



Articles

Making corporate law great again: Deconstructing and identifying public interest in corporate theories and corporate entity theories

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Public interest fosters debate in many disciplines, including corporate governance discourses about corporations at the point when what is optimal for society or the greatest good for society is considered. Nevertheless, public interest is rarely given a prominent role in corporate law; this has partly been because there is no definitive objective definition for the notion. Therefore there are contentions that public interest ought to be jettisoned or that it is not fit for purpose. This article examines if a definitive objective definition of the public interest is required in order for it to be fit for purpose, that is, to serve societal interests. Using a deconstruction approach, various theories on the public interest will be discussed as well as corporate theories to explore how they encapsulate various conceptions of the public interest. This article then argues that corporate theories incorporate tacitly or otherwise, the public interest, and that this is desirable because it could provide alternative ways of addressing corporate governance concerns. It is also added that an objective definition of the public interest is not imperative in order for the notion to be useful, rather a dynamic and flexible definition of the public interest enables corporations to be responsive and responsible for their societal impact, particularly in this era of rapid globalisation.

I Introduction

Public interest has been an important concept particularly in political and philosophical discourses for hundreds of years. It has a venerable history and tradition, from Aristotle's common good rationale for good governance and the purpose of a society to Wiredu's transcending notions of common good.¹ Public interest is however not limited to political thought; it is a salient concept which has been transposed and appropriated by various disciplines including the regulation of the professions, commercial and business spheres, international or global governance.² This is because public interest has

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1 Barry Bozeman, *Public Values and Public Interest: Counterbalancing Economic Individualism* (Georgetown University Press, 2007) 1; Aristotle, *The Politics, Book I* (TA Sinclair trans, Penguin, revised ed, 2000) [trans of: *Politics* (first published 350 BCE)]; John Locke, *Second Treatise of Government, Chapter II: Of the State of Nature* (London, 1823); Kwasi Wiredu, 'Introduction: African Philosophy in Our Time' in Kwasi Wiredu (ed), *A Companion to African Philosophy* (Blackwell Publishing, 2004).

2 Kadri Simm, 'The Concept of Common Good and Public Interest: From Plato to

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connotations of values which are thought to be in the societal interest and contributory to the common good as well as the amelioration of societal welfare.³ It is not surprising then that public interest or societal interest is increasingly becoming a critical issue of contention in corporate governance literature. However, its definitions are scant and little explanation is given as to why public interest is or is not paramount for corporate governance or normative corporate law. Nevertheless, public interest is mentioned albeit grudgingly by some, in discourses about corporations at the point when what is optimal for society or the greatest good for society is considered.⁴ Therefore, although public interest is rarely given a prominent role in corporate law, it is generally accepted in varying degrees that corporations and corporate law should serve societal interests or general societal welfare in some manner.⁵ Public interest is a useful consideration in corporate discourses because it could provide another way of addressing and examining corporate misconduct which can have devastating societal impact.⁶ Activities of regulators on all levels of corporate governance have been mostly 'scandal-driven'.⁷ Yet the globalised nature of commerce has meant that the activities of corporations have far-reaching consequences and are of societal concern.⁸ Public interest could provide a feasible alternative to a knee-jerk scandal-driven reaction to corporate law and governance.

Being that public interest is generally used to describe common interests, values or characteristics desired by individuals such as the protection of liberty, private property rights as well as other values such as social or moral values,⁹ explicitly acknowledging public interest in corporate law discourses can foster better understanding of the societal role of corporations. It also can

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- Biobanking' (2011) 20 *Cambridge Quarterly Healthcare Ethics* 554; Alan Demack, 'Public Interest or Common Good of the Community: Bringing Order to a Dog's Breakfast' (2015) 6 *Legal Ethics* 23; Bruce Douglass, 'The Common Good and the Public Interest' (1980) 8 *Political Theory* 103; Surendra Arjoon, Alvaro Turriago-Hoyos and Ulf Thoene, 'Virtuousness and the Common Good as a Conceptual Framework for Harmonizing the Goals of the Individual, Organizations, and the Economy' (2018) 147 *Journal of Business Ethics* 143.
- 3 J Robert Branston, Keith Cowling and Roger Sugden, 'Corporate Governance and the Public Interest' (2006) 20 *International Review of Applied Economics* 189; Joseph E Stiglitz, 'Global Public Goods and Global Finance: Does Global Governance Ensure that the Global Public Interest is Served?' in Jean-Philippe Touffut (ed), *Advancing Public Goods* (Edward Elgar Publishing, 2006) 149; Organisation for Economic Co-operation and Development, *OECD Recommendation of the Council on Public Integrity* (2017) <<http://www.oecd.org/gov/ethics/recommendation-public-integrity/>>.
- 4 Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 4th ed, 1991) 4, 6–7.
- 5 Ibid.
- 6 Rupert Neate, 'Ratings agencies suffer "conflict of interest", says former Moody's boss', *The Guardian* (online), 22 August 2011 <<http://www.theguardian.com/business/2011/aug/22/ratings-agencies-conflict-of-interest>>.
- 7 Allison Fass, 'One Year Later, The Impact Of Sarbanes-Oxley', *Forbes* (online), 22 July 2003 <http://www.forbes.com/2003/07/22/cz_af_0722sarbanes.html>; the slew of corporate scandals, including Enron, Arthur Andersen, Tyco, Global Crossing and WorldCom which led to the enactment of the US *Sarbanes-Oxley Act of 2002*.
- 8 BBC News, 'Carillion collapse to cost taxpayers £148m', 7 June 2018 <<https://www.bbc.co.uk/news/business-44383224>>.
- 9 Stephen M King, Bradley S Chilton and Gay E Roberts, 'Reflections on Defining the Public Interest' (2010) 41 *Administration and Society* 954, 957.

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create a bridge between the various corporate theories of the firm in order to enhance and foster good corporate governance.¹⁰

However, defining the public interest has proven to be a challenge shrouded in mystery. It has been and still is the subject of numerous debates as theorists seek a singular or objective all-encompassing definition. Although, it is imperative that public interest is defined in order to explore how it may foster good corporate governance, an important issue is the demystification of the notion, defining it in a manner that embraces its heterogeneous realities, and identifying and evaluating its varied definitions. This would enable a complex and nuanced understanding of fast-changing societal needs and interests and the role corporations play in the (dis)satisfaction of societal interests. In order to demystify the notion of the public interest, Derrida's theory on deconstructivism¹¹ will be used as a guiding tool to conduct an enquiry into the concept.¹² Accordingly, deconstructionism will be used to identify and explore various existing definitions of public interest in the different categories of corporate theories and interrogate the relationship between public interest and corporate theories.¹³ It is then contended first that there is no absolute static definition of public interest but that it is a dynamic concept which requires continuous consideration and questioning of the accepted basis of its meaning. This is a way of ensuring that public interest is not rigid but continues to serve as an analytical lens for meeting societal needs in numerous spheres including corporations. The deconstructionist approach thus contributes to re-centring public interest at the heart of discourses about the common good, good governance and interests of general benefit to society. This extends to good governance of corporations and realigning corporations with societal interests.

This article is structured as follows. First, there is a brief discussion about deconstructionism, exploration of three public interest theories and definitions. Second, there is a general consideration of broad categories of corporate theories of the firm. Third, and this is the main part of the article, there is an assessment or exploration of public interest, its various conceptions and illustrations of how they are implicitly or explicitly present in the development and rationales for corporate theories. Lastly, there are some concluding remarks.

10 For definition of corporate governance, see Marc Moore, *Corporate Governance in the Shadow of the State* (Hart Publishing, 2013) 14; Marc Moore and Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Palgrave, 2017) 3.

11 Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, Johns Hopkins University Press, corrected ed, 1998) [trans of: *De la grammatologie* (first published 1967)]; Jacques Derrida, 'The Future of the Profession or the Unconditional University (Thanks to the "Humanities," What Could Take Place Tomorrow)' in Peter Pericles Trifonas and Michael A Peters (eds), *Deconstructing Derrida: Tasks for the New Humanities* (Palgrave-Macmillan, 2005) 26.

