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Veldman 2018 Working paper version of 'The Separate Legal Entity and the Architecture of the Modern Corporation'

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I. Introduction

Central to the ability to recognise, respect and balance stakeholder needs for the board of a public corporation are the ways in which the status and purpose of the modern corporation are understood (Veldman et al, 2016). Shifting conceptions of the status and purpose of the modern corporation have led to different answers to the questions how, by whom, by what and for whom corporate governance should organise the procedures and processes that direct and control business.

From the 1970s onwards, the 'Nexus of Contracts' (NoC) theory has become central in regulation, and codification, in public policy and regulatory decision-making, in accounting theory, in executive and investor practice, and in the curricula of many law and management schools (Horn, 2012; Khurana, 2007; Pye, 2001, 2002). Based on the notion that shareholders contract with executives, it promotes an agency theoretic model of corporate governance, in which executives, as 'agents', respond exclusively to shareholders, as 'principals'. In this model, the purpose of the modern corporation is interpreted as serving shareholder value creation and executive 'judgement' is oriented towards the production of 'value' as measured by short-term market valuation of the corporation (Millon, 2014).

The payoffs and costs of this model for corporate governance have been substantial. As corporate directors and officers are oriented towards serving the interests of shareholders, corporate proceeds are progressively distributed in their direction. To provide adequate signals to the market (and ramp up their own remuneration), corporate executives since the 1970s have increased dividend payouts and stock buybacks, while shareholders have reciprocally approved massive increases in executive remuneration (Lazonick, 2014). These strategies have provided negative outcomes for corporations as productive entities with a long-term horizon, as it materialised in the form of substantial decreases for business development and

Research and Development. They also provided negative outcomes for the societies in which public companies function, as the adoption of mergers and acquisitions as well as buyouts and demergers, ‘downsizing’ and ‘divestment’, outsourcing, and restructuring resulted in massive layoffs, falling job tenures, use of zero hours contracts and defined contribution pension schemes and a rising amount of yearly working hours for employees. The nexus of contracts theory thus provided high payouts to short-term oriented shareholders by enticing managerial executives to engage in excessive risk-taking by adopting a strongly diminished regard for the consequences of corporate strategy beyond the impact of the next quarter’s numbers; and to offload long-term costs of such risk-taking to public corporations, employees and states (Dore, 2008; Fourcade and Khurana, 2013; Jacoby, 2008, 2011; Jansson et al, 2016; Kay, 2015; Stout, 2012; Veldman et al, 2016).

What is interesting about the nexus of contracts model, specifically in the light of its dominance as a model for corporate governance theory and practice, is that its main theoretical assumptions have questionable theoretical validity. A rich literature explores the problematic theoretical identification of the separate legal entity (SLE); of claims to ‘ownership’ and ‘control’; and of the relation between ‘agents’ and ‘principals’ in relation to the legal conception of these terms (Aglietta and Rebérioux, 2005; Biondi et al, 2007; Millon, 2014; Robé, 2011). In this chapter I will explore these debates in the context of the understanding of the SLE, and specifically in relation to the role of the SLE in providing the ‘architecture’ of the modern public corporation as a structure of rights and obligations.

I start with the historical development of the SLE as a specific type of legal construct and its importance for the development of the modern public corporation. Then, I explore how the SLE provides the basis for an architecture that conditions the roles, positions and relations between corporate constituencies on the basis of a number of tradeoffs between these constituencies. I continue by looking at how these tradeoffs relate to the architecture of the modern corporation, and notably to the function and role of the board. I conclude by arguing that the specific architecture of the modern corporation, together with the contingent status of the SLE, provides a combined basis for the development of a model for corporate governance that can orient boards of public corporations toward long-term value creation in the interest of broad sets of stakeholders.

