Bond University

Bond Law Review

Volume 34 Issue 2

2022

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The Nexus of Contracts Revisited: Delineating the Business, the Firm, and the Legal Entity

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Abstract

This article explores the economic concept of the 'firm' and the legal concept of the 'company'. Having identified that the two do not entirely overlap, it detects an ambiguity in existing legal literature, and argues that the former is a better fit for corporate law's 'nexus for contracts'. It introduces the 'business' to describe all constituencies in the nexus of contracts not represented by the company. Reconceptualising base concepts in such a manner helps us reimagine existing argumentation structures – rather than arguing that non-shareholders should have rights in respect of the operation of the company, instead we can argue for limitations in respect of what the company can do in respect of the business. Three implications arise from this analysis. First, company law collectivises the power of certain constituencies only, and there is conceptual space to collectivise the power of the others. Second, this demonstrates differences in proximity – shareholders and directors should only interact through the company, and other constituencies have less of a claim to a say in the company's running. Third, we can use this conceptualisation to argue that the company is holding assets as trustee for the wider firm rather than in its own right.

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I Introduction

Economic analysis is ubiquitous in company law.[1] Most, however, adopts a particular normative aspect – it is primarily shareholder focused.[2] This article seeks to provide balance to the use of this analytical tool within company law. It argues that the 'company', as an entity and as a concept, does not fit neatly into the economic concept of the 'firm'. Sometimes, multiple firms exist within a single 'company', and sometimes multiple companies exist in a single firm. There is, therefore, a difference – or delta - between the edges of the firm and the edges of the company. This article argues that an additional concept of the 'business' is needed to fill this delta. The company is not, therefore, inherently to the core of a 'nexus for contracts'. Instead, the firm more broadly is. The company is merely a party to the nexus of contracts.

The company itself has become subject to shareholder and director capture. The shareholders and directors within a firm decide where the company will be incorporated, make the major decisions as to the company, and receive the residual claim in the company's activities. Accordingly, governance of the company is, inherently, entirely focused on these internal stakeholders.[3] The company as a concept, therefore, has been captured by them. This framework is so holistic that any minor changes to it risk being mere puffery – aesthetic and superficial, without changing issues caused by the corporate form. Often, as a result, this drives analytical approaches to propose more significant reforms of company law. Whilst a number of the concepts outlined in this article are universalisable, its discussion of law is predicated upon the UK's particular doctrinal framework. This framework is different from other jurisdictions, even those with strong links to UK law,[4] and a different doctrinal position may affect the interaction between economic and legal analysis outlined in this paper. As such, the argument in this article should be considered to be of application in the UK.

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[1] See, eg, Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991); Claire Hill and Brett McDonnell, 'The Evolution of the Economic Analysis of Corporate Law' in Claire Hill and Brett McDonnell (eds), *Research Handbook on the Economics of Corporate Law* (Edward Elgar, 2012); Stephen Bainbridge, *Corporation Law and Economics* (Foundation Press, 2002); Henry Manne, 'Our Two Corporation Systems: Law and Economics' (1967) 53 *Virginia Law Review* 259; Reinier Kraakman et al, *The Anatomy of Corporate Law* (Oxford University Press, 3rd ed, 2017).

[2] Commentators normally start with 'shareholder primacy' and try to justify this by reference back to economic concepts – see Joseph Heath, 'The Uses and Abuses of Agency Theory' (2009) 19(4) *Business Ethics Quarterly* 497, 506.

[3] In this article, 'internal stakeholders' refers to shareholders and directors, and 'external stakeholders' refers to all other stakeholders in the firm.

[4] In the context of differences in the balance between mandatory and default rules in company law between the UK and the US, see John C Coffee IV, 'Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 *Columbia Law Review* 1618; Laurence Gower, 'Some Contrasts between British and American Corporation Law' (1956) 69 *Harvard Law Review* 1369.

