39.

61. See SNOW, *supra* note 15, at 134.

62. See WATTS, *supra* note 26, at 97.

63. CURCIO, *supra* note 1, at 48, 53.

64. Vanadium steel alloy turned out to be the key to accomplishing Ford's vision. Ford rejected the conventional wisdom that consumers associated weight with quality, a mistake that would be repeated by U.S. automakers in competing with Japanese manufacturers in the 1970's. GOLDSTONE, *supra* note 10, at 287. Lighter in weight and three times stronger than ordinary steel, vanadium was also superior in its ability to resist shock and vibration, and thus better able to withstand the strain imposed by poor American roads. NEVINS, *supra* note 17, at 349. To successfully manufacture vanadium steel, Ford financed construction of a mill in Canton, Ohio capable of operating a furnace that was 300 degrees hotter than the typical furnace used to manufacture steel at the time. GOLDSTONE, *supra* note 10, at 286.

65. See RAE, *supra* note 11, at 88–89. Ford's competitors sought to satisfy a limited demand among wealthy customers for a vehicle with a serviceable life of approximately two years. *Id.*

66. BARNARD, *supra* note 16, at 60.

67. GOLDSTONE, *supra* note 10, at 224–26.

68. SORENSEN, *supra* note 39, at 28.

69. Other shareholders followed Malcolmson's lead and sold their shares to Ford, reducing the number of stockholders to seven. *Id.*

by original stockholder Albert Strelow, making Couzens second only to Ford as the largest shareholder with 11%.⁷⁰

Ford's "universal" vehicle, the Model T, was the first car manufactured on an assembly line.⁷¹ An endlessly moving chain attached to a power conveyor, the first assembly line began operating in October 1913. Instead of completing an entire vehicle at his own bench, each worker repeatedly performed only a single operation at his station as the chassis was dragged across the floor to the next worker, who did the same. The line was adjusted to a convenient height to keep workers from developing back pain.⁷² Cars were spaced and the line paced to speed up slow workers and slow down the swift.⁷³ Within the first year, the coordinated group effort reduced the time of assembly of a Model T from more than twelve hours under the stationary assembly system to one and one-half hours.⁷⁴

Arguably the most important social engineering innovation in the field of labor economics,⁷⁵ the five-dollar minimum wage for an eight-hour day was adopted on January 5, 1914 at a

70. GOLDSTONE, *supra* note 10, at 229. Strelow invested the \$25,000 he received from the sale of his shares to Couzens in a Canadian gold mine that went broke. *Id.* at 228.

71. The assembly line had previously been used in the meat packing industry and large bakeries. Automobile manufacturers had used it for sub-components, but not an entire vehicle. SORENSEN, *supra* note 39, at 33. The Model T ranks as the ninth best-selling car in history with 16.5 million units sold from 1908 to 1927. Tim Pitt, *The Best-Selling Cars of All Time*, MSN (Oct. 28, 2015), <http://www.msn.com/en-ca/autos/research/the-best-selling-cars-of-all-time/ss-BBjeoJJ>.

72. See CURCIO, *supra* note 1, at 71.

73. *Id.*

74. BAK, *supra* note 18, at 75. Ford recreated a truncated version of the moving automobile assembly line at the 1915 Panama-Pacific Exposition in San Francisco where it was one of the most popular exhibits. *Id.* at 40. "[A] Model T would actually come together from several piles of inert parts . . . Then, fueled, oiled, watered, and crank-started, it left the transfixed spectators' mouths agape as it motored nicely out into the courtyard to make a circuit around the statue of Neptune's daughter. It was no wonder that every Model T was sold on the spot . . ." SORENSEN, *supra* note 39, at 40. On opening day, fair officials asked Ford representatives to shut down the model assembly line temporarily until they could arrange for additional crowd control. NEVINS & HILL, *supra* note 55, at 1.

75. CURCIO, *supra* note 1, at 76.

meeting attended by Ford, Couzens and a handful of others.⁷⁶ John Dodge was among many who believed the Five-Dollar Day was Couzens' idea.⁷⁷ According to his biographer,⁷⁸ it was Couzens who conceived the plan and brought it to Ford's attention.⁷⁹ Couzens persisted in advocating for its adoption until he had overcome Ford's repeated objections.⁸⁰ Mindful of Ford's aversion to altruism and philanthropy,⁸¹ Couzens focused on economic justifications, describing the new policy as

76. BARNARD, *supra* note 16, at 90. As part of the policy, Ford created a "sociological department" to enforce a paternalistic program by which company investigators made home inspections to assure that workers adhered to standards of cleanliness and hygiene. Consumption of alcoholic beverages, and failure to save for the future or otherwise comport with character traits valued by Ford would result in disqualification for the new wage. WATTS, *supra* note 26, at 205. The plan was coupled with a policy of hiring handicapped workers. CURCIO, *supra* note 1, at 77. Couzens explained the rationale for why female workers were excluded from the plan. "The average woman employee cannot be regarded as a fixture in a business as a man can be. A woman will leave at almost any time, for almost any reason, and when she stays long enough to be a dependable worker, she is apt to get married and have someone else support her. It is the man we aim to benefit." BAK, *supra* note 18, at 69.

77. BARNARD, *supra* note 16, at 337 n.35. John Dodge attributed the five-dollar-a-day plan to Couzens in sworn testimony. SWARD, *supra* note 10, at 51. Reverend Samuel S. Marquis, dean of St. Paul's Cathedral in Detroit, who replaced the original head of the sociological department in 1915, testified under oath, "Mr. Couzens dared him to make the minimum pay five dollars a day, and Mr. Ford agreed." RAE, *supra* note 11, at 74. *See also* Wayne, *supra* note 15, at 823.

78. Despite conflicting evidence, a leading expert on the history of the Ford Motor Company supports Barnard's version of the story. LEWIS, *supra* note 8, at 69. *See also* WATTS, *supra* note 26, at 190.

79. BARNARD, *supra* note 16, at 89. Consistent with the strategy of keeping Ford's name in the public eye, Couzens abdicated the limelight and credited Ford with originating the idea. LEWIS, *supra* note 8, at 73. However, by 1915, Couzens was openly claiming credit. LEWIS, *supra* note 1, at 34.

80. BARNARD, *supra* note 16, at 89–90.

81. Journalist E. G. Pipp described Ford as being "as selfish a man as God permitted to breathe." REYNOLD M. WIK, *HENRY FORD AND GRASS-ROOTS AMERICA* 5 (1972). Couzens wrote about Ford, "[h]e has never given anything . . . to charity, and in fact declares against it." Letter from Couzens to Theodore H. Price (Sept. 22, 1916) (copy on file with author). "Ford claimed not to believe in charity, because, he argued, it took away a man's ambition and self-respect." CURCIO, *supra* note 1, at 159. Ford became involved in charitable enterprises later in life. *Id.* at 160–64.

a remedy for persistent problems of absenteeism and turnover.⁸²

The announcement of the Five-Dollar Day created pandemonium among business leaders, some of whom predicted bankruptcy. The *Wall Street Journal* reported that Ford was injecting “Biblical and spiritual principles into a field where they do not belong.”⁸³ The morning after the announcement, 10,000 men lined up in 10-degree weather outside the Ford plant looking for work.⁸⁴ Police deployed fire hoses to disperse the tumultuous mob of job applicants.⁸⁵

Relations between Ford and Couzens began to deteriorate in 1914. The previous year, while still serving as a company executive, Couzens had been appointed chairman of the Detroit Street Railway Commission. As public service consumed an increasing amount of Couzens’ time and attention, Ford complained about Couzens’ absence from the factory.⁸⁶