II. Creating the Modern Public Limited Liability Corporation

The way in which the SLE has been postulated and developed as a legal concept since the start of the nineteenth century provides the basis for the modern public limited liability corporation. By providing a ‘reified’ construct that is attributed with ownership and liability in and by itself, the SLE conditions the public corporation’s architecture, specifically by providing the basis for the emergence of

the board and of executive management as distinct corporate ‘organs’ and by setting the scope and direction of their fiduciary duties (Biondi et al, 2007; Johnson and Millon, 2005; Millon, 2014; Robé, 2011; Veldman, 2016). A short description of the historical emergence of the modern public limited liability corporate form helps to illustrate the centrality of the SLE as a reified legal construct.

The modern public limited liability corporate form was preceded by the partnership form, in which unlimited liability circumscribed the assumption of ownership and control. In the nineteenth century, unlimited liability for losses and debts by individuals engaging in commercial ventures was thought to be a basis for the ‘morality of the market’, as it was deemed to act as a strong incentive to direct the agency of investor-partners toward the long-term interest of the partnership and, thereby, to minimise the risk for others with a non-ownership stake in the partnership as a business venture (eg employees, suppliers, customers, community, state etc). The risk for investor-partners of losing personal assets if they failed to manage business risks was the basis for the assumption of full control over management and strategy as a legitimate function of their property ownership (Ciepley, 2013; Djelic, 2013; Johnson, 2010; McLean, 2004).

The development of the SLE during the nineteenth century predicated an almost complete shift away from this model. As the reified SLE was attributed with ownership and liability in its own right, this new construct created the basis for a new organisational ‘architecture’. The separation between shares and the assumption and consequences of the day-to-day management of a public corporation turned shareholders into a largely external constituency, and entitled shareholders to the ‘residual cash flows of the company’ (Ghoshal, 2005: 79), but no longer gave a direct claim to ownership or management over ‘the corporation, the assets or the firm’ (Robé, 2011: 31). The development of this new architecture was based on an elaborate quid pro quo, in which (minority) shareholders strongly benefitted. The creation of a new architecture with the SLE at the heart of the architecture of the modern corporation allowed among other things to: remove the attribution of unlimited liability to investor-partners; provide legal protection for minority shareholders against expropriation by majority shareholders; provide protection against sudden or unilateral dissolving of the firm at the exit or death of a partner; conceive of shares as fully paid up and thus free-standing rights to a portion of the revenue stream of the company; and to separate of shares from control rights, offering ‘liquid’ transferability, the ability to reinvest in an open market with relatively little trouble or cost, a fast exit opportunity, and the potential for secondary trading gains (Ireland, 1999; Lamoreaux, 1998).

In comparison to the traditional partnership model, the development of the SLE into a reified legal construct and the subsequent development of a new ‘architecture’ for the public corporation dramatically transformed the role, functions and claims of investor-partners (Millon, 2014), de facto creating an entirely new type of ‘shareholders’. In the modern public corporation, these ‘shareholders’ gave up direct ownership and control claims and in exchange received a large set of privileges and protections. Notably, this new breed of shareholders gained

the capacity to remain ‘outside’ the corporation and ‘inside’ the market, creating the conditions for (minority) shareholders to relatively safely orient themselves toward the market value of the corporation, while disengaging from the risks of actual management (Ireland, 1999; Ireland, 2010; Veldman and Willmott, 2017).

The central role of the SLE in creating a new corporate architecture introduces two questions. The first question, which I will engage with in the next section, is how the SLE itself is constituted as a reified construct in relation to attributions of ownership and liabilities. The second question, which I will engage with in sections IV and V, is how a reified conception of the SLE relates to the architecture of the modern corporation. Specifically, I will explore how a transfer of attributions of ownership and liability to the SLE as a reified construct produced a shift in the role, functions and claims of corporate constituencies in the new architecture of the modern public corporation.

