

COMMENTARY TO DEAN FERSHÉE

*Judy Cornett**

Thank you. I want to thank my friend and colleague, Joan Heminway, for inviting me to participate in this wonderful gathering. I would also like to thank Colleen Conboy for her outstanding organizational efforts and my research assistants, AliceRose Sherman and Heather Bosau, for excellent research and conversation. And, of course, thanks to Dean Fershée for his thoughtful and thought-provoking paper.

Those of you who know me might be surprised to see me speaking at a corporate law conference, since I'm skeptical of "nonbreathers," as Gerry Spence calls them.¹ Despite having taken Business Associations in law school and despite having represented many corporations as a practicing lawyer, I actually know little about them. My first encounter with corporations occurred when I was in high school. My father, who couldn't take orders from anybody and therefore had to work for himself, owned "Mac's Auto Parts," the forerunner of AutoZone and Advance Auto. When I filled out school forms, I identified him as "Owner, Mac's Auto Parts." But one day he came home and told me that, from then on, I needed to identify him as "President, Mac's Auto Parts, Inc." And my mother was no longer to be identified as "homemaker," but as "Secretary, Mac's Auto Parts, Inc." Nothing else had changed (except, probably my parents' tax returns), but at least my mother – who had been sending out the Mac's Auto Parts invoices for years – would finally get some credit for her efforts.

Given my sparse knowledge of corporations, I found Dean Fershée's paper to be very informative.

The concerns Dean Fershée expresses about the threat to director primacy posed by benefit corporations seem to derive from a classic false dichotomy created by some courts: A normal corporation exists to make profits for its shareholders, while a benefit corporation exists to confer

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¹ See GERRY SPENCE, *THE MAKING OF A COUNTRY LAWYER* 425 (Macmillan 1997) (referring to "insurance companies and other corporations").

public benefits apart from profits.² And these two types of corporations are seen as defining two separate universes of corporate activity.³ Because there is such a thing as a benefit corporation, only a benefit corporation can confer public benefit.⁴ Because a normal for-profit corporation is not a benefit corporation, it cannot confer public benefits, but must confine itself to making profits for its shareholders.⁵ Thus, the very existence of the benefit corporation invites scrutiny of the activities of the normal for-profit corporation, which must now be policed to make sure it is not invading the exclusive sphere of the benefit corporation.⁶

The temptation to scrutinize and police others is powerful. All humans are subject to it, and courts in particular are comfortable with it. Courts exist to look at human affairs and make judgments about them. In fact, it's something of a miracle that director primacy ever became the default rule, insulating corporate decisions from judicial interference. Perhaps director primacy resulted from the power of the early industrialists and the sacred position of corporations in American life: "The business of America is business."⁷ But now, with the impetus toward "accountability" and "outcomes" for everything, including education, perhaps courts see their opportunity to police corporations, at least when they try to swim upstream and take action that violates the core value of "maximizing profit." Or perhaps courts are rushing into the vacuum created by the continuing decline of other sources of corporate regulation – unions, government agencies, and journalists, for example.

Although the specter of courts' micromanaging corporate decisions is a nightmare scenario, we should remind ourselves that the U.S. Supreme Court, in particular, has exhibited a surprising solicitude for corporations.

² See Joshua P. Fershee, *The End of Responsible Growth and Governance?: The Risks Posed by Social Enterprise Enabling Statutes and the Demise of Director Primacy*, 19 *TRANSACTIONS: TENN. J. BUS. L.* 361, 362 (2017) (citing *eBay Domestic Holdings v. Newmark*, 16 A.3d 1 (Del. Ch. 2010)).

³ See *id.* at 382.

⁴ *Id.*

⁵ See *id.* at 362.

⁶ See, e.g., *id.* at 362–63.

⁷ The full quote, from a speech given by President Calvin Coolidge to the American Society of Newspaper Editors in January 1925, is as follows: "After all, the chief business of the American people is business. They are profoundly concerned with producing, buying, selling, investing, and prospering in the world." President Calvin Coolidge, *The Press Under a Free Government* (Jan. 17, 1925); see Robert Sobel, *Coolidge and American Business* (1988), <https://www.coolidgefoundation.org/resources/essays-papers-addresses-35/>.

The Court has protected corporations' Free Speech rights in *Citizens United*.⁸ The Court has protected corporations' religious freedom under RFRA in *Hobby Lobby*.⁹ And the Court in *Daimler AG v. Bauman* protected corporations from general personal jurisdiction based upon "continuous and systematic" contacts with a state.¹⁰ Distressed by the prospect that a multi-national corporation might be subject to jurisdiction in California for a cause of action not arising there, Justice Kagan opined during oral argument: "If [Daimler AG] were subject to general jurisdiction in California, so too it would be subject to general jurisdiction in every State in the United States, and all of that has got to be wrong."¹¹ Of course, corporations had known since *International Shoe* that maintaining continuous and systematic contacts in a state could subject them to general personal jurisdiction, but Justice Ginsburg worried that a corporation whose U.S. sales equaled 1% of the U.S. GDP would not be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit" if they had to face a lawsuit in a state other than the one where the cause of action arose.¹²

Thus, the result of *Daimler* is that, for any given cause of action, Walmart can be sued in only three states: Arkansas, Delaware, and the state where the cause of action arose.¹³ A vacationer who purchases tainted potato salad in the Myrtle Beach Walmart, consumes it in a state park in North Carolina, and becomes ill and recuperates at home in Knoxville, cannot sue in Tennessee. As Justice Sotomayor observed in *Daimler*: "[I]t should be obvious that the ultimate effect of the majority's approach will

⁸ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 364 (2010) ("The First Amendment does not permit Congress to make these categorical distinctions based on corporate identity of the speaker and the content of political speech.").

⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708–09 (2014).

¹⁰ *Daimler AG v. Bauman*, 571 U.S. 117 138–39 (2014).

¹¹ Transcript of Oral Argument at 31, *Daimler AG v. Bauman*, 517 U.S. 117 (2014) (No. 11-965).

¹² *Daimler AG*, 571 U.S. at 139 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

¹³ See Scott Dodson, *Jurisdiction in the Trump Era*, 87 *FORDHAM L. REV.* 73, 76 (2018) ("As a result, for Walmart, only Delaware (its state of incorporation) and Arkansas (where it has its headquarters) – not California (where it does much of its business)—can exercise general jurisdiction.") (citation omitted).

be to shift the risk of loss from multinational corporations to the individuals harmed by their actions.”¹⁴

Thus, if the issue of director primacy ever makes its way to the Supreme Court, we can be sure that the corporate interests will find solace and protection.

¹⁴ *Daimler AG*, 571 U.S. at 158–59.