By 1915, Couzens’ disagreement with Ford’s aggressive pacifism led to a showdown.⁸⁷ In pamphlets and public state-

82. BAK, *supra* note 18, at 70. Ford was not having trouble recruiting workers at the prevailing wage rate of \$2.34 per day. Rather, the problem was an annual turnover of 370%, a 10% per day rate of absenteeism (anathema to the assembly line method of production), and the threat of unionization. Henderson, *supra* note 4, at 51–52; BARNARD, *supra* note 16, at 87. Muckraking journalist Ida Tarbell, who visited the Ford plant in 1913 to research a book, reported that Ford was hiring 60,000 employees per year to maintain a workforce of 12,000. *Id.* at 88. Turnover declined to 50% almost immediately after introduction of the plan, and to 15% within one year. Henderson, *supra* note 4, at 51. Ford wrote in his autobiography, “[t]he payment of five dollars a day for an eight-hour day was one of the finest cost-cutting moves we ever made” SWARD, *supra* note 10, at 75.

83. WATTS, *supra* note 26, at 193.

84. CURCIO, *supra* note 1, at 79.

85. Kawaguchi, *supra* note 19, at 505. Couzens announced a policy of giving preference in hiring to local residents in an attempt to stem the tide of job seekers who arrived in Detroit by freight train. SWARD, *supra* note 10, at 53.

86. BARNARD, *supra* note 16, at 100. Couzens had also taken time off to travel to California where his son had died in an accident when his new Model T plunged off a steep, narrow mountain road and sank in a lake below. PETER COLLIER & DAVID HOROWITZ, *THE FORDS: AN AMERICAN EPIC* 79 (1987).

87. That year Ford chartered a “Peace Ship” and, as head of a delegation he organized, sailed across the Atlantic in a quixotic publicity campaign to end the conflict in Europe. SORENSEN, *supra* note 39, at 44. While the typical reaction to the Peace Ship episode was ridicule, former President Theodore

ments, Ford blamed bankers and Jews for fomenting preparedness for World War I.⁸⁸ Couzens was incensed when Ford published his views about neutrality and non-involvement in the house organ, *Ford Times*, which Couzens believed was supposed to be under his control.⁸⁹ A proponent of military interventionism, Couzens argued that pacifist editorials published in Ford's name would alienate customers and cost the company sales.⁹⁰ Ford believed his stance resonated with the public.⁹¹ Their differences resulted in Couzens' resignation as an officer on October 12, 1915, although he remained a stockholder and director until 1919.⁹²

Relations between Ford and the Dodge brothers also deteriorated. In July 1913, the Dodges served notice that they would cease providing parts to Ford.⁹³ By letter to Couzens dated August 18, 1913, the brothers resigned as directors to manufacture their own car, larger and more expensive than the Model T.⁹⁴ The Dodges maintained their 10 percent interest as shareholders.⁹⁵

Roosevelt offered a harsh denunciation. "Mr. Henry Ford takes some of his fellow pacifists on a peace-junket to Europe, in the effort to bring about a peace more degrading to humanity than the worst war – a peace which would consecrate successful wrong, and trample righteousness in the dust." 18 THEODORE ROOSEVELT, *THE WORKS OF THEODORE ROOSEVELT* 271 (1926).

88. CURCIO, *supra* note 1, at 95.

89. COLLIER & HOROWITZ, *supra* note 86, at 79.

90. WATTS, *supra* note 26, at 227.

91. CURCIO, *supra* note 1, at 95.

92. *See infra* note 139 and accompanying text.

93. A year earlier Couzens had successfully brokered a delay of the Dodge brothers' split with Ford. Following Couzens' intervention, the Dodges agreed to reconsider their decision to cease providing parts to Ford and to resign as directors. Letter from John Dodge to Couzens (July 26, 1912), in Couzens Papers, *supra* note 47. Couzens informed Ford of Couzens' efforts to maintain the relationship with the Dodge brothers "in the same happy and harmonious condition as it exists today." Letter from Couzens to Henry Ford (July 29, 1912), in Couzens Papers, *supra* note 47. By this time Ford Motor Company had evolved from "a mere assembling plant . . . [to] a manufacturing plant, in which it made many of the parts of the car which in the beginning it had purchased from others." *Dodge v. Ford Motor Co.*, 170 N.W. 668, 670 (Mich. 1919).

94. By way of contrast with the Model T, the Dodge brothers described theirs as "a real automobile." CURCIO, *supra* note 1, at 93.

95. The Dodge brothers offered to sell their shares to Ford, but he refused to purchase them. *Dodge*, 170 N.W. at 675.

Profits from manufacturing parts for Ford, combined with their dividends, enabled the Dodge brothers to go into competition with Ford. Beginning in 1908, Ford Motor Company paid regular annual dividends of \$1.2 million per year. Between 1911 and 1915, Ford also paid special dividends totaling \$41 million.⁹⁶ The Dodges were relying upon future dividends to finance expansion of their own business.⁹⁷

In January 1916, after announcing a record profit of \$60 million, Ford disclosed his intent to pay only the usual dividend of \$1.2 million a year.⁹⁸ As the company had a cash surplus of over \$52 million in 1916,⁹⁹ stockholders could have expected to receive special dividends of at least \$25 million.¹⁰⁰ Instead, all but a small fraction of the company's profits would be reinvested to build a massive manufacturing facility, and iron smelting plant on the River Rouge in order to increase production,¹⁰¹ and to further lower the price of the Model T.¹⁰²

Ford's plans for expansion clashed with the Dodge brothers' assumption that the flow of dividends would not diminish. Couzens, whose more cautious approach to expansion had been a restraining influence on Ford, was no longer involved in the business.¹⁰³ In August 1916, Ford cut the price of the Model T to \$360, and announced a suppression of dividends.

96. *Id.* at 670.

97. CURCIO, *supra* note 1, at 94. Acknowledging receipt of notice of dividends in July 1914, John Dodge wrote, "They are certainly very appreciated and trust that you will not lose the habit." Letter from John Dodge to Couzens (July 24, 1914), in Couzens Papers, *supra* note 47.

98. HYDE, *supra* note 35, at 83.

99. *Dodge*, 170 N.W. at 670.

100. HYDE, *supra* note 35, at 83.

101. Ford denied the Dodge brothers' allegation that Ford's expansion plans included the purchase of iron ore mines in Michigan's Upper Peninsula or in Minnesota, and the acquisition or construction of ships to transport ore to the new smelter. *Dodge*, 170 N.W. at 671, 675.

102. *See id.* at 673-74. When first introduced in 1908, the Model T sold for more than \$900. *See id.* at 670. Annual adjustments thereafter reduced the cost to \$440 by 1916. *Id.* Ford's stated goal was to lower the price to \$220. CURCIO, *supra* note 1, at 103. Ford had never been able to satisfy customer demand for the Model T regardless of price. *Dodge*, 170 N.W. at 670.

103. "[T]he Dodges felt [Couzens] could be depended upon to control disbursements for expansion. He had always done so." NEVINS & HILL, *supra* note 55, at 23.

II. WHEELS OF JUSTICE

On the evening of November 1, 1916, Henry and Clara Fords' only son, Edsel, married Eleanor Lothian Clay, niece of Detroit department store magnate J. L. Hudson, at Hudson's mansion.¹⁰⁴ The Dodge brothers attended the wedding as guests of the bride's family.¹⁰⁵ It would be announced in the newspapers the following day that the Dodges had filed suit in Wayne County Circuit Court on November 2 against Ford for subordinating the goal of shareholder wealth maximization to other interests.