Viewing the business as separate, however, lets us review this analytical framework. Instead of resisting the delta between the company and the firm, we can embrace it by filling it with the business. This provides a series of analytical steps that we can take to review the corporate form. First, the effect of shareholder capture of the corporate form is that the relevant constituencies, shareholders and directors, have collectivised their powers into the company, whereas other stakeholders have not. Corporate law has thus skewed the balance of bargaining power within the firm, and the nexus of contracts, and so we need to address this. Second, this lets us conceptualise the company as the vehicle of shareholders and directors, and thus the way that they interact with the business within the firm. In other words, all other stakeholders are more proximate to the business. They have the same proximity to the business as the company does. The company, as the vehicle of shareholders and directors, is interposed between these constituencies and the business, meaning that shareholders and directors have actually, as a result of their capture of the company, removed themselves one step from the activities of the business.

It is logical for law to focus on restraints on what the company can do in respect of the business. Often this is acknowledged, but used to argue that these are not a matter for company law, but instead other areas like environmental law, employment law, tort law, or any other aspect of the legal taxonomy.[5] Conceptual clarity about the split between the business and the company within the firm lets us realise that this is wrong. This gap means we can argue that there should be limitations on what the company can do with the business, and that this should be considered as a part of company law. Indeed, this is a natural response to the uneven mapping of the firm to the company – if the company catered for all stakeholders in the firm, there would be no need to restrict its activities.[6] That it does not means that, as a matter of the economics of the firm, we need to acknowledge the limit of the company within the nexus of contracts.

Third, the company may own certain of the firm's factors of production. But this economic conception lets us argue that it does so on behalf of the firm, rather than in its own right. We should therefore cease to question who a company's directors act as trustees for,[7] and instead start developing the concept that the company is acting as a

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[5] See, eg, Anant Sundaram and Andrew Inkpen, 'The Corporate Objective Revisited' (2004) 15 *Organization Science* 350.

[6] See, eg, Thomas Donaldson and Lee Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications' (1995) 20 *Academic of Management Review* 65. See recent proposals for shared governance in Grant Hayden & Matthew Bodie, *Restructuring the Corporation: From Shareholder Primacy to Shared Governance* (Cambridge University Press, 2021).

[7] Merrick Dodd, 'For Whom Are Corporate Managers Trustees' (1932) 45 *Harvard Law Review* 1145.

trustee for the firm. Such argumentation structures let us repurpose many existing legal arguments to buttress this economic analysis. It also helps us fully conceptualise business and asset sales, where a company sells the assets of the firm to another company.

Corporation law and economics often comes from a particular normative viewpoint. It is not inevitable, though, that following the path set out at the intersection of law and economics inevitably takes us to shareholder primacy[8] and the status quo. By embracing the gap between the company and the firm, we can recapture economic analysis from its embedded normative standpoint.

The rest of this article proceeds as follows. Part II outlines the economic concept of the firm, and the legal concept of the company. Part III explores the delta between these two concepts, argues that the nexus of contracts fits best to the former instead of the latter, and introduces the concept of the business to fill this gap. Part IV explores three implications of revisiting the nexus of contracts: there is a need to collectivise external stakeholders to restore a power balance, the implications of proximity to the company and the business, and a potential view of the company as a trustee for the firm. Part V concludes.

II The Firm and the Company

A. *The Firm*

Our analytical journey starts with the 'firm'. The firm has two meanings – a technical legal meaning under English law,[9] and a wider economic concept. We explore the latter. So what is a firm under economic analysis? The most famous definition of a firm[10] is 'a system of consciously coordinated activities or forces of two or more persons.'[11] Here, then, the core concept is merely parties coordinating their efforts into a joint outcome. Various refinements have been made to this basic concept. Generally, though, the firm is a coordination amongst various factors of production (the 'team'[12]), with some members of the team having authority over others[13] to coordinate the team.[14]

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8 D Gordon Smith, 'The Shareholder Primacy Norm' (1998) 23 *The Journal of Corporation Law* 277.

9 *Partnership Act 1890* (UK) s 4(1) defines an unincorporated partnership as a firm.

10 John Galbraith, *The New Industrial State* (Penguin, 2nd ed, 1972) 140.

11 Chester Barnard, *The Functions of the Executive* (Harvard University Press, 2nd ed, 1968) 81.

12 Armen Alchian & Harold Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *American Economic Review* 777.

13 Ronald Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386; Kenneth Arrow, *The Limits of Organization* (Norton, 1974).