III. The Separate Legal Entity

Although the SLE provides the centrepiece for a new institutional architecture, the precise status of this legal construct remains thoroughly unsettled. During its development in the nineteenth century, the SLE was initially conceived as a placeholder that provided a shorthand to a specific problem of ownership and liability attribution, rather than a full-fledged legal ‘subject’. Even though the SLE gradually came to represent the corporation as an ‘it’, rather than a ‘they’, it continued to do so as highly specific ‘legal fiction’ with a reified status. However, the status of this specific ‘legal fiction’ gradually developed into an ‘extended’ conception, in which the identification of this construct as a legal ‘entity’ provided the basis for attributions of (contractual) agency and (citizenship) rights to the SLE. Between the placeholder and the extended conception, the identification of the status of the SLE came to relate to multiple referents, including the SLE as a functional placeholder or a legal ‘entity’, ‘subject’ or ‘person’; the corporation as a whole; a (contractual) aggregation of individuals; particular constituent groups; or as any combination of these positions. As the amount of referents used to explain the status of the SLE and the modern corporation increased, so did the attributions of agency, ownership, rights and protections with regard to all these referents, further complicating the status of this legal construct (Naffine, 2003; Veldman, 2016).

By the end of the twentieth century, the legal understanding of the SLE had become so convoluted that it most resembled a ‘Cheshire Cat’. The convoluted status of the SLE was problematic because attributions of (contractual) agency, liability, ownership and rights to the SLE or ‘the corporation’ could map onto a multiplicity of referents, and even onto multiple referents at the same time. As a result, the status of the SLE as a reified construct and its relation to other legal constructs like citizens and states became conceptually unclear, providing the basis for broad contestation of the developing status of this new legal construct

(Maitland, 2003; Robé, 1997; Veldman, 2016). Notwithstanding the ongoing contestation of the status and effects of the SLE, pragmatism was consciously advised with regard to the fundamentally unstable theoretical and philosophical status of this legal construct, in order to preserve its functional outcomes (Dewey, 1926, 1931; Foster, 2006; Hallis, 1978; Lawson, 1957).

Although the precise conceptual status of the SLE and its relation to the broader concept of 'the corporation' remains elusive, the SLE still provides the basis for a specific corporate architecture.

Insofar as the SLE is attributable with ownership and liability, and with broader attributions of agency and (citizenship) rights, it functions as a reified point of attribution for such properties in the legal and economic systems of representation (Veldman, 2016). By being attributed with these properties and functions as a reified construct (as an 'it') in lieu of 'the corporation' and of constituent groups (like the investor-partners) the SLE creates the conditions for a fundamentally new architecture, compared to the unlimited liability partnership form. In this regard, even if the conceptual status of the SLE remains fundamentally unclear, the *effects* of the SLE as a reified legal construct that allows for the attribution of ownership, liability, agency in relation to the creation of a new corporate architecture, and the way in which the SLE as a reified construct functions in relation to that architecture can still be examined. In the next section I will explore the development of the SLE as the starting point for the emergence of a new architecture in which the board and executive management function as corporate 'organs' with their fiduciary duties circumscribed by this institutional setup.

IV. Corporate Organs and Fiduciary Duties

The SLE provides the basis for a new corporate architecture. Whereas in the unlimited liability partnership shareholders had both financial and normative claims to the functions of ownership and control, postulating the SLE means that the assets and liabilities of the corporation are attributed to the SLE. The postulation of the SLE structurally bars shareholders from access to corporate assets and from direct engagement in managerial functions. As a result, the nature, role, position, relations and claims of shareholders as a constituency are both functionally and theoretically repositioned and redefined as just one (external) constituency amongst others compared to the unlimited liability partnership (Boatright, 1994; Blair and Stout, 2011; Ridley-Duff and Bull, 2015). Shareholders accepted this new position, in which they came to function as an external constituency with no direct affordance of rights, because it provided them with rights, privileges and protections that investor-partners did not and could not have in the unlimited liability partnership form. Even if shareholders are afforded specific rights, eg voting rights, rights of inspection and rights to bring derivative lawsuits to enforce corporate claims (Millon, 2014: 1043), by a legal or corporate governance

framework, those rights are not innate to the role or function of the shareholding constituency in the modern corporation. Rather, they are to be understood as ‘vestiges of an older age when shareholders, like partners, controlled their firms ...’ (Millon, 2014: 1025).