The Dodge brothers claimed Ford had increased wages unnecessarily for the benefit of employees, and sold cars more cheaply than necessary to benefit customers, both at the expense of profits and to the detriment of the company's shareholders. Their complaint sought to require Ford to distribute 75% of the company's cash surplus, or about \$39 million, as dividends. On the day suit was filed, at the Dodges' request, the court issued an order temporarily restraining the use of company funds for construction of the River Rouge assembly plant.¹⁰⁶

Ford wasted no time before litigating the case in the media. He called E. G. Pipp, editor-in-chief of the *Detroit News*,¹⁰⁷ which reported on November 4 that Ford said, "I do not believe that we should make such an awful profit on our cars. A reasonable profit is right, but not too much. So it has been my policy to force the price of the car down as fast as production would permit and give the benefits to users and laborers with resulting surprisingly enormous benefits to ourselves."¹⁰⁸

104. *Id.* at 86.

105. Ford conversed amiably with the Dodges at the reception. *See* COLLIER & HOROWITZ, *supra* note 86, at 62.

106. NEVINS & HILL, *supra* note 55, at 88. On December 22, the state supreme court lifted the injunction on the condition of the company posting a \$10 million bond. *Id.* at 98. Ford had no trouble posting the bond. The Bank of Detroit immediately expressed willingness to provide the bond at no cost if the company maintained a corresponding balance in an interest-bearing account at the bank. Letter from E. O. Rice to Couzens (Dec. 23, 1916), *in* Couzens Papers, *supra* note 47.

107. Smith, *supra* note 3, at 317.

108. Kawaguchi, *supra* note 19, at 517.

Trial began on May 21, 1917 before Circuit Judge George S. Hosmer.¹⁰⁹ Ford's cross-examination by Elliott G. Stevenson, counsel for the Dodges, occupies more than a third of the record.¹¹⁰ In his questioning, Stevenson seized upon Ford's statement published in the *Detroit News*. Ford doubled down, saying not only that the goal of the business was to consider a wide range of constituencies, but also that the shareholders' interests should not be considered primary to others.¹¹¹

STEVENSON: Now, I will ask you again, do you still think that those profits were awful profits, and not right?

FORD: Well, I guess I do, yes.

STEVENSON: And for that reason you were not satisfied to continue to make such awful profits?

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

STEVENSON: [A]re you trying to keep them down? What is the Ford Motor Company organized for except profits, will you tell me, Mr. Ford?

FORD: Organized to do as much good as we can, everywhere, for everybody concerned . . . [a]nd incidentally make money.

STEVENSON: Incidentally make money?

FORD: Yes, sir.¹¹²

With Ford seemingly on the defensive, Stevenson committed a classic trial lawyer's mistake, asking one question too many after receiving a favorable answer from a hostile witness:¹¹³

109. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 668, 677 (Mich. 1919).

110. NEVINS & HILL, *supra* note 55, at 98.

111. Ford's testimony has been described as "among the worst testimony given by any corporate defendant in any trial at any time." Henderson, *supra* note 4, at 61.

112. Kawaguchi, *supra* note 19, at 538, 544.

113. This rule, known as "Younger's Ninth Commandment on Cross Examination," is attributed to famed trial advocate Irving Younger. See IRVING YOUNGER, *THE IRVING YOUNGER COLLECTION: WISDOM & WIT FROM THE MASTER OF TRIAL ADVOCACY* 463 (Stephen D. Easton ed., 2010). The most common example is likely apocryphal: "Q: So, if you didn't see my client bite

STEVENSON: But your controlling feature . . . 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?

FORD: If you give all that, the money will fall into your hands; you can't get out of it.¹¹⁴

Thankfully for him, Stevenson *was* able to get Ford to make a serious admission which arguably cost Ford the case. In response to questioning, Ford testified that he had made up his mind not to pay any more dividends except regular dividends "for the present."¹¹⁵ Had Ford been willing to commit to a time certain for ending the suspension, it would have made for a much stronger case.¹¹⁶

STEVENSON: For how long? Had you fixed in your mind any time in the future when you were going to pay—

FORD: No.

STEVENSON: That was indefinite in the future?

FORD: That was indefinite; yes, sir.¹¹⁷

On October 31, 1917, in a 23-page opinion,¹¹⁸ Judge Hosmer ordered Ford to pay \$19,275,385 in dividends, 50% of the company's cash surplus, and permanently enjoined further use of company resources to finance construction of the River Rouge plant.¹¹⁹

Ford appealed to the Michigan Supreme Court the following day.¹²⁰ On February 7, 1919 the court issued its decision in *Dodge v. Ford*. Describing Ford as the "dominant force" in the company, Chief Justice Russell C. Ostrander cited the follow-

off the victim's nose, how do you know he did it? A: Because I saw him spit it out."

114. Kawaguchi, *supra* note 19, at 544.

115. *Id.* at 527.

116. NEVINS & HILL, *supra* note 55, at 100.

117. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683 (Mich. 1919).

118. Kawaguchi, *supra* note 19, at 575–76.

119. *Dodge*, 170 N.W. at 677.

120. The Dodges did not appeal the trial court's decision. *Id.* at 678.

ing pretrial publicity as reflecting Ford's attitude that shareholders "should be content to take what he chooses to give."¹²¹

"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."¹²²

According to the court, Ford's testimony "creates the impression . . . that he thinks the Ford Motor Company has made too much money, has had too large profits, and . . . 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"¹²³

Justice Ostrander's opinion is most frequently cited for the following proposition, one of the most iconic passages in the history of corporate law:

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.¹²⁴

The language for which *Dodge v. Ford* is most often cited is dicta.¹²⁵ The state supreme court reversed the trial court's decision to enjoin the proposed expansion of the company's

121. *Id.* at 683.

122. *Id.* at 671.

123. *Id.* at 683–84.

124. *Id.* at 684. Justice Ostrander expressly acknowledged that directors have implied power to authorize "an incidental humanitarian expenditure of corporate funds for the benefit of the [employees]." *Id.* Thus, the opinion limits the extent to which directors can subordinate shareholder profit to other concerns, rather than imposing a duty to exclusively engage in profit maximization. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 774 (2005).

125. Stout, *supra* note 3, at 165.

manufacturing capacity.¹²⁶ Although the decision never uses the phrase “business judgment rule,” the analysis foreshadows this doctrine. Saying that “judges are not business experts,”¹²⁷ Justice Ostrander implicitly acknowledged that judicial interference would have a chilling effect on business decision-making. His opinion provides the rationale for why the considered decisions of corporate managers that are plausibly related to a rational business purpose should be shielded from judicial second-guessing. “It is recognized that plans must often be 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. . . . 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.”¹²⁸

The court affirmed the trial court’s decision to require the issuance of a portion of the dividend requested by the Dodge brothers.¹²⁹ Again, while the decision never uses the phrase “minority oppression,” the analysis is prophetic. First, the court noted Ford’s position as controlling stockholder. “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.”¹³⁰ Next, the court posited the fiduciary duty of good faith owed by a controlling stockholder not to oppress the minority stockholders in the context of a closely held corporation. “There should be no confusion . . . 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.”¹³¹

We may never know with certainty why Ford insisted on litigating the case to a finish. Anxious to begin production of their own vehicles, the prospect of a lengthy trial and certain appeal would likely have motivated the Dodges to accept a settlement that would have permitted construction of the River

126. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919).