12 Jacques Derrida, *Force de loi: Le 'Fondement mystique de l'autorité'* (Galilée, 2005) 22–24, 26.

13 Virginia Held, *The Public Interest and Individual Interests* (Basic Books, 1970) chs 3–5.

II Deconstructionism: An interrogation into the public interest

II.I Deconstructionism: The method of analysis

Derrida's *Of Grammatology* was where deconstructionism was first delineated. It was applied to explore the language and construction or adaptation of Heidegger's *Destruction*.¹⁴ Derrida explicated deconstruction as a notion that pays attention to structure but goes beyond structuralism. It is added that deconstruction focuses on the undoing, decomposing and extricating of structures, notions or institutions rather than their destruction, or even simple analysis or critique.¹⁵ It is consequently difficult to define deconstruction as its predicates, defining concepts and significations can themselves be subject to deconstruction.¹⁶ In Derrida's *Force de loi: Le Fondement mystique de l'autorité*, justice and the history of right were used to illustrate and explicate deconstruction.¹⁷ It was argued that one cannot speak directly of justice or objectivise justice without betraying its essence and thus limiting it.¹⁸ In a similar manner, one cannot speak objectively of public interest without limiting it.¹⁹ This requires the questioning of the origin and theories of the public interest so as to undertake a rigorous deconstruction without neutralising the concept itself.²⁰ Essentially, a deconstructionist approach to defining and understanding public interest problematises perceptions of singularity.²¹ Deconstructionism is thus a useful method to defining public interest because there is no preferred peculiar, singular or even uniquely deconstructionist view; it is instead marked by nuances, reflexivity and self-awareness which are important to defining public interest in a manner that serves societal interests including the examination of the role of corporations.²²

Similarly, deconstruction enables a discussion of the public interest in a manner that exceeds a hierarchy of binary oppositions and allows for the existence of undecidable notions.²³ This means that public interest is accepted as an undecidable notion, complex and undefinable but not problematised. In this manner, public interest can transcend disciplinary and ideological bias, scholarly or academic trends because it is not limited to a particular or specific conceptualisation. It is instead flexible and open to continuous evolution which means that it can serve societal interests in innumerable manners from the regulation of personal data to ensuring corporate responsibility.

14 Derrida, *Of Grammatology*, above n 11; Jacques Derrida, 'Letter to a Japanese Friend' in David Wood and Robert Bernasconi (eds), *Derrida and Différance* (Parousia Press, 1985) 1, 2.

15 Derrida, 'Letter to a Japanese Friend', above n 14, 1, 4.

16 Ibid.

17 Derrida, *Force de loi: Le Fondement mystique de l'autorité*, above n 12.

18 Ibid 26.

19 Ibid 34-5.

20 Ibid 45.

21 Stefan Herbrechter and Ivan Callus, 'The Grammar of Deconstruction' in Simon Morgan Wortham and Allison Weiner (eds), *Encountering Derrida: Legacies and Futures of Deconstruction* (Continuum, 2007) 138.

22 Ibid; Jacques Derrida, *Positions* (University of Chicago Press, 1981) 39-44.

23 Derrida, *Positions*, above n 22, 43.

Attention will now turn to a brief overview of public interest theories. These will, in a latter part of the article, be examined and critiqued through deconstructionist lens.

II.II Overview of public interest theories

Although there is a plethora of public interest theories, for the purpose of this article, Virginia Held's categories — preponderance or aggregative theories, unitary theories and common interest theories — will be explored because they highlight various ways of critiquing and defining public interest in a manner that is accessible to deconstructionist methodological considerations.²⁴

1 Preponderance or aggregative theories

Preponderance or aggregative theories²⁵ are based on a subjective and individualist conception of public interest. Hence public interest is generally seen as synonymous with the interest of preponderance or aggregate sum of individuals.²⁶ Public interest is based on self-regarding interests common to the preponderance of individuals in the community²⁷ or regarded as aggregation or sum of individual interests or preferences.²⁸ These theories tend to be associated with economic interests, increase in the general economic welfare of society with a focus on individual liberty and the satisfaction of individuals' wants and needs through the creation of optimum environment, often synonymous with a liberal government or state. This usually implies limited governmental intervention in individuals' affairs but governmental instrumentation in securing the satisfaction of individual wants or needs.²⁹

2 Unitary theories

Unitary theories³⁰ conceptualise public interest as superseding interests that transcend the interests of individuals. Public interest is ideal-regarding and often associated with moral values and judgments which guide all in society whether they are aware of it or not. Its theorists tend to consider as valid the judgments that actions or interests are in the public interest as opposed to conflicting individual claims of interests which are consequently invalid.³¹ They apply an objective conception of interests to define public interest,

24 Held, above n 13, chs 3–5; also of interest is the classification of public interest theories by Glendon Schubert, *The Public Interest: A Critique of the Theory of a Political Concept* (Free Press, 1960).

25 Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671, 675; Held, above n 13, ch 3.

26 Held, above n 13, 50.

27 John Petrov Plamenatz, *The English Utilitarians* (Basil Blackwell, 1958) 14.

28 Alfred Marshall, *Principles of Economics* (Palgrave Macmillan, 2013); I M D Little, *A Critique of Welfare Economics* (Oxford University Press, 1950) 54–6; Kenneth Arrow, *Social Choice and Individual Values* (Yale University Press, 3rd ed, 2012) 10–11.

29 Gerhart Niemeyer, 'Public Interest and Private Utility' in Carl J Friedrich (ed), *Nomos V: The Public Interest* (Atherton Press, 1962) 8.

30 McHarg, above n 25, 675–6; Held, above n 13, ch 5.

31 Held, above n 13, 135.

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deriving these interests from what individuals ought to want, prefer and that which is good for them based on a universal concept of what is morally worthy. Such public interest conceptions seem to require individuals to sacrifice self-interest,³² and act in the interest of the community and/or state.³³ Accordingly, emphasis is placed on unity and the perceived collective and uniform welfare of the community.³⁴

3 Common interest theories

Here, public interest is defined with a focus on interests that are common to all. These are non-conflicting interests.³⁵ These interests are thus different from interests of specific sections of society. Emphasis is placed on the common good and allowing individuals within a given society to seek that which is collectively good.³⁶ The conception of common good and will here is different to the interests or will of all because they are not only the sum of a total of conflicting interests or even an aggregation of said interests; they include interests born of unanimity.³⁷ These definitions or conceptions of public interest marry moral values and judgments with economics and/or individualism because they attempt to incorporate the self-regarding aspects of individual interests with others-regarding interests.³⁸ Therefore, these conceptions of public interest include values and interests such as wealth maximisation, civil liberties, property rights, environmental protection, social justice, and interest in information, knowledge and education all at once.³⁹

A brief explication of corporate theories will now ensue as this sets the tone for the deconstruction of public interest and corporate theories to reveal the nuanced ways in which public interest is present in discourses relating to the corporation and its role(s) within society.

III Corporate theories: Brief introduction and classification of approaches

Corporate theories tend to fall broadly into three main strands or schools of thoughts.⁴⁰ The first strand is the law and economics strand which envelops

32 Plato, *The Republic* (Desmond Lee trans, Penguin Classics, 2007) 412, 520 [trans of: *Πολιτεία* (first published 360 BCE)].

33 Ibid.

34 Ibid 462–5; John Mbiti, *African Religions and Philosophy* (Doubleday, 1970) 141; Ifeanyi Menkiti, 'Person and Community in African Traditional Thought' in Richard A Wright (ed), *African Philosophy: An Introduction* (University Press of America, 1984) 171, 176.

35 McHarg, above n 25, 676–8; Held, above n 13, ch 4.

36 Jean-Jacques Rousseau and Charles Frankel, *The Social Contract* (Hafner, 1947) Book II ch III, 26, ch I, 23.

37 Ibid Book II ch III, 26; Book II ch VI, 33–4.

38 Harold Lasswell, 'The Public Interest: Proposing Principles of Content and Procedure' in Carl J Friedrich (ed), *Nomos V: The Public Interest* (Atherton Press, 1962) ch 5, 57.

39 Domènec Melé, 'Integrating Personalism into Virtue-Based Business Ethics: The Personalist and the Common Good Principles' (2009) 88 *Journal of Business Ethics* 227; Carol Lewis, 'In Pursuit of the Public Interest' (2006) 66 *Public Administration Review* 694, 698–9; Wiredu, above n 1, 17; Kwame Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (Oxford University Press, 1997).