The central role of the SLE and the subsequent redefinition and repositioning of shareholders in a new architecture is important to understand the basis for the role and claims of shareholders, but also for the role of directors and officers. The retreat of investor-partners to a disengaged and external function in exchange for privileges and protections effectively vacated the function of management previously occupied by those investor-partners. In the vacuum left by the investor-partners the board emerged as a new corporate organ endowed with the function of strategic management (Veldman and Willmott, 2017). As Leo Strine, Chief Justice in Delaware argues: ‘corporate law clearly vests the power to manage the corporation in its directors, and not in the stockholders’ (Strine, 2010: 4). In comparison to the unlimited liability partnership, the function of strategic management thus shifts from a council of engaged investor-partners with a direct financial and normative claim to ownership and control over management, to the board of directors as a separate organ of the public corporation.

The SLE thus puts a corporate architecture in place, in which the board of directors emerges as an autonomous and independent corporate ‘organ’ with the role, function and discretionary space necessary to determine and implement corporate strategy (Segrestin and Hatchuel, 2011; Veldman and Willmott, 2017). As corporate assets and liabilities, and later agency and rights, are attributed to the SLE in lieu of ‘the corporation’; as the position, role and claims of the shareholding constituency becomes those of an (external) constituency, with a similar basis for claims as other corporate constituencies; and as the role and function of the board of directors emerges as an organ *of* the corporation as a whole, the function and role of the corporate board are fundamentally directed toward the corporation, represented by the SLE as an ‘entity’ (Aglietta and Rebérioux, 2005; Biondi et al, 2007; Blair, 2015; Ireland, 1999; Millon, 2013). For this reason, fiduciary duties in the corporate architecture shift away from the shareholders, and toward ‘the corporation’: ‘If the officers are supposed to act on behalf of the corporate entity—which comprises more than just the shareholders—it makes no sense to conceive of directors’ fiduciary duties solely in terms of the shareholders.’ (Johnson and Millon, 2005: 1645).

In sum, the SLE provides the basis for a new *corporate* architecture. The nature, role, position, relations, rights and claims of all corporate constituencies are conceived in relation to the SLE as a reified construct, and their new status is completely different from their status in the context of the unlimited liability partnership. Therefore, the SLE fulfils a fundamental role in providing a new architecture, and the reconceptualisation of the status of the constituencies involved in the modern public corporate form. Once the SLE is postulated and the corporate architecture is put in place, there is no way back to an *ex ante* situation without very fundamental and very difficult choices with regard to the nature,

role, position, relations, rights, claims and duties to the corporate constituencies (Maitland, 2003; Robé, 2011). Notably, in the new corporate architecture, the position, role, function and claims of the shareholding constituency become external to the corporation, while the role, function and duties of the corporate board of directors emerge and are conceived in direct relation to the SLE, which represents the corporation as a whole.

V. The SLE and Directors' Duties

It has been argued that the specific legal understanding of the SLE and the redirection of fiduciary duties it provides can be used to expand narrow notions of corporate governance. Johnson and Millon argue that: 'It is indisputable that officers are agents for the corporate enterprise ... Their responsibility to any particular corporate constituency ... flow[s] from decisions made in the interest of the corporation as a single, undifferentiated entity.' (Johnson and Millon, 2005: 1644). Similarly, Parkinson finds that corporate officers need to act 'in the best interests of the company' (Parkinson, 2003: 493), while Robé (2011: 32) argues that, executives 'are not and cannot be the shareholders' agents: they can only be the agents of the corporation which is their sole principal since it is the sole owner of the assets they manage on its behalf.' Similarly, 'Delaware corporate law, the most influential body of law for United States publicly held corporations, does not reflect an agency model. Directors' fiduciary duties are owed not to the shareholders alone, but rather to "the corporation and its shareholders."' (Millon, 2014: 1035). As executives and board members are required to act in the best interests of the 'entity', the 'company', the 'enterprise', or the 'corporation' as their 'principal', these notions provide a positive direction for directors' fiduciary duties toward the 'entity', which arguably represents the corporation as a whole by virtue of its representative quality and by virtue of its central role in the corporate architecture.