127. *Id.* at 684.

128. *Id.*

129. *Id.* at 685.

130. *Id.* at 683.

131. *Id.* at 684.

Rouge plant, and accommodated Ford's stated goal of further reducing the price of the Model T.¹³²

It is conventional wisdom among historians and legal scholars that Ford was motivated by resentment over the Dodge brothers' using dividend income to compete. Denying the Dodges access to cash would make it more expensive for them to finance expansion of a rival company. But Ford surely realized that the Dodges' intended vehicle would not be in direct competition with Ford's.¹³³ And, even if it were, Ford understood that an attempt to monopolize the market would raise antitrust problems.¹³⁴

There is a similar consensus that Ford's otherwise inexplicable litigation strategy was motivated by political ambition.¹³⁵ Ford viewed litigation as part of a personal and corporate branding strategy to enhance his public image as a folk hero, and to stimulate demand for his product through media attention.¹³⁶ The case presented Ford with a timely opportunity to strengthen his appeal as a populist.¹³⁷

132. Financing construction of the River Rouge assembly plant was never an issue. Ford Motor Company was debt-free at the time of the litigation. *Id.* at 670. The company spent more than \$60 million on construction throughout the litigation. JARDIM, *supra* note 13, at 112. Even after payment of the special dividend the Dodges demanded, the company had sufficient cash surplus to complete construction. *Id.* at 107.

133. Ford Motor Company was engaged in the business of manufacturing low-priced automobiles. *Dodge*, 170 N.W. at 673. Ford was aware that the Dodges' product, priced at almost twice the cost, would not compete with the Model T. SWARD, *supra* note 10, at 67.

134. CLARK, *supra* note 6, at 604.

135. See LEWIS, *supra* note 8, at 102. Ford likely would have prevailed had he been willing to testify that lowering the price of cars was intended to boost profits by increasing sales volume. Instead he took the unnecessarily candid and indefensible position in pretrial comments and testimony that stockholders had made "enough" money, and that consumers and workers deserved to benefit at stockholders' expense, an altruistic position whose sincerity is belied by his reputation. See BARNARD, *supra* note 16, at 90.

136. Henderson, *supra* note 4, at 53-54. Litigation with George Selden, inventor of the gasoline-powered engine, lasted seven years until a trial court decision that Ford had infringed upon Selden's patent was reversed on appeal in 1911. BARNARD, *supra* note 16, at 68. Ford sued the *Chicago Tribune* for defamation after it published an editorial under the headline, "Ford is an Anarchist," falsely claiming that Ford employees would forfeit their jobs if they reported for duty after President Wilson mobilized the national guard during a conflict with Mexico in June 1916. After a four-month trial, a jury returned a verdict for the plaintiff, and awarded Ford damages of 6 cents.

It is likewise accepted that Ford's suspension of dividends was the first step in a squeeze-out plan. Before the trial began, Ford announced that he and Edsel would start a new company to build a cheaper vehicle than the Model T. As intended, this thinly disguised effort at intimidation created panic among the minority stockholders.¹³⁸ Announcement of Ford's intention to compete eliminated any possibility of trying to sell a minority interest in Ford Motor Company on the open market. Ford then announced a tender offer, on the condition that he acquire 100% of the shares. By July 1919, Ford had arranged to buy the minority stockholders' shares for \$106 million,¹³⁹

NEVINS & HILL, *supra* note 55, at 129–39. Ford's involvement in high-profile litigation made good copy and created strong feelings of loyalty among the general public. WIK, *supra* note 81, at 51. "Ford's well-publicized views were enthusiastically received by millions of people. . . . [T]hey served immeasurably to identify the industrialist with the best interests of the common man." LEWIS, *supra* note 8, at 101. Couzens and Ford agreed about the value of litigation as a means of enhancing the Ford legend by influencing public opinion and attitudes about Ford. *Id.* at 24. Otherwise, Couzens was scornful about publicity generally, describing it as "propaganda." Letter from Couzens to I. G. English (Jan. 16, 1917), in Couzens Papers, *supra* note 47. "[M]ost all kinds of publicity that can be given a car cannot, in any respect, equal the results from the performance of the car itself. Most publicity is superfluous, and I think most companies spend entirely too much money for publicity, in fact, much more than is necessary. . . . [T]he product itself is the best kind of advertising." Letter from Couzens to John Dodge (Feb. 17, 1917), in Couzens Papers, *supra* note 47.

137. A calculated public relations campaign cast Ford as an everyman by way of contrast with robber barons of the period, such as Carnegie, Mellon, and Rockefeller. Henderson, *supra* note 4, at 50. According to a story planted in a California newspaper, "Personally there is not much outward difference between Henry Ford, maker and dispenser of millions, and many of his workmen. Money has not made the slightest difference in his habits, his manner of life, or his friendships." *Id.*

138. NEVINS & HILL, *supra* note 55, at 107.

139. Ford paid \$12,500 per share, except to Couzens who held out until he was offered \$13,000 per share in consideration for his services as an officer. *Id.* at 109. Couzens received \$29.3 million. His sister, a school teacher, received \$262,000 in return for her \$100 investment. BAK, *supra* note 18, at 107. Including dividends, Couzens' investment yielded about \$40 million. George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and its Staff*, 66 TAX L. REV. 787, 815 (2013).

estimated to be far below market value.¹⁴⁰ Ford reportedly danced a jig when he learned of the final agreement.¹⁴¹

But Ford had another powerful motivation for suspending dividends, which will be explored in Part III.

III.

THE SIXTEENTH AMENDMENT AND THE GREAT WAR

Tax avoidance was likely the critical motivation for Ford's decision to suspend dividends.¹⁴² To understand why requires a brief digression into the history of the modern graduated income tax. An assumed part of contemporary American life, the progressive income tax—taxing higher incomes at higher marginal tax rate—traces its origin to the 16th Amendment and the mass mobilization for World War I.¹⁴³

Averse to taxation generally,¹⁴⁴ the Founders viewed taxing individuals directly as a last resort, to be implemented only during wartime or other emergencies.¹⁴⁵ Before the Civil War, and for a brief period thereafter, the federal government's

140. SWARD, *supra* note 10, at 73. Shortly after the 1919 sale, Ford received a \$1 billion offer for the company, representing four times the per share value paid to Couzens. LACEY, *supra* note 35, at 176.

141. LEWIS, *supra* note 8, at 103.

142. This is the first article to advance this theory, although suggestions that Ford was motivated by tax avoidance appear in passing references in the literature on *Dodge v. Ford*. See Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 435 n.128 (2002); WILLIAM A. KLEIN ET AL., TEACHER'S MANUAL FOR BUSINESS ASSOCIATIONS 190 (8th ed. 2012); Henderson, *supra* note 4, at 66, 73. To avoid taxes, Ford would later create one of the world's largest foundations. William S. Dietrich II, *In the American Grain: The Amazing Story of Henry Ford*, PITTSBURGH QUARTERLY (2011), <https://pittsburghquarterly.com/pq-people-opinion/pq-profiles/item/376-in-the-american-grain.html>.

143. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

144. Thomas Paine famously warned against "the greedy hand of government thrusting itself into every corner and crevice of industry. . . . It watches prosperity as its prey and permits none to escape without a tribute." THOMAS PAINE, THE RIGHTS OF MAN, PART II, at 14–15 (1792).