40 There is no agreed consensus on these three schools of thought, see Janet Dine, *The*

legal and economic contractarianism.⁴¹ Its focus is on an individualist and economic rationality approach to effective corporate governance.⁴²

The second strand is the communitarianism or pluralist strand. It is sometimes referred to as the 'progressive approach' because of the general focus on shared values and interests of various stakeholders in the common good, and unifying objective which is the good governance of companies or the notion of corporations as institutions which are part of society and thus subject to moral and social obligations.⁴³

The third strand is the entity or corporate personality theory which conceptualises the corporation as a separate entity in its own right for which good corporate governance is indispensable for its continuous evolution, reproduction and existence.⁴⁴ Therefore paying attention to societal interests is in the interest of the corporation for its viability but it is a citizen in its own right and subject to obligations of good citizenship.⁴⁵

There are some preliminary conclusions which can be inferred from the above exploration of corporate theories. One can deduce that the various theories have political conceptions and foundations that underpin them which implicitly or explicitly incorporate some notion of the public interest.⁴⁶ For instance, contractarians appear to fall largely under the umbrella of (neo)liberalism (as it pertains to economics) and individualism characterised by a desire for a free market economy, freedom to contract and economic efficiency, ultimately considered in the interest of society.⁴⁷ Communitarians appear to embrace a more socialist ideology, characterised by promotion of social welfare and the community.⁴⁸ The same may be said for concession theorists who historically conceptualised the corporation as a concession

Governance of Corporate Groups (Cambridge University Press, 2000); Andrew Keay, *The Corporate Objective: Corporations, Globalisation and the Law* (Edward Elgar Publishing, 2011).

41 Armen Alchian and Harold Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *American Economic Review* 777; Frank H Easterbrook and Daniel R Fischel, 'The Corporate Contract' (1989) 89 *Columbia Law Review* 1416, 1426-7; Stephen Bainbridge, 'Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship' (1997) 82 *Cornell Law Review* 856, 869.

42 Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962); Roy Morrison, *We Build the Road as We Travel* (New Society Publishers, 1991) 107.

43 Amitai Etzioni, 'Communitarianism' in Karen Christensen and David Levinson (eds), *Encyclopedia of Community: From the Village to the Virtual World* (Sage Publications, 2003) vol 1, A-D, 224; Rory Ridley-Duff, *Communitarian perspectives on corporate governance* (Doctoral Thesis, Sheffield Hallam University, 2005) 17-27, 38.

44 E Merrick Dodd Jr, 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145, 1145-63; David Millon, 'Theories of the Corporation' (1990) 39 *Duke Law Journal* 201, 211-20; Sarah Worthington, 'Shares and shareholders: property, power and entitlement: Part II' (2001) 22 *Company Lawyer* 307, 310.

45 George F Canfield, 'The Scope and Limits of the Corporate Entity Theory' (1917) 17 *Columbia Law Review* 128, 128-43; Millon, above n 44, 216.

46 J Pound, 'The rise of the political model of corporate governance and corporate control' (1993) 68 *New York University Law Review* 1003, 1003-9.

47 Gerry Rubin and David Sugarman (eds), *Law, Economy and Society, 1705-1914: essays in the history of English Law* (Professional Books, Abingdon, 1984) 12-13; Ross Grantham, 'The Doctrinal Basis of The Rights of Company Shareholders' (1998) 57 *Cambridge Law Journal* 554, 578-82; Dine, above n 40, 14; John E Parkinson, Gavin Kelly and Andrew Gamble (eds), *The Political Economy of the Company* (Hart Publishing, 2001) 4, 23-5.

48 Parkinson, Kelly and Gamble, above n 47, 35-6; Dine, above n 40, 17-18.

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granted by the state and therefore subject to a number of obligations in order to retain its social licence to operate and privileges granted to it such as limited liability.⁴⁹ This is quite significant because it highlights, first, that the corporation and corporate theories are not apolitical. Second, the exclusion or inclusion of interests such as other forms of efficiency or rationality is itself indicative of adherence to certain understanding of the societal role of corporations and indeed conceptions of the public interest;⁵⁰ this will be explored in greater detail in subsequent sections of this article.

III.I Corporate theories and perspectives and public interest

1 Economic corporate theories and public interest

Economic and contractarian perspectives on the firm and corporate governance as aforementioned tend to advocate an economic conception of corporations. This is often based on the notion that the corporation serves the purpose of reducing transaction costs of contracting, increasing efficiency in production and the better allocation of resources.⁵¹ There are nonetheless identifiable public interest rationales behind these theories.

Economists and advocates of an economic analysis of the law generally conceptualise public interest as ‘the commons’,⁵² demonstrating a distinction between private and public goods. The commons are seen as public goods which afford benefits to a large number of people, paid through taxation and other relevant societal endeavours required or imposed by the government and for which the government acts as trustee for the benefit of society.⁵³ Correspondingly, public interest is often thought to be a utilitarian concept, a product of a liberal democratic system, and born of ongoing organic political activity informed by individual interests and interest groups. Essentially it evolves with societal mores and political climate. Consequently, it is argued that public interest is a concept devoid of morality or ethics and instead simply a fruit of utilitarian or pragmatic (political) calculations in society.⁵⁴ Public interest is then considered to be a notion that ought to be largely restricted to the public sphere; the commons or public goods in a manner that serves a preponderance of individuals or is of utility to the greatest number of

49 United Kingdom, *Parliamentary Debates*, House of Commons, 29 June 1855, vol 139, cc310, 356–7; Grantham, above n 47, 578–82.

50 Ridley-Duff, above n 43, 17.

51 Ronald H Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; Oliver E Williamson, ‘Transaction-Cost Economics: The Governance of Contractual Relations’ (1979) 22 *Journal of Law and Economics* 233.

52 Christopher Hood, *Administrative Analysis: An Introduction to Rules, Enforcement, and Organizations* (Wheatsheaf Books, 1986) 2–12.

53 King, Chilton and Roberts, above n 9, 958.

54 Ibid 960; Michael Harmon, ‘Administrative Policy Formulation and the Public Interest’ (1969) 29 *Public Administration Review* 483, 484–5; Bradley S Chilton and James A Woods, ‘Moral Justifications on the Rehnquist Court: Hercules, Herbert, and “Druggies” Under the Fourth Amendment’ (2006) 17 *Criminal Justice Policy Review* 343, 343–51.

individuals.⁵⁵ Therefore the focus is on individual interests and preferences rather than collectivism per se. Thus, economic perspectives on corporate governance and public interest are arguably more affiliated with preponderance theories of public interest. These economic theories gravitate towards favour economic rationality and liberal individualism, with a focus on self-actualisation, economic liberty as well as wealth maximisation.⁵⁶ They thus adhere to the school of thought that advocates minimal state intervention in corporations and their governance, highlighting instead the liberty (to contract and enterprise) without unwarranted governmental or other state interference.⁵⁷ They advance and extol notions of individual freedom without state coercion even in the face of economic inequalities⁵⁸ coupled nonetheless with the protection of clearly defined property rights.⁵⁹ This might give the impression that economic individualism is the antithesis of public interest but in reality, to paraphrase Bozeman, it is the forest in which many a great public policy trees grow.⁶⁰ So individualism and public interest run together in many contexts, one of which is corporate law and governance.

In fact, some theorists contend that firms exist to meet societal need of reducing transaction costs in production and contributing to the reduction of social costs.⁶¹ They add that the corporation has led to the better coordination of mass production, in a manner that is seemingly more efficient than markets and bureaucracies and with lower production costs.⁶² They argue that this has contributed to economic efficiency and is instrumental in the improvement of societal social welfare.⁶³ In this manner, corporations serve societal interests, and may be considered to act in the public interest.

55 Mary Warnock (ed), *Utilitarianism and on Liberty: Including 'Essay on Bentham' and Selections From the Writings of Jeremy Bentham and John Austin* (Wiley-Blackwell, 2008) 188–90.

56 Richard Thaler, 'From Homo Economicus to Homo Sapiens' (2000) 14 *Journal of Economic Perspectives* 133.

57 F A Hayek, *The Constitution of Liberty: The Definitive Edition* (University of Chicago Press, 2011) 22–38; F A Hayek, *The Road to Serfdom* (University of Chicago Press, 2007) 72–87, 103–7.

58 Hayek, *The Constitution of Liberty: The Definitive Edition*, above n 57, 146, 87–8.

59 Ibid 118; Friedman, above n 42, 34, 37–8.

60 Bozeman, above n 1, 40.

61 Coase, 'The Nature of the Firm', above n 51; Ronald H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

62 William W Bratton Jr, 'The New Economic Theory of the Firm: Critical Perspectives from History' (1989) 41 *Stanford Law Review* 1471, 1475, 1488–9.