However, as explored above, the link between the entity and the corporation is far from unequivocal. Because the SLE provides its functions in relation to a multiplicity of referents, the corporate 'entity' provides an unclear and inconsistent basis for the positive identification of those referents. As a result, the direction, alignment and mapping of directors' fiduciary duties toward specific constituencies or interests is problematic on the basis of the 'entity as a principal' argument alone (see Mansell, 2013). Despite these conceptual problems with mapping fiduciary duties directly onto the SLE as an entity, we can still explore the *functioning* of the SLE, and specifically its central role in the corporate architecture, to explore the status of duties in relation to that corporate architecture and its outcomes.

Arguably, the SLE is predicated on a legal quid pro quo that transfers ownership and liability to the entity. This legal quid pro quo makes the claims and interest of shareholders in a public corporation largely external and indirect and provides the

basis for an architecture in which the corporate board begets its role, functions and mandate as an organ of the public corporation. As the board assumes its role and function, and the discretionary space to discharge its duties, by virtue of its position as an autonomous and independent corporate organ with fiduciary duties to the SLE, it can be argued that the fiduciary duties of the board of directors are conditioned by a *negative* duty to resist claims of any particular constituency that would come at the expense of the entity itself or at the expense of constituencies that are connected to and/or have an interest in the entity: 'Their responsibility to any particular corporate constituency is only indirect, and any benefits (or costs) to such groups are incidental effects that flow from decisions made in the interest of the corporation as a single, undifferentiated entity.' (Johnson and Millon, 2005: 1644). As such, the fiduciary duties of a corporate board include a positive duty to resist any and all direct and indirect ownership and control claims to or via the entity by *any* constituency.

Moreover, in the architecture called forth by the SLE the role and function of all corporate constituencies emerge in relation to their role, function and position as 'organs' or constituent groups of the modern corporation. In addition, the SLE endows the modern public corporation with a large set of attributions of agency and rights in relation to a multiplicity of referents, which includes the corporation as a whole as well as the corporate constituencies (eg citizenship rights, which in practice are granted on the basis of an identification of the corporation as an entity and as a collection of individuals or constituencies with separate rights and claims, see Blair, 2015; Mayer, 1989; Veldman and Parker, 2012). As the SLE calls forth an institutional architecture that provides the basis for the conception of the position, role, function and claims of corporate constituencies; as the SLE provides a reified construct that in practice functions as a representation that is attributed with agency and rights for and on behalf of 'the corporation'; and as the board is held to resist the prioritisation of claims by specific constituencies, it can be argued that the SLE functionally has come to represent 'the corporation' as a whole.

By extension, it can be argued that status of the SLE as an 'entity' can be interpreted 'as a distinct social and institutional entity, defined and protected by corporate law, standing at the centre of relationships involving various groups of stakeholders' (Gospel and Pendleton, 2003: 560). Moreover, it can be argued that the status as well as the claims of constituent groups arise from the corporate architecture that arises in direct relation to the SLE. As in this architecture no claims are originary or a priori more valid than those of other constituencies, it can be argued that the architecture of the modern corporation can be conceptualised as a 'federation' of corporate constituencies, and that the fiduciary duties of the board of directors toward the SLE are toward all these corporate constituencies in equal measure. In relation to the architecture of the modern corporation that arises in relation to the SLE, the role of the board is to adjudicate between the *relative* claims of *all* constituencies toward or via the SLE as the reified representation of 'the corporation' (Millon, 2014: 1043).