145. See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes'*, 33 ARIZ. ST. L.J. 1057, 1077–78 (2001). Article 1, Section 2 provided that direct taxes had to be apportioned among the states by population. U.S. CONST. art. I, § 2, cl. 3.

principal source of income was tariffs and excise taxes collected on imported goods.¹⁴⁶ Increasing the price of consumer goods by as much as 50%,¹⁴⁷ tariffs operate as an indirect form of taxation in the nature of a silent sales tax. Because the poor spend a larger percentage of their income on basic goods than the affluent, the burden of consumption-based taxes falls more heavily on the less wealthy segments of society, making the tariff system highly regressive.¹⁴⁸

The Civil War prompted enactment by Congress of the first progressive national income tax in 1861. Annual incomes above \$600 were taxed at a rate starting at 3%, with increasing percentages on income above \$10,000.¹⁴⁹ The Civil War era income tax was repealed in 1872. In 1894, Congress enacted a 4% tax on annual income above \$4,000, but it was struck down as unconstitutional by the Supreme Court in 1895 in the so-called *Income Tax Cases*.¹⁵⁰

Following the Supreme Court's invalidation of the 1894 income tax, a coalition of Democrats and progressive Republicans sought to firmly establish the federal government's authority to levy a direct tax on individual and corporate incomes. On July 12, 1909, Congress passed a joint resolution proposing a constitutional amendment enabling enactment of a federal income tax, and sent it to the states for consideration.¹⁵¹

Proponents of ratification portrayed the old tariff system as a perpetual subsidy of tycoons by the working class. The amendment was successfully marketed to the public as a way to

146. STEVEN R. WEISMAN, *THE GREAT TAX WARS* 21 (2002).

147. *Id.* at 6.

148. "A tariff falls 'upon consumption and not upon wealth, upon what one eats and wears and not upon his property; it means that the citizen who can scarcely provide food and raiment for his wife and children contributes as much or more to the support of the Government as does the multimillionaire.'" Jensen, *supra* note 145, at 1125 (quoting Rep. Adam M. Byrd of Mississippi during floor debate in 1909).

149. See Revenue Act of 1862, ch. 119, §§ 89–93, 12 Stat. 432, 473–75.

150. *Pollock v. Farmer's Loan & Tr.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895). The *Income Tax Cases* were heard and decided twice by a 5–4 margin.

151. J. JACKSON OWENBY, *THE UNITED STATES CONSTITUTION (REVISITED)* 320 (2011). "[T]here was a floor debate on whether to put a 10 percent cap in the constitutional amendment. The answer was no—largely because people thought the idea that the tax might ever rise that high too absurd to address." AMITY SHLAES, *THE GREEDY HAND* 181 (1999).

make families like the Vanderbilts, Mellons, Carnegies, and Rockefellers pay an equitable share of the cost of funding the federal government.¹⁵² The required three-fourths of the states ratified the 16th Amendment within four years.¹⁵³

On April 8, 1913, President Woodrow Wilson appeared before a joint session of Congress to introduce a bill calling for a progressive income tax.¹⁵⁴ The House passed the income tax bill on May 8, 1913.¹⁵⁵ The Senate followed suit four months later.¹⁵⁶ President Wilson signed the bill into law on October 3, 1913.¹⁵⁷

Intended to be experimental in nature, a combination of low rates and high exemption amounts was designed to minimize the number of people affected by what President Wilson and Congress expected would be an unpopular law, and to permit the governmental infrastructure necessary to administer the law to develop.¹⁵⁸ The 1913 Act imposed a 1% base tax on net income and a surtax, ranging from 1–6%, on income above certain thresholds.¹⁵⁹ However, a generous exemption (equal to \$90,000 in current value) meant that only about 2% of households paid any tax at all.¹⁶⁰ It was well understood at the time that the 1913 Act was intended to be only a preliminary step in what would gradually evolve into a more comprehensive, and remunerative, tax regime.¹⁶¹

Eruption of war in Europe, and eventual U.S. intervention, thwarted the plan for incremental development of federal income taxation.¹⁶² Known variously as the “Great War”

152. Jensen, *supra* note 145, at 1124–26.

153. *Brief History of IRS*, IRS, <http://www.irs.gov/about-irs/brief-history-of-irs> (last visited Jan. 24, 2018).

154. JOSEPH L. GARDNER, *DEPARTING GLORY: THEODORE ROOSEVELT AS EX-PRESIDENT* 316 (1973).

155. WEISMAN, *supra* note 146, at 278.

156. *Id.* at 280.

157. Sheldon D. Pollock, *Origins of the Modern Income Tax, 1894–1913*, 66 *TAX LAW.* 295, 327 (2013).

158. Yin, *supra* note 139, at 791 n.27.

159. Revenue Act of 1913, Pub. L. No. 63-16, § 2, 38 Stat. 114, 166. A unanimous Supreme Court upheld the constitutionality of the Revenue Act of 1913. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916) (rejecting a contention that the rate structure of the 1913 income tax violated the due process clause of the Fifth Amendment).

160. Yin, *supra* note 139, at 790.

161. *Id.* at 791–92 n.27.

162. *Id.* at 793.

and the “War to End All Wars,”¹⁶³ World War I was triggered by the assassination of the Austro-Hungarian Archduke Franz Ferdinand and his wife in Sarajevo on June 28, 1914.¹⁶⁴ President Wilson pledged strict and impartial neutrality.¹⁶⁵ However, public opinion grew increasingly negative toward Germany following the sinking of the Cunard passenger liner *Lusitania* off the Irish coast without warning on May 7, 1915, resulting in the deaths of 1,198 civilian passengers, including 128 Americans.¹⁶⁶

Although he narrowly won re-election to a second term as President in November 1916 under the slogan, “He Kept Us Out of War,”¹⁶⁷ subsequent events forced Wilson’s hand. In January 1917, German U-boats began sinking American merchant ships in the North Atlantic without warning.¹⁶⁸ Public opinion tilted toward intervention.¹⁶⁹ Faced with a direct challenge to the U.S., a reluctant Wilson appeared before a joint session of Congress on April 2, 1917 to ask for a declaration of war against Germany.¹⁷⁰ “The world must be made safe for democracy,” Wilson urged.¹⁷¹

163. Often attributed to Wilson, the phrase was first used by British author H.G. Wells in advocating for mobilization against German militarism. Erik Sass, “*The War to End All Wars*,” MENTAL FLOSS: ENT. (Aug. 16, 2014), <http://mentalfloss.com/article/58411/wwi-centennial-war-to-end-all-wars>.

164. GARDNER, *supra* note 154, at 320.

165. In a proclamation issued on August 6, 1914, Wilson called upon his fellow citizens to be “impartial in thought as well as in action.” *Id.* at 321.

166. WEISMAN, *supra* note 146, at 295. It was discovered that the *Lusitania*’s cargo consisted almost solely of military supplies. GARDNER, *supra* note 154, at 335.

167. Henry L. Stimson, *Introduction to XXI THEODORE ROOSEVELT, THE WORKS OF THEODORE ROOSEVELT*, at xiv (1926).

168. ARTHUR HERMAN, 1917: LENIN, WILSON, AND THE BIRTH OF THE NEW WORLD DISORDER 99 (2017). The German High Command calculated that, by sinking 600,000 tons of Allied and neutral merchant marine shipping per month, Great Britain would run out of ships and be forced to the peace table before the United States could effectively intervene in the war. *Id.* The chief of the German Admiralty staff assured the Kaiser, “I give your majesty my word as an officer that not one American will land on the Continent.” *Id.* The Kaiser was hopeful this decision would be the final decisive stroke of the war. By provoking U.S. entry into the conflict, the decision indeed changed the course of the war, although not in the way the Kaiser intended. *Id.* at 100–01.