14 Galbraith (n 10) 122. Other definitions exist – such as a 'unified governance structure': Oliver Williamson, *The Economic Institutions of Capitalism: Firms, Markets Relational Contracting* (Macmillan, 1985) 73. Throughout this article we use the Coasean analysis, on the grounds that other definitions 'are formulated in the spirit of Coase: Simon Deakin, David Gindis & Geoffrey Hodgson, 'What is a Firm? A Reply to Jean-Philippe Robé' (2021) 17 *Journal of Institutional Economics* 861, 864.

Discussion of the firm appears in the work of a number of key economic commentators.[15] Some famous names, like Adam Smith and Marx, are not known for their views on the firm. Smith did not overtly mention the firm, but his focus on the division of labour[16] outlined the basic concepts that others would follow: that increasing specialisation is beneficial,[17] and that allocation of resources is undertaken by the invisible hand of the market.[18] Similarly, the firm plays a background role in Marx' economic critique, not only as a result of the order of the firm contrasting to the chaos of the market, but also as the base unit which, through the division of labour, caused the alienation of labour.[19] Here, we see the split between the 'capitalist' and the 'worker', with the former oppressing the latter.

Other economists foregrounded the role of the firm. Thus Marshall[20] conceptualised the firm by metaphors to nature.[21] Marshall mapped the UK industrial landscape, and identified the common division of industry into a number of firms split on geographical lines.[22] It has been said that this laid the groundwork for the neoclassical view of the firm,[23] which is that firms compete against each other, and generally can achieve more by increased profit when they grow due to economies of scale.[24] This has been disputed, though, with other commentators arguing that Marshall was more concerned with how internal improvements maximised profit, rather than considering any inherent economy of scale.[25]

In any event, by the 1930s, the 'economies of scale' neoclassical view was entrenched: the firm existed to allow for the division of labour, centralisation of capital to enable capital purchases, and economies of scale.[26] This model is attractive because it can be put into general mathematical formulations, can demonstrate how the firm will respond

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15 The leading economic commentators themselves were primarily identified through the chapters published in Michael Dietrich and Jackie Krafft, *Handbook on the Economics and Theory of the Firm* (Elgar, 2012).

16 See Eric Colvin, 'The Division of Legal Labour' (1979) 17 *Osgoode Hall Law Journal* 595, 596.

17 A concept taken up, in other fields, by Ricardo. See discussion in Janet Kerr, 'Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship' (2007) 29 *Cardozo Law Review* 623, 640.

18 Michael Best, 'The Obscure Firm in the Wealth of Nations', in Dietrich and Krafft (n 15).

19 Ugo Pagano, 'Marx', in Deitrich and Krafft (n 15).

20 This discussion is based on Jacques-Laurent Ravix, 'Alfred Marshall and the Marshallian theory of the firm', in Dietrich and Krafft (n15).

21 For an overview, see Tiziano Raffaelli, Giacomo Becattini and Marco Dardi (eds) *The Elgar Companion to Alfred Marshall,* Cheltenham, (Edward Elgar, 2006).

22 See Alfred Marshall, *Principles of Economics,* (New Palgrave, 8th ed, 2013), Book IV, Ch 10.

23 Ravix (n 20) 53.

24 Thomas Ulen, 'The Coasean Firm in Law and Economics' (1993) 18 *Journal of Corporation Law* 301.

25 See Brian Loasby, *The Mind and Method of the Economist: A Critical Appraisal of Major Economists in the 20th Century* (Edward Elgar, 1989).

26 Ulen (n 24) 304-305.

to economic changes, and helps demonstrate the interaction between firms.[27] However, it has a series of corresponding problems – primarily that it is only concerned on the external perimeter of the firm, rather than any internal aspects.[28]

The first step to resolve that came from Coase's 1937 article.[29] Here, Coase first introduced the concept of transaction costs. [30] Thus the options for any form of production are to go to the market, or to use a firm structure. If we go to the market, it costs money to find out the terms on which transactions can be conducted, and we are opened to the opportunism of our contractual counterparty. If we bring these matters into the firm, we save these costs as we have authority over the counterparty.