63 Martin Gelter, 'The Dark Side of Shareholder Influence: Toward a Holdup Theory of Stakeholders in Comparative Corporate Governance' (Discussion Paper No 17, John M Olin Center For Law, Economics, and Business Fellows, Harvard Law School, 2008) 9; *Journal of the House of Commons* (1803) vol 29, 785; William McColloch, 'A Shackled Revolution? The Bubble Act and Financial Regulation in 18th Century England' (Working Paper No 2013–06, University of Utah, Department of Economics, March 2013) 11–12; Bishop Carleton Hunt, *The Development of the Business Corporation in England, 1800-1867* (Harvard University Press, 1936) 10–11; See Parliamentary Debates about the repeal of the *Bubble Act* in 1825 and in 1855 the Marine Insurance Bill: United Kingdom, *Parliamentary Debates*, House of Commons, 28 May 1824, vol 11, cc 920–33; Partnership Amendment Bill and the Limited Liability Bill: United Kingdom, *Parliamentary Debates*, House of Commons, 29 June 1855, vol 139, cc 310–58; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Methuen, 1904) Book VI.94, 96–100; *Darcy v Allein* (1602) Noy 173, 182.

Under economic theories, corporate law is considered largely as a way of providing templates and structures for contracting parties and transaction costs.⁶⁴ It sets out significant aspects of the corporation, particularly, corporate governance; the role of directors and their duties to the corporation.⁶⁵ This facilitates the organisation of corporations and thus reduces the transaction costs which would perhaps be otherwise incurred if these corporation statutes did not exist. It is claimed that this is ultimately beneficial for society as it serves the public interest of mitigating obstacles to production and transactions.⁶⁶ Hence, public interest in economic analysis of corporate law and corporate governance is also interpreted as efficiency and facilitation of the organisation of production and transactions.

Under this notion of public interest in corporate governance, the interests of other factors of production such as consumers, employees and suppliers are considered important but largely out of the scope of corporate law and corporate governance, that is, they ought to be regulated or addressed under consumer (protection) law, employment law, contract law, etc and not under corporate law.⁶⁷ This is believed to be the most effective way to ensure the proper protection of other constituencies or factors of production within the corporation as shareholders generally will hold directors accountable and ensure that they act in the best interests of the corporation which contributes to the protection of non-shareholder constituencies' interests and ultimately social welfare through 'the pursuit of aggregate social welfare'.⁶⁸ Economic analysis of corporate law and governance also implicitly incorporates the public interest through the protection of property rights of shareholders. This is because such protection can be said to be indirectly in the interest of society as it maintains the fundamental principles of liberty and entrenches the protection of the pursuit of individual goals as well as reinforces protection from governmental intervention in private contracts and private orderings.⁶⁹

Many advocates of economic conceptions of the nature of the corporation extrapolate that in order for the corporation to remain an efficient and effective institution which continues to contribute to the maximisation of general welfare, it should focus on shareholder primacy and profit maximisation as the aggregation of shareholders (self-interested individuals), coming together to find and exploit opportunities for mutually beneficial exchanges, best serves

64 William W Bratton Jr, 'Nexus of Contracts Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407, 407–8.

65 Easterbrook and Fischel, *The Economic Structure of Corporate Law*, above n 4.

66 Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117, 136; Ian B Lee, 'The Role of the Public Interest in Corporate Law' in Claire Hill and Brett McDonnell (eds), *Research Handbook on the Economics of Corporate Law* (Edward Elgar Publishing, 2012) 8.

67 Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439, 441, 449.

68 *Ibid.*

69 King, Chilton and Roberts, above n 9, 957; Richard Posner, *The Economics of Justice* (Harvard University Press, 2nd ed, 1983) 88–119; Hayek, *The Constitution of Liberty: The Definitive Edition*, above n 57, 22–38.

the objective of improving general welfare.⁷⁰ Furthermore, it is thought that giving control rights to shareholders and affording them more primacy means better scrutiny of the governance of these corporations because they are the residual owners and most invested in their good governance⁷¹ and it reduces debilitating decision-making conflicts between stakeholders.⁷² Although advocates of this approach do not explicitly argue that this benefits public interest, it is argued that shareholder primacy is a better way of resource allocation in the interest of all in society and the maximisation of aggregate social wealth.⁷³

It is of course not surprising that advocates of economic analysis of corporate law usually reject any unnecessary state interference; that is, state intervention that exceeds some regulation of competition to ensure fairness,⁷⁴ and regulations which exceed the facilitation of contractual relationships between actors of the corporations because state interference could lead to inefficiencies and augmentation of transaction costs.⁷⁵ Furthermore, it is contended that state intervention could in fact be detrimental to the development of societal interests, particularly economic or property interests because it does not necessarily reduce transaction and other social costs, particularly in the context of corporations.⁷⁶ It is similarly believed that making use of the efficient markets approach is generally more effective than bureaucracies born of state intervention due to the difficulty of monitoring directors externally and the corresponding costs of doing so.⁷⁷ States may also expropriate and conscript properties as well as violate civil liberties.⁷⁸

In light of the above, corporations are not only of public value; so is shareholder primacy, that is, in the interests of a large preponderance of individuals and thus in the public interest.⁷⁹ Therefore contrary to popular and anecdotal belief, economic theories are not devoid of notions of the public interest but instead claim that shareholder (wealth) maximisation or primacy brings the corporation closer to acting in society's interest, that is, the public interest.

70 Thomas Miceli and Matthew Baker (eds), *Research Handbook on Economic Models of Law* (Edward Elgar Publishing, 2013) Introduction; Grantham, above n 47, 554.

71 Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62 *Modern Law Review* 32.

72 Raghuram Rajan and Luigi Zingales, 'Power in a Theory of the Firm' (1998) 113 *Quarterly Journal of Economics* 387, 425.

73 Hansmann and Kraakman, above n 67, 439–41; John Armour, Simon Deakin and Suzanne Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 *British Journal of Industrial Relations* 531.

74 Guido Calabresi, 'Some Thoughts on Risk Distributions and the Law of Torts' (1961) 70 *Yale Law Journal* 499.

75 Frank H Easterbrook and Daniel R Fischel, 'Corporate Control Transactions' (1981) 91 *Yale Law Journal* 698, 700; Eric Orts, 'Shirking and Sharking: A Legal Theory of the Firm' (1998) 16 *Yale Law and Policy Review* 265, 275.

76 Coase, 'The Problem of Social Cost', above n 61, 15–17.

77 Thomas Clarke, 'Introduction: Theories of Governance – Reconceptualizing Corporate Governance Theory after the Enron Experience' in Thomas Clarke (ed), *Theories of Corporate Governance: The philosophical foundations of corporate governance* (Routledge, 2004) 5.

78 Ibid.

79 Bozeman, above n 1, 23, 53–4; Alchian and Demsetz, above n 41, 777–95; Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan, 1932).

A deconstruction of economic corporate theories and the various issues discussed above reveal that contrary to popular belief, public interest is not the antithesis to economic theories of the firm and corporate governance, rather they embrace it in a manner that is altogether more subtle and implicit but nonetheless very present. This is significant because drawing out the public interest implicit in economic theories enables more nuanced understanding of (many) corporations as they currently exist today, and the emphasis is placed on shareholder primacy and efficiency.

However, deconstruction also exposes the flaws in economic corporate theories and corresponding perceptions of public interest. While some elements of the economic theories are beneficial to conceptualising public interest, an unwavering dependence on contractarianism or economic satisfaction, for example, is problematic because it is submitted that they do not provide an accurate representation of reality. The reliance on a potent mix of economic individualism, utilitarianism and liberalism alone, to equate serving the public interest, excludes a number of other interests or values that also serve society. For instance, economic perspectives are commonly premised on the desire to protect certain rights, especially individuals' property rights, freedom of association and liberty to *entreprendre* which are legitimate considerations, however to equate them solely with public interest could mean a superficial and incomplete grasp of interests which are beneficial to society such as equality and protection of the vulnerable.