169. GARDNER, *supra* note 154, at 365.

170. HERMAN, *supra* note 168, at 147.

171. *Id.* at 149.

Long believing it was kept safe by the Atlantic and Pacific Oceans, and with no tradition of maintaining a large peacetime army, the U.S. was underprepared for large-scale intervention in Europe.¹⁷² American industry had no experience in making artillery, military vehicles, tanks or airplanes.¹⁷³ Even as the war raged on for two years, Wilson remained reluctant to increase the size of the military.¹⁷⁴

The country was fortunate to be able to draw upon the new income tax at this moment of crisis.¹⁷⁵ In a significant policy decision that would influence the tax system for generations, Congress opted for a progressive approach to financing the cost of mass mobilization for war.¹⁷⁶ In 1916, Congress raised the base tax to 2%, and surtax rates to a maximum of 13%.¹⁷⁷ In 1917, Congress increased the maximum surtax rate to 63%,¹⁷⁸ and again in 1918 to 65%.¹⁷⁹ Between 1913 and 1918, the base rate on individuals increased from the original 1% to 12%. In five years, the maximum combined individual income tax rate rose from 7% to an unprecedented 77%.¹⁸⁰ The change in income tax rates during this period is starkly

172. Winston Churchill noted that Great Britain similarly relied upon her island position in forbearing from conscription to maintain military readiness during peacetime. WINSTON S. CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE GREAT DEMOCRACIES* 302 (1958).

173. HERMAN, *supra* note 168, at 253. "Henry Ford, for example, had promised thousands of tanks coming out of his new factory at River Rouge. The war ended long before any were made." *Id.* at 254. American soldiers fought with British-made weapons; pilots flew French-built aircraft. *Id.*

174. See ROOSEVELT, *supra* note 87, at 265-74. Wilson's guiding principle was "that preparation tends to invoke war, and therefore that war can be avoided by abstention from preparation." Stimson, *supra* note 167, at xv.

175. The 1913 income tax has been described as one of the most opportune statutes ever passed by Congress. Yin, *supra* note 139, at 795 n.43. Cordell Hull, a Congressman from Tennessee and later Secretary of State under Franklin D. Roosevelt, wrote, "The income-tax law had been enacted in the nick of time for the demands of the war." WEISMAN, *supra* note 146, at 305.

176. World War I would eventually cost the United States about \$16 billion. WEISMAN, *supra* note 146, at 336. The size of the federal budget increased from \$742 million in 1916 to almost \$14 billion in 1918. *Id.*

177. Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756.

178. Revenue Act of 1917, Pub. L. No. 64-377, 39 Stat. 1000.

179. Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057.

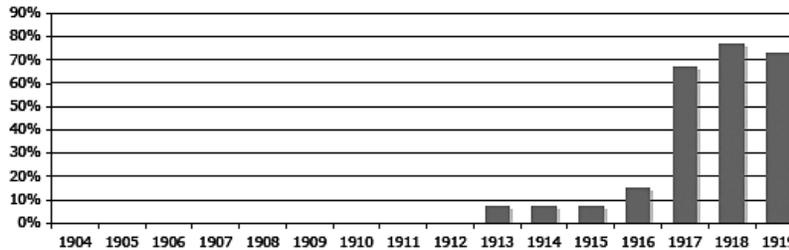
180. "Never before, in the annals of civilization, has an attempt been made to take as much as two-thirds of a man's income by taxation." WEISMAN, *supra* note 146, at 328 (quoting Edwin R.A. Seligman). The Bureau of

summarized in Table 1 below. Table 2 illustrates the dramatic changes in marginal income tax rates during the Ford Motor Company's formative years.

TABLE 1: CHANGE IN INCOME TAX RATES BETWEEN
1913 AND 1918

	1913	1918
Base Tax on Individuals	1% on net income	6% on net income up to \$4000 12% on additional net income
Surtax on Individuals	1% to 6%, beginning at net income over \$20,000	1% to 65%, beginning at net income over \$5000

TABLE 2: FEDERAL MARGINAL INCOME TAX RATE



Known for his “instinctive feel for nuances of public mood,”¹⁸¹ Ford would have sensed the shift in opinion toward preparedness. His personal diplomatic effort, the Peace Ship episode, ended in failure in December 1915.¹⁸² The growing inevitability of U.S. intervention in the Great War surely would require the government to raise revenue on a different order of magnitude than was generated by the 1913 Act. Ford and Couzens together would receive 70% of any dividends, on which they would owe an increasing share in taxes. Did the prospect of dramatically higher tax rates weigh on Ford’s mind when he announced the decision to suspend dividends in January 1916?

Internal Revenue expanded from 4,000 to 15,800 employees between 1913 and 1920. *Id.* at 319–20.

181. GOLDSTONE, *supra* note 10, at 100.

182. See COLLIER & HOROWITZ, *supra* note 86. Ford’s opposition to the war seemed to harden, and his stubbornness to intensify, as a result of the ridicule his project encountered. NEVINS & HILL, *supra* note 55, at 54.

Although entirely legal,¹⁸³ tax avoidance is typically not the subject of a paper trail, particularly for taxpayers with political aspirations, and especially during wartime exigency.¹⁸⁴ The evidence that Henry Ford was motivated by tax avoidance is necessarily circumstantial.

It explains the strange disassociation of the principals from the litigation. While their counsel clashed “almost savagely,” Ford and the Dodges were courteous in their references to each other on the witness stand, and the suit did not rupture the social relationships among their families.¹⁸⁵ Might Ford have been grateful to the Dodge brothers for helping to preserve Ford’s political viability by providing him with a convenient cover story for the suspension of dividends during wartime?¹⁸⁶

It explains why Couzens, and other stockholders similarly situated, did not side with the Dodges in demanding payment of dividends in the immediate prewar period, when Congress

183. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff’d* 293 U.S. 465 (1935). According to Learned Hand, “Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.” *Id.* “Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands.” *Comm’r v. Newman*, 159 F.2d 848 (2d Cir. 1947) (Hand, J., dissenting).

184. If only by accident of birth, Couzens’ political aspirations were necessarily less ambitious than Ford’s. *See supra* note 20 and accompanying text.

185. *See NEVINS & HILL, supra* note 55, at 95. There is reason to believe that the Dodge brothers may have been stalking horses for powerful steel firms seeking to protect their monopoly position by thwarting Ford’s plans to develop his own smelting capacity, or other powerful interests alienated by Ford’s campaign against U.S. involvement in World War I. Henderson, *supra* note 4, at 57. From 1915 until the time of the Michigan Supreme Court decision in 1919, the Dodges’ production increased from 18,000 to 120,000 units. Their sales rose from \$11 million to \$120 million, and their profits from \$300,000 to \$24 million. “The reason the dividend they demanded did not really matter to the Dodges is they could (and did) easily raise funds from other sources . . .” *Id.* at 56.