The example frequently used to illustrate this[31] is that of the interaction between Fisher Body and General Motors.[32] Fisher was the main supplier of a certain car motor part used by General Motors. This agreement was governed by a long-term contract. GM became increasingly unhappy about what happened when demand for its cars was higher than expected – there, Fisher was able to increase the unit price of the relevant component to much higher than the usual rate, and GM had to accept it as it lacked an alternative. In 1926, GM bought Fisher Body. In Coasean terms, then, the transaction costs of going to the market became too expensive, and so GM brought Fisher body within its firm to replace this market cost with authority.

Thus the delineating factor of a firm is that it uses the 'visible hand' of management instead of the 'invisible hand' of the market.[33] Coase specifically refers to the authority of an 'entrepreneur',[34] and defines 'entrepreneur' as the 'person or persons who, in a competitive system, take the place of the price mechanism in the direction of resources.'[35] Entrepreneur implies an individual, but does not necessarily state which individual. Certainly, Coase's article does not mention directors or shareholders. Whilst matters are brought into the firm by way of giving control over that factor of production, Coase is very vague about whom

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27 Oliver Hart, 'An Economist's Perspective on the Theory of the Firm' (1989) 89 *Columbia Law Review* 1757, 1758.

28 Ibid; Ulen (n 24).

29 Coase (n 13).

30 He would elaborate on this in Ronald Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law & Economics* 1.

31 See, eg, Hart (n 27) 1759; Ulen (n 24) 315- 316.

32 See generally Benjamin Klein, 'Vertical Integration as Organizational Ownership: The Fisher Body-General Motors Relationship Revisited' (1988) 4 *Journal of Law, Economics & Organization* 199; Benjamin Klein, Robert Crawford & Armen Alchian, 'Vertical Integration, Appropriable Rents and Competitive Contracting Process' (1978) 21 *Journal of Law & Economics* 297.

33 Alfred Chandler, *The Visible Hand* (Belknapp, 1977).

34 A concept borrowed from Schumpeter. For Schumpeter's elaboration, see Joseph Schumpeter, 'The Creative Response in Economic History' (1947) 7 *The Journal of Economic History* 149.

35 Coase (n 13) 388.

will actually exercise this control. Coase's analysis was developed by Williamson, who argued that transaction cost minimisation is, in fact, the predominant reason for choice of organisation structure.[36]

The big weakness of the Coase approach is that whilst it correctly identifies costs interacting with the market, it is blind to equivalent costs arising within an authority position – what mechanism exists, post-acquisition, to make sure that Fisher Body continued manufacturing body parts to such a standard? After all, the 'authority' deployed by GM is nothing, really, other than a series of contractual relationships that they have with the humans who operate Fisher Body. Alchian and Demsetz argue that in any team production, it is necessary to monitor each member of the team. The party with the monitoring function should be given powers to receive the residual claim, to observe other members of the team, to be the party with whom all other members contract, to be able to change the team, and to sell these rights.[37] This is the first time that features of an economic firm are, in any way, inherently recognisable to modern corporate law scholars as translatable to the corporate form.

Other economists also discussed the firm. Penrose considered the firm an administrative abstraction, and situated its relevance within the sphere of 'knowledge' – firms would grow driven by growth of knowledge within the firm, and in turn increased firm knowledge would expand knowledge across the economy.[38] Grossman and Hart focus on the non-human aspects of the firm, and argue that ownership completes this conceptual gap between contracts and authority.[39]

Different economists have focused on different aspects of the economics of the firm. Thus, we can generally say that economists do not have a complete conception of the firm. Hart says

> [m]ost formal models of the firm are extremely rudimentary, capable only of portraying hypothetical firms that bear little relation to the complex organizations we see in the word. Furthermore, theories that attempt to incorporate real world features of corporations, partnerships and the like often lack precision and rigor.[40]

Nonetheless, there is a core theme that runs through the economic literature – that the boundaries of the firm are objectively defined and there is no ability for any individual constituency to unilaterally decide

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[36] See Oliver E Williamson, 'The Economics of Organization: The Transaction Cost Approach' (1981) 87 *American Journal of Sociology* 548; Oliver E Williamson, 'The Theory of the Firm as Governance Structure: From Choice to Contract' (2002) 16 *Journal of Economic Perspective* 171.