Although economic perspectives are very important to understanding and addressing directorial misconduct in the light of public interest, they are insufficient to adequately address it because they do not guarantee good governance in the best interests of the corporation or in the interests of other constituents who may not be protected under other areas of law, whereas a more robust understanding of public interest might intervene by more readily requiring state intervention to protect the rights of these constituents.⁸⁰ A close examination of these economic theories as they are currently conceptualised seems to indicate that they are not cognisant of the evolving global economy, and the shifting role and nature of corporations. The shift from being a means of efficient facilitation of mass production and organisation into powerful alternative institutions with growing global power, influence in governance (even in the public sphere) as well as the interdependence of public and private spheres is not sufficiently addressed.⁸¹ This means that these theories have a blind spot as they seem tethered to a reductionist and, arguably, outdated understanding of corporations and public interest. An illustration of this is the notion of efficiency which is fundamental to these theories and which is based on an objective 'ethnocentric oneirism' definition.⁸² Ethnocentric oneirism refers to an ethnocentric misconception of writing as writing according to a western structure of signs and phonetic notation,⁸³ an act which is indicative of a society's transformation from primitive to

80 Cheryl Wade, 'Fiduciary Duty and the Public Interest' (2011) 91 *Boston University Law Review* 1191.

81 Joseph T Mahoney, Anita M McGahan and Christos N Pitelis, 'The Interdependence of Private and Public Interests' (2009) 20 *Organization Science* 1034, 1035.

82 Derrida, *Of Grammatology*, above n 11, 49, 109–10.

83 Arturo J Aldama, 'Tayo's Journey Home: Crossblood Agency, Resistance and

civilised.⁸⁴ Conceptualising writing in an ethnocentric and narrow manner reduces it to writing in a certain arbitrary manner or the use of accepted techniques when in reality those who are argued to be without writing are simply not performing the act of writing according to a certain standard. Here this is extended to signify and connote a (western) ethnocentric singular approach to conceptualising efficiency. The accepted definition of efficiency is arguably homogenous even in its application in law and economics. A deconstruction of this notion may lead to further exploration of its meaning, its critique and redefinition which would not necessitate a hierarchy or order of subordination of interests. Therefore, the question ‘efficiency according to whom?’ does not seem redundant even in the context of corporate law because of the heterogeneity of efficiency rationales and underlying individual and societal preferences.⁸⁵ The same critique could be applied to economic perspectives on the public interest due to the ethnocentric and singular approach taken to conceptualise the public interest. Societal interest goes beyond a reductionist view of efficiency, reduction in transaction costs and increase in aggregate social welfare, even in the context of corporations. Separating social interests from economic considerations such as environmental protection or reducing inequalities or equities means that one is left with narrow conceptions of the public interest. This is challenging because corporations can be complicit in environmental degradation and contribute to economic disparities.⁸⁶ The *ethocentric oneirist* approach to public interest robs public interest of the opportunity to reflect societal preferences and address societal needs.

It is nonetheless noteworthy that public interest is a crucial concept which is a subject of enquiry, albeit largely implicitly in law and economic theories and thought and enables a more complex understanding of the role of corporations in society. Allusions are made to public interest in discussions about the firm, the nature of the corporation and identifying values which contribute to optimal and efficient resources allocation, reduction of production and transaction costs, societal wealth maximisation and the improvement of the economy. These are all thought to be indispensably beneficial for society and its general welfare.

Attention will be turned to pluralist and concession theories of the firm to examine if they provide more robust understanding of the public interest.

Transformation: A Reading of Leslie Marmon Silko’s Ceremony’ in John C Hawley (ed), *Cross-Addressing: Resistance Literature and Cultural Borders* (SUNY Press, 1996) 157, 160.

84 Derrida, *Of Grammatology*, above n 11, 109–10; Peter Trifonas, ‘Teaching the Other II: Ethics, writing, community’ in Gert J Biesta and Denise Egéa-Kuehne (eds), *Derrida & Education* (Routledge, 2001) 109–10.

85 Chris William Sanchirico, ‘Deconstructing the New Efficiency Rationale’ (2001) 86 *Cornell Law Review* 1003, 1056–70; Jill Fisch, ‘Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy’ (2006) 31 *Journal of Corporation Law* 637, 639.

86 United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

2 Pluralist corporate theories and perspectives and public interest

Pluralist and concession theories are generally associated with the public interest because it has often played a significant part in the development of the theories. Concession theory, for example as aforementioned, historically considered the corporation to be a concession granted by the state⁸⁷ and so in order for a corporation to retain legitimacy and the social licence to exist, it must act in a manner that is in the interest of society to a certain degree. Incorporating concepts such as representation of various constituencies, legitimacy and accountability in the governance of the corporation are portrayed as public interest considerations which are indispensable to good corporate governance.⁸⁸ Concession theory can be said to embrace a unitary conception of public interest as a superseding interest transcending and reconciling the interests of individuals and other sections of society including corporations, guiding them on ideals of common good to which they ought to strive. Concession theorists tend to strongly advocate and emphasise the validity of governmental regulation and implication in corporate governance to ensure that these ideals of morality and common good are upheld.⁸⁹ However, concession theory fell out of fashion and favour with theorists in corporate law and corporate governance due to arguments that individuals would come together to devise ways of facilitating production regardless of sovereign or state interference.⁹⁰ Nevertheless, concession theory, though largely of historical interest, is also of some utility because it enables an understanding of the historical role corporations have played in society even in contemporary times with an increasing emphasis placed on the private character and nature of corporations.⁹¹ Concession theory also arguably served as a source of inspiration for advocates of other corporate theories such as an anti-managerialist (pluralist) approach to corporate governance which is concerned primarily with limiting the power and discretion afforded to managers and directors of corporations because like decision-makers in the public sphere,⁹² the actions of these corporate decision-makers can have significant impact on society that far exceeds their sphere of governance and so therefore, they ought to be subject to clearly defined legal controls.⁹³

87 *Case of Sutton's Hospital* (1612) 10 Co Rep 23a; Samuel Williston, 'History of the Law of Business Corporations Before 1800' (1888) 2 *Harvard Law Review* 105, 116; *City of London v Vanacker* (1699) 1 Lord Raymond 496, 498; *R v Spencer* (1766, K B) 3 Burr 1827, 1839; I Cleeve, *The Law of Corporations Containing the Laws and Customs of All the Corporations and Inferior Courts of Record in England* (Printed by the assigns of R and E Atkins, 1702) 17; Colin Cooke, *Corporations, Trust And Company: An Essay in Legal History* (Manchester University Press, 1950) 58–60.

88 Bratton, 'The New Economic Theory of the Firm', above n 62, 1497.

89 See generally, Richard Flathman, *The Public Interest: An Essay Concerning the Normative Discourse of Politics* (Wiley, 1966) pt I.

90 The development of the unincorporated company in the United Kingdom is illustrative of this despite the *Bubble Act of 1825* which was considered to be dead letter, see Cooke, above n 87, 74–6; Armand B DuBois, *The English Business Company after the Bubble Act, 1720–1800* (Commonwealth Fund, 1938) 86.

91 Bratton, 'The New Economic Theory of the Firm', above n 62, 1475.

92 *Charitable Corp v Sutton* (1742) 2 Atk 404; *Keech v Sandford* (1726) 1 Sel Cas Ch 61; United Kingdom, *Parliamentary Debates*, House of Commons, 3 July 1844, vol 76, cc 273, 278–82.

93 Bratton, 'The New Economic Theory of the Firm', above n 62, 1497–8.

Essentially, looking at this approach through the lens of public interest reveals a number of issues. It indicates how concession theory has influenced other corporate theories but also highlights the unitary public interest theory which is implicit in some anti-managerialist approaches to the public interest. By holding directors to a high standard of scrutiny in their conduct, setting ideals such as fairness, participation in governance, deliberative decision-making as interests which supersede the private interests of directors and even the corporations themselves,⁹⁴ and contending that directors ought to incorporate the interests of all who contribute to the creation of general value for the corporation in their decision-making, they attempt to ensure that corporate governance has a robust and multifaceted appreciation of the role of contemporary corporations.⁹⁵

In other pluralist corporate theories, public interest is incorporated in more explicit ways. For some theorists, public interest signifies better alignment of a corporation's interests with those of society.⁹⁶ Such alignment is demanded as it is argued that society often deals with the systemic and negative externalities of corporations and their actions. It is consequently contended that it is neither efficient nor a true reduction of transaction costs for society if it shoulders the cost of the inefficiencies of the corporation and ultimately bearing the cost of the mishaps of the corporation.⁹⁷ This pluralist approach to public interest does not necessarily de-centre or negate shareholder primacy but it does require managerial stewardship⁹⁸ and that shareholder primacy be tempered with a greater consideration of other constituents of the corporation and society's needs for the reduction of excessive corporate risk-taking which will have an impact on systemic externalities.⁹⁹ This tempering is demanded by some scholars even in cases when the risk is likely to benefit shareholders because the risk might not be in the long-term interest of the corporation or take into consideration social purposes of corporations.¹⁰⁰ This is due to the belief that the negative externalities of corporations could be damaging to local communities' economy, increase unemployment and thus poverty and by consequence, reduce social as well as economic welfare.¹⁰¹ In light of these concerns, it is claimed that state intervention might be necessary to restrict the freedom to contract in order to prevent and reduce the effect of the

94 Roger Blanpain et al (eds), *Rethinking Corporate Governance: From Shareholder Value To Stakeholder Value* (Kluwer law International, 2011) 332–3.