186. Ford received a letter from the Dodges in September 1916 threatening to sue if Ford did not resume the payment of dividends. “Ford rebuffed the Dodges’ demand without response or acknowledgment. This is unusual and seems designed to invite conflict.” Henderson, *supra* note 4, at 56.

could be expected to roll back wartime tax rates at the end of hostilities.¹⁸⁷

It explains Couzens' uncharacteristic reaction to the Dodges' complaint. Although personally named as a defendant in his capacity as a director, Couzens never filed an answer or other responsive pleading.¹⁸⁸ Failing to answer a complaint bespeaks untidiness and leaves loose ends. Couzens was punctilious, if not obsessive, about responding promptly to every piece of correspondence, even the most mundane letter seeking a job reference, or a political or philanthropic contribution.¹⁸⁹ But how could Couzens respond to the Dodges' allegations and preserve his intellectual honesty?¹⁹⁰ Couzens, who actually believed in altruism and progressive policies towards workers, may have decided it was better to remain mute than to dissemble about the rationale for discontinuing dividends on the public record.¹⁹¹

187. A series of tax cuts in the 1920s reduced the top marginal income tax rate from a war-era high of 77% to 24% by 1932. WEISMAN, *supra* note 146, at 351.

188. Couzens ignored a telegram from Ford's lawyer warning that, by failing to answer the complaint, Couzens would be deemed to have acknowledged the truth of the Dodge brothers' allegations. Telegram from Alfred Lucking to Couzens (Dec. 15, 1916), *in* Couzens Papers, *supra* note 47. Lucking followed up by sending Couzens a copy of an affidavit by Ford's chief construction engineer describing the loss that would result to the company from a delay in the construction schedule, including damages for breach of contracts with members of the building trades. Affidavit of William B. Mayo, *in* Couzens Papers, *supra* note 47.

189. BARNARD, *supra* note 16, at 51.

190. Couzens was described by a writer in the *New Republic* as the "perfect example of the honest man in politics . . . the most intellectually honest man . . . in Washington." *Id.* at 324.

191. Couzens' ambivalence on the subject of dividends is evident in his response to an inquiry about a possible sale of his shares. In September 1916, Couzens received a letter from a New York City attorney and business broker posing what the writer described as a "hypothetical question": "If John D. Rockefeller could be induced to buy a minority interest in the Ford Company for the Rockefeller Foundation, do you think Mr. Ford could be induced to give any assurance with respect to the declaration of dividends, provided he were satisfied that the income derived from the stock so purchased would be devoted to the philanthropic purposes for which the Rockefeller Foundation was established?" Letter from Theodore H. Price to Couzens (Sept. 22, 1916), *in* Couzens Papers, *supra* note 47. Couzens responded cryptically. "I do not believe there is any inducement that would get [Ford] to declare himself as to dividends. I do not blame him for this, particularly, because conditions and earnings enter materially into that question and I

Couzens, a social friend of the Dodge brothers,¹⁹² and by then openly antagonistic to Ford, remained strictly neutral.¹⁹³ When compelled to comment on the case, Couzens was non-committal.¹⁹⁴ His ambivalence is understandable. Couzens was the second largest beneficiary of Ford's decision to suspend dividends. However, unlike Ford, Couzens believed in preparedness and intervention. The relatively low amount of taxes paid by Couzens in the period following his resignation from Ford Motor Company, notwithstanding the high rates in effect for much of this period, would be a source of vulnerability for Couzens in his political career.¹⁹⁵

The outcome of the case found Couzens at the center of a flurry of stockholder correspondence and activity, none of which involved who won or who lost, or the implication of the

think it would be unwise for anyone to commit themselves, for any period of time, in any such proposition. If I were competent to answer at all, I would answer 'no'." Letter from Couzens to Theodore H. Price (Sept. 1916), *in* Couzens Papers, *supra* note 47.

192. Couzens helped the Dodge brothers gain admission to elite society, despite their well-deserved reputation as hard partiers. "Grosse Pointe society would have nothing to do with them because of all the trouble that they had in the bars of Detroit." David Zatz, *John and Horace Dodge: From Building Fords to Dodge Brothers*, ALLPAR (Aug. 20, 2017), <https://www.allpar.com/corporate/bios/dodge-brothers.html>. Couzens facilitated John Dodge's election to membership in the prestigious Detroit Club, for which the latter expressed gratitude. "[I] sincerely hope that when in the Club I will behave myself well enough so that you will never have any regrets." Letter from John Dodge to Couzens (July 5, 1917), *in* Couzens Papers, *supra* note 47.

On the eve of the filing of the complaint in *Dodge*, Couzens was arranging Horace Dodge's membership. In a cover letter forwarding a blank application, Couzens wrote, "If you will sign this and return it to me I will be very glad to propose your name and get a second to it. I know the Club will be glad to have you with them, and I will be very glad to be instrumental in getting you." Letter from Couzens to Horace Dodge (Nov. 1, 1916), *in* Couzens Papers, *supra* note 47. Horace Dodge promptly returned the completed application to Couzens. Letter from Horace Dodge to Couzens (Nov. 3, 1916), *in* Couzens Papers, *supra* note 47.

193. NEVINS & HILL, *supra* note 55, at 95.

194. Responding to a newspaper editor who had made Couzens aware of an editorial critical of Henry Ford, Couzens wrote, "I am neutral on the question of the suit between Messrs. Dodge Brothers and Mr. Ford. . . . It has been my desire from the beginning to have the whole controversy settled out of court, but both sides seemed to be determined to go through with it to a finish." Letter from Couzens to I. G. English (Dec. 27, 1916), *in* Couzens Papers, *supra* note 47.

195. *See infra* note 209.

decision for corporate governance or shareholder primacy. The focus was exclusively on how to minimize the tax consequences of what the stockholders described as the "Big Dividend."¹⁹⁶ One suggested that the dividend be payable out of cash surplus accumulated prior to enactment of the 1913 Act, so as to be exempt from taxation entirely.¹⁹⁷ Ultimately, the board of directors adopted a resolution specifying that the dividend ordered by the court be paid out of accumulated cash surplus on hand on August 1, 1916, so as to be taxable at the maximum rate of 15% then in effect.¹⁹⁸

CONCLUSION

There were no losers in *Dodge v. Ford*. Construction of the River Rouge assembly plant was not interrupted.¹⁹⁹ In a Solo-

196. Memorandum Regarding the Year in Which the So-Called "Big Dividend," Being the Dividend Declared as the Result of the Decree in the Case of Dodge vs. Ford, is to be Treated as Income to the Stockholders, and is to be Taken Out of the Invested Capital of the Corporation, *in Couzens Papers*, *supra* note 47.

197. "The first chance you get to have a talk with Mr. Couzens, in view of the outcome of the Dodge Bros.-Ford litigation in ordering distribution to stockholders of nearly \$20,000,000.00 from accumulated surplus, I wish you would please urge upon him, as one of the Directors who will be called upon to pass the resolution declaring such dividend . . . the great importance of having the phraseology of the same worded that there can be left no doubt as to WHEN the surplus from which such dividend was declared payable, was accumulated. . . . If, for example, there was in the Treas. of the corporation, on March 1st, 1913, \$20,000,000.00 . . . then a resolution expressly setting forth the fact that such dividend be paid out of surplus accumulated prior to March first, 1913, would make the dividend tax exempt in the hands of the recipient." Letter from John W. Anderson to Henry S. Morgan, Gen. Sec'y of Couzens (Feb. 14, 1919), *in Couzens Papers*, *supra* note 47. Morgan informed Anderson that, at Couzens' request, Morgan had called on Lucking. "Mr. Lucking assured me that the resolution to be passed would be properly worded so as to positively cover the year in which the various amounts accrued, and I, therefore, believe we should have no worry regarding this." Letter from Henry S. Morgan to John W. Anderson (Feb. 20, 1919), *in Couzens Papers*, *supra* note 47. Anderson reiterated that, while tax rates for 1913, 1914 and 1915 are the same, there was an increase in 1916, and "there was a very considerable increase in the 1917 rate." Letter from John W. Anderson to Henry S. Morgan (Mar. 3, 1919), *in Couzens Papers*, *supra* note 47.