In this regard, the exclusive identification of ‘the corporation’ with the shareholders and the prioritisation of shareholders’ claims is problematic. Claims to ‘residual ownership’; to direct contractual relations between shareholders and directors and/or executives; or to a status for shareholders as the exclusive ‘members’ of the corporation, based on an implicit continuation of their role as investor-partners, as in section 172 of the 2006 UK Companies Act (Collison et al, 2014), all negate the specific status and role of the SLE; of the architecture that it puts in place; and of the role and duties of the board of directors in a public corporation. As such claims negate the elaborate quid pro quo that is necessary to constitute and maintain the architecture of the modern corporation, and the structure of rights and obligations that it puts in place between corporate constituencies, they directly put into question the privileges and protections provided to all corporate constituencies—including the shareholders—by the SLE.

VI. Social Licence

Apart from the SLE, corporate architecture and a legal quid pro quo, there is a second reason to argue that boards of directors would do well to maintain a view of the corporation as a quasi-social institution with duties to broad sets of constituencies (Berle and Means, 2007 [1932]). This second reason focuses on the connection between the problematic theoretical status of the SLE and the practical implications of the modern corporation. In section II I explored how the privileges and protections provided by the SLE are based on the conscious acceptance of multiple, shifting and mutually exclusive referents. The broad theoretical ramifications of the pragmatism that supported the development of the SLE as a reified legal construct are acknowledged across disciplinary domains (Biondi et al, 2007; Bowman, 1996; Schrader, 1993; Zey, 1998). The development of this legal construct supported a large number of economic, social and political developments, including the development of oligopolistically organised capitalism. The combination of sustained theoretical unclarity and broad practical effects made the SLE the object of significant contestation from many quarters during the nineteenth and twentieth centuries (Dodd, 1931; Hannah, 2010; Ireland, 2005; Johnson, 2010).

Notably, Berle and Means, in their seminal 1932 volume *The Modern Corporation and Private Property*, found that the public limited liability corporate form presented the means to build increasingly dominant corporate empires, resulting in oligopolistic economic organisation. Charting a constant increase of highly dispersed shareholdings in US public corporations, they argued that these increasingly dominant organisations were no longer under effective control of the shareholders, while other means of control, including judicial oversight or state intervention, were also largely ineffective. The combination of the expanding influence and impact of the modern corporation with the weak legitimisation for control

by a managerial cadre who were usually not investors, and a de facto absence of effective means of control over these new ‘princes’ led Berle and Means to argue that the exercise of managerial discretion over public corporation was tied to a social trade-off. Actively attending to, and balancing, the concerns of diverse stakeholders and providing notionally equitable outcomes for multiple constituencies would be central to achieving a ‘public consensus’ that would continue to provide the social legitimacy for the modern corporation under managerial control as well as oligopolistic economic organisation.

Berle and Means were well aware of the specific architecture put in place by the SLE and its consequences (Berle and Means (2007 [1932]: 244). However, their argument why managers needed to maintain a social licence for the modern corporation was more pragmatic. For them, the broad benefits of the use of the modern public corporation for multiple constituencies, including the capacity for central economic coordination and, hence, oligopolistically organised capitalism, meant that unfettered managerial discretion over these dominant new institutions could only be legitimised in the long run if it would remain tied to the provision of ‘economic citizenship’ and the upkeep of a broad ‘social contract’ that would serve the interests of a range of beneficiaries (Berle and Means, 1968 [1932]: 313). The analysis provided by Berle and Means thus built on the elements already present in the *legal* quid pro quo and reinforced and expanded them with a *social* quid pro qui that coupled the effects of the development of the modern corporation to the direction of managerial duties toward the long-term development of the corporation and the interests of both corporate constituencies and broader societal stakeholders (Moore and Rebérioux, 2007; Diamond, 2011).