95 Ibid 337.

96 Lee, above n 66, ch 7; Günther Teubner, 'Company Interest: The Public Interest of the Enterprise "In Itself"' in Ralf Rogowski and Ton Wilthagen (eds), *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer, 1994) 21; Branston, Cowling and Sugden, above n 3.

97 Steven Schwarcz, 'Misalignment: Corporate Risk-Taking and Public Duty' (2016) 92 *Notre Dame Law Review* 1, 29–30.

98 Elmer Johnson, 'General Motors Corporation, Its Constituencies and the Public Interest' (1986) 5 *Journal of Business Ethics* 173, 173–4.

99 *Overend, Gurney and Co v Gurney* (1868–69) LR 4 Ch App 701, 717–20 (Lord Hatherley LC); *The Overend and Gurney Co v Gibb* (1871–72) LR 5 HL 480, 495, 500, 502, 506.

100 David Lutz, 'African Ubuntu Philosophy and Global Management' (2009) 84 (Supplement 3) *Journal of Business Ethics* 313, 315.

101 Steven Schwarcz, 'Systemic Risk' (2008) 97 *Georgetown Law Journal* 193, 207; Wade, above n 80.

aforementioned externalities.¹⁰² Some academics have suggested that the greater governmental intervention ought to incorporate a public governance duty discouraging excessive directorial risk-taking and requiring directors to engage in a balancing act of incorporating various constituents' interests including society's interests in their governance decision-making.¹⁰³ This approach implicates a common interest approach to the public interest because it maintains that the reduction of corporations' systemic externalities and their impact on society are of public interest, interests common to all due to the harm caused to the public; the local and wider economy, rather than sections of society.¹⁰⁴ This assimilates common interest theories of public interest which focus on non-conflicting interest in society as discussed in the earlier parts of this article.

In similar fashion, other corporate theories, such as the team production¹⁰⁵ and director primacy theories, also incorporate common interest theories of the public interest.¹⁰⁶ This is because these approaches appear to incorporate, in varying degrees, the expectation that directors will act or ought to act in a manner that takes into consideration the common good of all stakeholders of the corporation,¹⁰⁷ despite the fact that certain advocates place special focus on shareholders.¹⁰⁸ Although the emphasis is on managerial discretion, it is argued by these theorists that there is an onus placed on directors to evaluate and balance the different conflicting and legitimate interests of different constituents of the corporation.¹⁰⁹ This implicitly means exemplarily

102 Moore, above n 10, 236; Henry Butler and Jonathan R Macey, 'Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority' (1996) 14 *Yale Law and Policy Review* 23, 29; Steven Schwarcz, 'Rethinking Freedom of Contract: A Bankruptcy Paradigm' (1999) 77 *Texas Law Review* 515, 520–1, 534–6, 551 et seq.

103 Lee, above n 66, 15; Schwarcz, 'Misalignment: Corporate Risk-Taking and Public Duty', above n 97, 48–52.

104 Alan Morrison, 'Meta Contracting and Autonomy: A Liberal Theory of the Firm' (May 2012) 1, 22–3; Butler and Macey, above n 102, 29.

105 Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 248; Margaret Blair and Lynn Stout, 'Team Production in Business Organizations: Introduction' (1999) 24 *Journal of Corporation Law* 743; Allen Kaufman and Ernie Englander, 'A Team Production Model of Corporate Governance' (2005) 19 *Academy of Management Executive* 9, 12; Alchian and Demsetz, above n 41, 777; Bengt Holmstrom, 'Moral Hazard in Teams' (1982) 13 *Bell Journal of Economics* 324; Robin Marris, *The Economic Theory of 'Managerial' Capitalism* (Palgrave MacMillan UK, 1964) 16.

106 Stephen Bainbridge, 'The Board of Directors as Nexus of Contracts' (2002) 88 *Iowa Law Review* 1.

107 Alan J Meese, 'The Team Production Theory of Corporate Law: A Critical Assessment' (2002) 43 *William and Mary Law Review* 1629, 1632; Blair and Stout, 'A Team Production Theory of Corporate Law', above n 105, 276–87; *ibid* 1.

108 Bainbridge, 'The Board of Directors as Nexus of Contracts', above n 106, 31–3.

109 Some director primacy advocates such as Stephen Bainbridge, 'Preserving Director Primacy by Managing Shareholder Interventions' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power and Activism* (Edward Elgar Publishing, 2015) 231; and Bernard Sharfman, 'Shareholder Wealth Maximization and Its Implementation under Corporate Law' (2015) 66 *Florida Law Review* 389, 394–401 would see the aim as being shareholder wealth maximisation in a board primacy context. Also see Lynn Stout, 'The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance' (2003) 152 *University of Pennsylvania Law Review* 667, 685–6; Martin Lipton and Steven Rosenblum, 'Election Contests in the

managerial conduct because in order for the various constituents of the corporation to rely on the expertise and legitimacy of directors as objective trustworthy decision-makers, they must portray that they are not easily influenced or even susceptible to the temptation of other (personal) interests which would interfere with the exercise of their official duty as agents of the corporation.¹¹⁰

A deconstruction of pluralist and/or communitarian corporate theories reveals that public interest is also present in these corporate law and governance approaches. However, the various theories discussed above incorporate theories of public interest in diverse ways. Some apply public interest in a universalising and transcending manner to justify managerialism, electing directors as best placed to serve all of a corporation's constituents or stakeholders including society at large, due to their expertise and insider knowledge.¹¹¹ Others advocate an anti-managerialist but stakeholder-centric stance because they consider that managerial discretion ought to be tempered as directors might be tempted to engage in excessive risk-taking for their own interests.¹¹² These theorists argue that this is vital in order to ensure maximal good governance in society's interests as well as other stakeholders. For example, this limits societal exposure to corporations' negative externalities. The incorporation of public interest in these corporate theories reveals varying conceptions of the role of corporations in society and attempts to justify how the different approaches serve or can serve societal needs.

A deconstruction of the various conceptions of the public interest in the pluralist corporate theories also draws out a number of issues which could be impediments to a complex understanding of the role of corporations in our increasingly globalised world. For instance, a deconstruction of the anti-managerialist approach highlights an emphasis on the need to scrutinise managerial discretion but may not address the complex inner layers of directorial misconduct. For example, in cases where directors are also shareholders, if the focus is simply on procedures, directors could be said to have fulfilled their duty of loyalty appropriately and in the public interest even in cases where they have reduced the duty to a simple box-ticking exercise.

Also, as is the case with shareholder-centric corporate theories and their aggregative or preponderance conceptions of the public interest, the pluralist corporate theories discussed above are not necessarily compatible with important issues of societal interests such as environmental protection, respecting the local communities in which a corporation operates. For

Company's Proxy: An Idea Whose Time Has Not Come' (2003) 59 *Business Lawyer* 67, 79; George Dent, 'Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance' (Faculty Publications Paper No 164, Case Western Reserve University School of Law, 2008) <http://scholarlycommons.law.case.edu/faculty_publications/164.

110 Although some director primacy advocates such as Bainbridge link this to agency theory and nexus of contracts theory which have consequences for the conception of public interest, aligning it more with preponderance theories: Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford University Press, 2008); Bainbridge, 'The Board of Directors as Nexus of Contracts', above n 106, 1.

111 Margaret Blair and Lynn Stout, 'Director Accountability and the Mediating Role of the Corporate Board' (2001) 79 *Washington University Law Quarterly* 403.

112 Berle and Means, above n 79.

example, theorists who advocate for extensive managerial discretion do so in order that directors may govern bona fide in the interest of the corporation. This does not allow them to act in ways considered not in the interests of the corporation; therefore acting in the best interests of a corporation does not extend beyond communities where corporations actively operate.¹¹³ Similarly, even if the definition of ‘actively operate’ is enlarged or generous, this is still arguably less than the entire society.¹¹⁴ Granted that some scholars who make a business case for corporate social responsibility advocate that this means that directors ensure and assure the protection of the long-term interests of a corporation by having regard to its stakeholders and the public interest,¹¹⁵ it does not change the fact that the definition of public interest here is subject to hierarchy of interests and order of subordination. The focal point still remains a fairly narrow interpretation of the best interests of a corporation which does not quite capture the evolving role of corporations in society and the part that it plays in globally.