198. The court-ordered dividends were distributed on July 10, 1919. Couzens Papers, *supra* note 47, at 6.

199. The Supreme Court had previously lifted the trial court's injunction against construction of the River Rouge assembly plant. *See NEVINS & HILL*, *supra* note 55, at 98.

monic decision, the Michigan Supreme Court ordered Ford to pay a \$19 million special dividend, half the amount the Dodge brothers sought. Ford succeeded in deferring for three years the payment of taxes on the \$12 million in dividends he received as his share. Ford received no dividends taxable at wartime rates, rates which he would have considered confiscatory and were intended to raise revenue for a cause he morally opposed.

Ford was able to use the platform of litigation to espouse his populist business philosophy and strengthen his appeal to the "hearts of ordinary American citizens."²⁰⁰ Ford was spared the vituperation the public reserved for the robber barons of his era, such as John D. Rockefeller, J. P. Morgan, the Vanderbilts and the Mellons.²⁰¹

Ford was unable to parlay his fame and popularity into public office. After being defeated in the Republican primary,²⁰² he ran on the Democratic ticket for senator from Michigan in 1918, losing to Truman H. Newberry, Secretary of the Navy under Theodore Roosevelt, by 7,500 votes.²⁰³ Until the early 1920's, Ford was often mentioned as a presidential prospect.²⁰⁴ He made no secret of his presidential ambitions.²⁰⁵

200. WATTS, *supra* note 26, at 258.

201. WIK, *supra* note 81, at 7.

202. SORENSEN, *supra* note 39, at 48.

203. A recount demanded by Ford brought him within 5,000 votes of victory. WATTS, *supra* note 26, at 248. Edsel Ford's draft deferment was raised as an issue in the campaign by Ford's opponent. BAK, *supra* note 18, at 97-99. According to John Kenneth Galbraith, "In his campaign, Ford made no speeches, most likely because he could not speak." RAE, *supra* note 11, at 152.

204. See LEWIS, *supra* note 8, at 97. The *New York Times* reported Couzens' reaction to Ford's possible candidacy. "Why Ford for President? . . . How can a man over sixty years old, who has done nothing but make motors, who has no training, no experience, aspire to such an office? It is most ridiculous." WIK, *supra* note 81, at 162.

205. He published an article in *Collier's* in 1923 entitled, "If I Were President." LASKY, *supra* note 11, at 31. Various explanations have been offered for why Ford ultimately decided not to run for president. Perhaps he realized his controversial opinions likely made him unelectable. RAE, *supra* note 11, at 153, 175. Ford may have been dissuaded following a conversation with President Calvin Coolidge in which Ford reportedly received assurances of business concessions. NEVINS & HILL, *supra* note 55, at 310. According to a leading authority on Henry Ford, "[T]he Ford boomlet fizzled after Clara

As their case made its way through the dispute resolution process, the Ford and Dodge families maintained a cordial social relationship. Ford was described as visibly shaken when he received news of John Dodge's untimely and sudden death at 55 from Spanish influenza, contracted while attending the New York auto show in January 1920.²⁰⁶ Famously inseparable from his brother in life, Horace Dodge died later that year at age 52.²⁰⁷

Couzens was elected mayor of Detroit in 1918, on the same day Ford lost his senatorial election to Newberry.²⁰⁸ Ironically, in 1922, Couzens was appointed to fill the vacancy created when Newberry resigned from the U.S. Senate amid allegations of campaign finance law violations committed during his campaign against Ford.²⁰⁹ Couzens served in the Senate for

declared she would have none of it. Henry, who valued domestic peace at any price, bowed to her dictate." Henry L. Lewis, *Introduction to SAMUEL S. MARQUIS, HENRY FORD: AN INTERPRETATION*, at xxx (Wayne State Univ. Press 2007) (1923).

206. HYDE, *supra* note 35, at 84.

207. Zatz, *supra* note 192. The Dodge brothers reportedly would not read mail unless it was addressed to both of them. *Id.*

208. BAK, *supra* note 18, at 100. As mayor, Couzens installed a system of public mass transit to ease Detroit's traffic problem resulting in large part from the success of his former employer. GOLDSTONE, *supra* note 10, at 334. He is credited with instituting measures to accommodate the growing number of cars with streetcars and pedestrian traffic, including marking lanes, stop signs at intersections, signage for one-way streets, and traffic signals. "What James Couzens accomplished in Detroit began to spread across the country By the mid-1920s Detroit would be recognized as one of the most innovative cities in the country for traffic management and safety." Wayne Ferrens, *James J. Couzens: An Extraordinary Man*, MOTORCITIES (Jan. 4, 2017), www.motorcities.org/About+Us/James+J+Couzens+An+Extraordinary+Man-356.html.

209. Couzens was reportedly the wealthiest member of Congress at the time of his appointment to the Senate. BARNARD, *supra* note 16, at 149. Although Couzens claimed to have paid more than \$8 million in federal income taxes during the decade prior to his appointment, more than \$7 million was tax on the profit from his sale of Ford stock in 1919. Accordingly, Couzens paid only about \$1 million in taxes between 1913 and 1922, "not an especially large sum given the amount of his wealth (and presumed level of income) and the applicable income tax rates during a portion of that period." YIN, *supra* note 139, at 819. During debate on controversial tax legislation in 1924, Couzens was "pointedly asked. . . on the Senate floor whether he had 'paid any income tax whatsoever' in the prior four years and, if so, how much?" *Id.* at 821. Couzens replied that the question was "impudent and irrelevant." *Id.*

14 years. A Republican by affiliation, Couzens' independence alienated party leaders.²¹⁰ Long out of step with the party in his support for a progressive agenda,²¹¹ Couzens' enthusiastic endorsement of Franklin D. Roosevelt's reelection in 1936 was the final straw. Couzens faced opposition in the Republican primary that year, and was defeated.²¹² He died in October 1936, with none other than Henry Ford serving as a pallbearer at the funeral.²¹³

In seeking to resolve the enigma that is Henry Ford, it seems appropriate to give his wingman the last word. "James Couzens simply chalked up the mystery to the man's genius, which is something he thought could never be analyzed."²¹⁴ According to one historian, "Henry Ford can be understood only in the context of his times."²¹⁵ The same can be said of *Dodge v. Ford*. As its relevance in corporate law wanes, it may not be time to stop teaching the case, but to repurpose it in the curriculum—perhaps as a case in tax history.

210. Couzens' political independence from the Republican Party was long-standing. In response to a fund-raising solicitation from the finance chairman of the National Republican Congressional Committee, Couzens expressed his unwillingness "to contribute to any Republican who might be a candidate. While I am anxious that the United States Senate and House of Representatives be controlled by the Republican Party, I am more interested in who the party is, than in that he is a Republican." Letter from Couzens to R. W. Austin (July 2, 1917), in Couzens Papers, *supra* note 47.

211. Couzens' progressive attitudes have been attributed to "pangs of guilt over his wealth." WATTS, *supra* note 26, at 189–90.

212. BARNARD, *supra* note 16, at 316.

213. *Id.* at 325.

214. CURCIO, *supra* note 1, at 270.

215. WIK, *supra* note 81, at 6.