VII. Discussion and Conclusions

I explored how the currently dominant view of the public corporation in corporate governance theory, the ‘nexus of contracts’ view, has typified the role of directors and officers as ‘agents’ who, on the basis of contractual or (residual) ownership claims, stand in an exclusive dyadic governance relation to shareholders as their putative ‘principals’. As interests of shareholders and directors are prioritised, those of the SLE, other corporate constituencies, and other stakeholders are marginalised (Aglietta and Rebérioux, 2005; Bratton, 1989; Johnson and Millon, 2005; Millon, 2014). To assess these claims, I showed how, in relation to the corporate architecture put in place by the SLE, positing shareholders as a constituency with a right to control or management, and positing boards as directly accountable to shareholders (through residual claims or through contract), can only be seen as the outcome of a conceptual confusion, which presents a highly problematic basis for the development of corporate governance theory and practice, as it fails to explain the specific functions and role of the SLE; the specificity of the corporate institutional structure and the specific privileges and protections it provides to

shareholders; and the specific position of and role for corporate boards in relation to both a legal and a social *quid pro quo* that allows for the provision of a social licence to the modern public corporation.

I showed how the SLE puts in place the basis for a specific corporate architecture, in which the role, position, and claims of all constituent groups and their relations are fundamentally changed, compared to the traditional unlimited liability partnership model. And although the orientation of fiduciary duties toward the 'entity' is problematic as a concrete basis for the identification of a positive content for fiduciary duties, the legal *quid pro quo* provides the basis for a view of the SLE as the centrepiece of corporate architecture and for the emergence of the board of directors as a central corporate constituency with fiduciary duties toward the 'entity' (Johnson and Millon, 2005; Keay and Loughrey, 2015); and hence for a view of the mandate and role of the board as a mediating hierarchy between the long-term claims of constituencies on the 'entity' (Segrestin and Hatchuel, 2011).

The necessity to maintain this role and mandate for the board is related to a legal *quid pro quo* that is central to the provision of privileges and protections to corporate constituencies and is reinforced by a social *quid pro quo* that is necessary to provide legitimacy to the ongoing effects of the use of the modern corporation, notably oligopolistic economic organisation. The combination of the legal and the social *quid pro quo* supports the argument that the duty of a board of directors in a public corporation is to maintain a balance between the rights, claims, obligations and protections of all constituencies inside the corporation and to provide long-term positive and equitable outcomes for broad sets of constituencies, both inside and outside the corporation (Berle and Means, 2007 [1932]; Fayol, 2013 [1949]; Ireland, 2016; Tricker, 2015; Veldman et al, 2016).

In relation to the combined legal and social *quid pro quo* that is necessary to provide legitimacy to the modern corporation, directing corporate directors and officers to act in the exclusive interests of shareholders' interests and claims is highly problematic. The adoption of this notion of corporate governance leads to the use of the SLE, a construct with a problematic legal and social status and legitimisation, in the exclusive service of the shareholders, who present a specific constituent group with strong privileges and protections as a result of the corporate architecture, while the implications of the SLE for all other constituent groups are ignored. It has been argued that the nexus of contracts notion is anachronistic and inaccurate from a legal point of view, leading Millon (2014: 1044) to ponder that 'the emergence of the agency claim and its widespread embrace as an assumed legal requirement are nothing short of astonishing.' However, denying the status and effects of the SLE and the architecture it provides; allocating the rewards and protections of the use of the SLE exclusively to shareholders, directors and officers; shifting the risks of the use of the modern corporation and oligopolistic economic organisation to all other constituencies and stakeholders has, arguably, been central to the capacity to extract extensive short-term gains for the shareholder constituency at the expense of all other corporate constituencies

and stakeholders (Jansson et al, 2016; Mayer, 2013; Reich, 2016). As the adoption of a specific theory of corporate governance has concrete outcomes in terms of political economy, further exploration of the SLE and of the architecture it puts in place is fundamental to building a progressive corporate governance theory and practice (Veldman et al, 2016).

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