Certain scholars have tried to address the changing role of the corporations and better align it with the public interest. They contend that due to the increasing blurred lines and interdependence between the public and private sphere, directors ought to manage corporations in the best interest of the public and not simply the national public interest but perhaps in the interest of the global community.¹¹⁶ The impact of the recent financial and economic crisis has been used to illustrate the extent of (transnational) corporations’ power, reach and impact¹¹⁷ but also to highlight the far-reaching effects of bad corporate governance and corporate irresponsibility on the global economy and community.¹¹⁸ They suggest corporate governance with the public interest objective of global sustainable value creation.¹¹⁹ Notwithstanding that these scholars have argued that directors have the (practical) discretion to place public interest above other interests in the governance of a corporation,¹²⁰ this is arguably only the case in theory and there is very little evidence to suggest otherwise in practice.¹²¹ Likewise, it has been contended that this is because this approach to corporate governance and public interest is impractical and unworkable in reality, creating more opportunities for directors to abuse their power and position under the guise of societal interests. It could create regulatory fatigue which would not encourage compliance and may even cause setbacks in the management of directorial misconduct. While the

113 Blair and Stout, ‘A Team Production Theory of Corporate Law’, above n 105, 248; Lee, above n 66, 13.

114 Blair and Stout, ‘A Team Production Theory of Corporate Law’, above n 105, 248; Blair and Stout, ‘Director Accountability and the Mediating Role of the Corporate Board’, above n 111.

115 Einer Elhauge, ‘Sacrificing Corporate Profits in the Public Interest’ (2005) 80 *New York University Law Review* 733.

116 Mahoney, McGahan and Pitelis, above n 81, 1040.

117 Allan Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Irwin Law, 2005) 9; Dodd, above n 44, 1157; Coase, ‘The Nature of the Firm’, above n 51, 388; Friedman, above n 42, 120.

118 Mahoney, McGahan and Pitelis, above n 81, 1038.

119 Ibid 1043–5; Lewis, above n 39, 698–9.

120 Mahoney, McGahan and Pitelis, above n 81, 1035, 1038.

121 *Companies Act 2006* (UK) s 171; Lee, above n 66, 13.

critique might be valid, the status quo, shareholder-centred corporate governance or less explicitly public interest-centred approaches to corporate governance do not necessarily reduce regulatory fatigue nor curtail managerial indiscretion.¹²² Also deconstructing this approach to the public interest reveals that it might be desirable because it does not shy away from the unworkable or undecidable elements of public interest; it in fact seems to embrace it. This could be useful because complexification or subtle nuances in the exploration of a notion like public interest do not necessarily render it redundant but instead could contribute to making the corporation a flexible and adaptable institution which is self-aware and reflective in its societal role. After all, justice, another complex notion, has not been abandoned simply because it cannot be defined exhaustively.

In sum, public interest in communitarian or pluralist corporate theories is more explicitly present in discourses. Its diverse conceptualisations attempt to encompass values such as sustainable development, environmental protection, protection of employee rights and wellbeing and corporate citizenship. These are indicative of the fact that public interest is an important subject of enquiry and that it enables better understanding of the societal role of corporations. Deconstructing the various public interest notions in these corporate theories indicates that these theories are also subject to a number of oversights. They could in diverse ways hinder the attempt to create nuanced and refined understanding of the evolving role of corporations and the compatibility of corporations' objectives with acting in the good of society and incorporating values which are considered beneficial to public welfare. Therefore, although these corporate theories seek to better explain how corporations serve or ought to serve society and to a certain degree afford a more multifaceted grasp of the role of corporations through their incorporation of the public interest, their quest for objective and facile definition of the public interest hampers their efforts. For example, by limiting public interest to national boundaries or making societal interest subordinate to other interests such as shareholder or employee interests, there is a recreation of a hierarchy of interests or lack of appreciation of the importance of societal interests which may not thoroughly reflect the significant role that corporations play in society especially in this era of globalisation.

Attention will now turn to an exploration of corporate entity theories and public interest so as to identify and deconstruct underlying public interest rationales and their importance for explicating the societal role of corporations. The various corporate theories discussed above tend to consider the corporation to be a fictive artificial entity granted with legal personality,¹²³ yet this has not negated their incorporation of the public interest, either tacitly or explicitly. It will be considered if corporate entity theories which tend to ascribe a separate and real personality to corporations automatically denote that corporations serve the public interest. Essentially, it will be explored if

122 Michael Marin, 'Disembedding Corporate Governance: The Crisis of Shareholder Primacy in the UK and Canada' (2013) 39 *Queen's Law Journal* 223; Jonathan Ford, 'Shareholder primacy is central to modern governance woes', *Financial Times* (online), 4 March 2018.

123 *Salomon v A Salomon and Co Ltd* [1896] UKHL 1; *Trustees of Dartmouth College v Woodward*, 17 US (4 Wheat) 518, 636 (1819).

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these entity theories necessarily mean more complex or nuanced understanding of the public interest role of corporations.

3 Corporate entity theories and perspectives and public interest

(a) Real entity theory and public interest

One of the key real entity corporate theories is inspired by Gierke's real entity theory.¹²⁴ He opined that when individuals come together in groups to create a collective entity, there is a trade between individual interests and collective interests. Therefore, these individuals choose to make a sacrifice of their own interests in order that the group acquires its own interests and goals which do not fluctuate based on membership changes to the group. The group becomes a real entity and legal recognition is not necessary to establish its existence. It has its own will and property and individuals who govern it are simply its organs carrying out its will.¹²⁵

This theory tacitly incorporates notions of the public interest as Gierke considered the corporation to have public and private character but his conception of public and private spheres was a spectrum or continuum rather than polar opposites.¹²⁶ Therefore, he thought that private law dealt with the external contractual interactions of the corporation while public law dealt with the internal working and relationships within it as a social body, being that the state is the all-encompassing social body. Correspondingly the governance of corporations falls under the ambit of the state.¹²⁷ Advocates of this approach such as Laski and Deiser affirm that the state ought to be involved in the management of corporations, that the law has everything to do with the inner workings of the corporation, and even the character of those running it.¹²⁸ This, they contend, is necessary because business affairs have ceased to be merely a matter of private interests as they are bound to affect society. Hence it is left to the state to protect society's interests.¹²⁹ It is in fact added that as corporations go on to have increasing influence on our daily lives, regulating our lives, they have to be made responsible for their actions, particularly when they threaten the wellbeing of the community.¹³⁰ This, if deconstructed, could of course be taken to mean actions that are contrary to the (collective) public interest ought to be regulated by the state. Furthermore, corporate realism appears to embrace unitary or common interest conception of public interest with regard to corporate governance. Gierke's real entity theory considers that

124 Otto von Gierke, *Political Theories of the Middle Age* (Frederic William Maitland trans, Cambridge University Press, 1900) xxi, xxvi; Alan Dignam and Michael Galanis, *The Globalization of Corporate Governance* (Ashgate, 2009) 13.

125 Bratton, 'The New Economic Theory of the Firm', above n 62, 1490–3.

126 Gerald Rufus Isaacs, *The South Sea Bubble* (Greenwood Press, 1978) 64, 95.

127 Mark Hager, 'Bodies Politic: The Progressive History of Organizational "Real Entity" Theory' (1989) 50 *University of Pittsburgh Law Review* 575, 630–1; Otto von Gierke, *Die Grundbegriffe des Staatrechts und die neuesten Staatrechtstheorien* (Tübingen, 1874) 180–1, 183–4; *Charitable Corporation v Sutton* (1742) 26 ER 642, 405–6; *A-G v Wilson* (1840) Cr & Ph 1.

128 Harold J Laski, 'The Theory of Popular Sovereignty: I' (1919) 17 *Michigan Law Review* 201, 213–14; George Deiser, 'The Juristic Person – I' (1908) 57 *University of Pennsylvania Law Review* 131, 139.

129 Harold J Laski, 'The Basis of Vicarious Liability' (1916) 26 *Yale Law Journal* 105, 111–12.

130 Deiser, above n 128, 141.

corporations are real entities separate from the individuals who formed them, which appears to implicitly indicate that there is a superseding and unifying interest which transcends the interests of said individuals and that corporations have a moral responsibility to act in the interest of society from which it derives its legitimacy and to which it is accountable. Laski and Deiser's corporate entity approaches, on the other hand, could be assimilated with common interests conceptions of public interest because there is an implicit acceptance that there are various and diverse interests which could be important to the corporation and may differ from those of the state. Yet they assert that the state ought to be involved in the inner workings of corporations for the common interests of society as they claim that the far-reaching (negative) impact of corporations' actions ought to be regulated by the state.

While deconstructing these corporate theories reveals the public interest has contributed to the understanding of the corporation, its public and private character as well as the complexities of the role of corporations, Deconstruction also discloses an important issue; these corporate theories do not define the ambit of the application of public interest in corporate governance clearly. Although it appears that public interest seems largely to be restricted to national boundaries due to the strong reliance on government regulatory intervention, this could also arguably be extended to international regulations (where they exist) on corporate governance. Nonetheless, one thing remains unclear: is the concept of (corporate) citizenship limited to national or international boundaries? This is another important question as answers to it completely change the nature of corporate responsibility and limits of the conception of the public interest. This could potentially mean that corporations are global corporate citizens; directors could be held accountable for acting contrary to obligation of citizenship and for not respecting their responsibilities to act in the global public interest. Similarly, in that case, what are the definitions of global or international public interest? This requires a consideration of many possibilities and impossibilities of defining public interest and more importantly, an awareness that paths selected to defining it are chosen rather than exhaustively delimiting it. Such heterogeneity may be promising as it means that public interest is defined in a dynamic manner which could be more in harmony with fast evolving (global) societal needs. Even so, it comes with new challenges and complexities.

(b) Autopoiesis and public interest

Another corporate entity theory which tacitly addresses the public interest is autopoiesis. An autopoietic conception of corporate governance incorporates the belief that corporations are self-referencing social sub-systems and that law is not necessary to regulate society¹³¹ and law itself is a social system.¹³² Corporations are thus the organised domain of the economic system rather than being part of the markets, the spontaneous domain of the economic

131 Andrew Johnston, *EC Regulation of Corporate Governance* (Cambridge University Press, 2009) 221.

132 Niklas Luhmann, *Law As a Social System* (Oxford University Press, 2004) ch 3; Ana Lourenço, 'Autopoietic Social Systems Theory: The Coevolution of Law and the Economy' (Working Paper No 409, Centre for Business Research, University of Cambridge, June 2010) 10.

system.¹³³ This separates them from the market; contract from organisation.¹³⁴ Corporations are therefore thought to be operationally closed and fairly autonomous in their environments which means that their shareholders as well as other stakeholders are part of these environments.

The corporation maximises profits for itself as well as pursue other corporate objectives that it ascribes to itself. The law therefore cannot directly control the corporation as it is self-referencing and reproducing; all it can do is put in place procedural regulation to encourage it to act in a manner that is morally right.¹³⁵ This leaves the process of the corporation's organisational autopoiesis untouched which is in the interest of society and for the betterment of future generations as it guarantees the satisfaction of human needs for such organisations.¹³⁶ The aim of regulation is to ensure that corporations are more responsive to their wider society as this is essential for the reflection and reproduction of the social sub-systems that are corporations.¹³⁷ The notion that corporations' sole goals are profit maximisation and shareholder primacy are rejected under this theory as is any other partial notion of corporate goals which favour sections of the corporate constituencies only.¹³⁸ It is maintained instead that focus ought to be the main social objective of the corporation and its various contributions to different aspects of social life in order to determine the corporate interest and public interest but not based on political stakeholding theories based on notions such as power, legitimacy and democracy.¹³⁹ It is stated that the notion of individual human or natural interests and the artificial interests of corporations are social constructs and therefore the fixation on individualism is to be broken down so that attention can be turned to corporations in order to ensure that they continue to remain responsive and sensitive to their environment, assuring the preservation of these entities' social identity and self-reproductivity, power, autonomy and resources.¹⁴⁰

Deconstructing autopoietic corporate theory unveils a focus on unitary and common interest conceptions of public interest as it considers that corporations are social systems which serve the purpose of meeting human needs for better production, communication and organisation for example, and yet, corporations have a transcending interest in aligning their interests with that of society so as to continue to remain responsive and attentive to their environment.¹⁴¹ This means the focus is on a moralistic notion of common good transcending the interests of certain sections of society, such as

133 Johnston, above n 131, 222; Günther Teubner, *Law as an Autopoietic System* (Blackwell, 1993) 133.

134 Teubner, *Law as an Autopoietic System*, above n 133, 133; Günther Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' (1988) 36 *American Journal of Comparative Law* 130, 137–8.

135 Johnston, above n 131, 222–4.

136 Teubner, 'Enterprise Corporatism', above n 134, 153.

137 Teubner, 'Company Interest: The Public Interest of the Enterprise "In Itself"', above n 96, 21, 33.

138 Ibid 31–2.

139 Teubner, *Law as an Autopoietic System*, above n 133, 134–5.

140 Teubner, 'Company Interest: The Public Interest of the Enterprise "In Itself"', above n 96, 33–4.

141 Johnston, above n 131, 224–5.

shareholders.¹⁴² Yet a closer examination of autopoiesis reveals that like some of the pluralist theories already discussed, the focal point of discussion is the best interests of the corporation and so any consideration of public interest is aimed at contributing to the corporation's ability to respond to its environment, self-reproduce and self-reference. This means that ultimately there will be conflicts between the interests of society and those of the corporation. This consequently only allows for a limited role or consideration of public interest in corporate governance. This approach is also not dissimilar to economic perspectives on corporate law because a hierarchy of interests and values are implicitly incorporated in autopoietic conception of the public interest. It is arguably just as restrictive and limitative of the reach of public interest even though it is articulated differently. Hitherto, autopoietic corporate theory provides an important approach to explicating public interest in corporate theories because the understanding of the role and indispensability of corporations to society are clearly identified and highlighted.

Moreover, it can be deduced from the exploration of corporate entity theories, autopoiesis and real entity theories that public interest has had an important role to play in the definition and theorising on the firm and the nature of the corporation. For instance, they contend generally that in order for the corporation to be viable and continue to thrive, it ought to act more responsibly within society. There is an acknowledgment that the longevity and continuity of corporations are irrevocably tied to the society in which they operate.

IV Conclusion

Applying a deconstructionist critique to the various corporate governance theories and corresponding public interest theories affords an identification of their merits and flaws and reveals a number of issues. Primarily, public interest is an undecidable notion which is limited when an objective, singular definition is sought. It is also evident that public interest is not necessarily a notion that is irrevocably wedded to communitarianism or pluralist corporate theories, as is sometimes thought. Exploring the different definitions of public interest in corporate theories reveals that subtle nuances in the definitions enrich the notion and make it more accommodating of various ideologies, from communitarianism to contractarianism, which are often thought to be polar opposites.

Similarly, deconstruction provides a basis for an understanding of the political ideologies underpinning the various theories. It also reveals that public interest bridges the gap between the various theories and could provide a common ground on which dialogue can begin. Yet, a critique of the various theories on public interest indicates that public interest itself is useful but not infallible. Therefore, it is important when considering the notion of public interest in corporate law and governance that such effort is not undertaken uncritically.¹⁴³ Likewise, a deconstruction method reveals the complexity and vagueness of the concept — public interest does not necessarily equate to it

¹⁴² Ibid 225–7.

¹⁴³ Teubner, 'Company Interest: The Public Interest of the Enterprise "In Itself"', above n 96, 32.

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being unworkable or not practical. Such an approach indicates that this is what makes the concept more adaptable and flexible for the understanding of corporations and corporate law. Public interest is thus a useful lens through which to examine the development of corporations and it provides a focal point or a common foundation for various theories of the firm and the nature of the corporation on the most fundamental and basic question at the heart of these theories — the role of corporations in society. It enables one to have a complex and nuanced understanding of the role of corporations which is important particularly in this era of globalisation and fast evolving societal needs.

In sum, public interest is the lens through which corporations can be analysed or examined. One might ask why public interest and not another concept is able to serve this purpose. The answer is that public interest is such an important concept in various other spheres and fields of enquiry or research as mentioned earlier in this article. It is associated generally with good governance and has connotations of values or actions which are beneficial to society and its welfare.¹⁴⁴ Public interest thus possesses strong moral force which could make it the ideal concept to revitalise and rejuvenate discussions about corporations and their role in society.

¹⁴⁴ Michael Macaulay, 'The I that is We: Recognition and Administrative Ethics' in Raymond W Cox, *Ethics and Integrity in Public Administration: Concepts and Cases* (M E Sharpe, 2009) 36.