[37] Alchian & Demsetz, (n 12); Hart (n 27) 1761-62.

[38] Brian Loasby, 'Edith Penrose and George Richardson' in Dietrich & Krafft (n 15).

[39] Sanford Grossman & Oliver Hart, 'The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration' (1986) 94 *Journal of Political Economy* 691.

[40] Hart (n 27) 1757. See also David Gindis, 'Legal Personhood and the Firm: Avoiding Anthropomorphism and Equivocation' (2016) 12 *Journal of Institutional Economics* 499.

the boundaries of the firm. These boundaries are set jointly by these factors of production – a factor of production must agree to cease to be an external contractor and join the team. Thus the boundaries of a firm are set jointly by operational decision and are then objectively determined. Economists do not leave space for factors to act as a firm and subjectively declare that they are not: parties cannot bring a factor of production under the authority of the firm but decide that they do not constitute part of the firm.[41] So Galbraith argued that the key characteristic in a firm was the coordination between its team members.[42] Chandler argued that decentralised co-ordination allowed for a multi-divisional firm.[43] Nelson and Winter argued that the size of the firm was driven in each case by evolutionary processes which set the extent of the firm.[44] For all, though, the boundaries of the firm are set jointly, through agreement of all participants, and objectively determinable.

B. *The Company*

The company, conversely, is the legal tool which commerce most commonly deploys.[45] The company is one of the most common business organisations – which exist to separate the assets of owners from the assets of the business venture itself.[46] This benefits those that are not the firm's owners, as it means that the firm's assets will not become intermingled with those of the ultimate beneficial owner.[47] However, the advantages of the company to third parties are undermined by the operation of company law. The company is different from the firm – in that it is picked, set up and run by only two factors of production (often included, in corporate law theory, with the wider category of 'stakeholders'[48]) – the shareholders and the directors. As a matter of company law procedure, the 'mysterious rite called incorporation'[49] creates the company, and this process is controlled by

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41 Jonathan Hardman, 'The Butterfly Effect: Theoretical Implications of a Minor Corporate Transparency Proposal' (2021) 50 *Common Law World Review* 180.

42 Stephen Dunn, 'John Kenneth Galbraith and the Theory of the Firm' in Deitrich and Krafft (n 15).

43 Steven Toms & John Wilson, 'Revisiting Chandler on the Theory of the Firm' in Deitrich and Krafft (n 15).

44 Markus Becker & Thorbjorn Knudsen, 'Nelson and Winter Revisited' in Deitrich and Krafft (n 15).

45 It has a long tradition of doing so. See Paul Johnson, *Making the Market: Victorian Origins of Corporate Capitalism* (Cambridge University Press, 2010) 2.

46 Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 111 *Yale Law Journal* 387; Henry Hansmann and Reinier Kraakman, 'Organizational Law as Asset Partitioning' (2000) *European Economic Review* 807.

47 Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 *Harvard Law Review* 1333.

48 See Robert Phillips, R Edward Freeman, and Andrew Wicks, 'What Stakeholder Theory Is Not' (2003) 13:4 *Business Ethics Quarterly* 479.

49 Dodd (n 7) 1160.

the state.[50] The state does not undertake a qualitative analysis to establish whether the state considers that the company should be set up – instead, checks are purely formalistic and procedural in nature.[51] The incorporation process is initiated by the shareholders and directors – they have to complete and sign a form which the state's operatives then file to create the company.[52] It has thus been argued that shareholders and directors will choose to incorporate in the jurisdiction most favourable to them.[53] In turn, it has been argued that this will force convergence between jurisdictions to be friendlier to shareholders to attract incorporation within their jurisdiction.[54] Indeed, the process of jurisdictions competing to provide the friendliest environment to shareholders has been compared to a 'market', with jurisdictions providing the 'supply' and shareholders and directors acting as the 'demand' within jurisdictions.[55] UK law expressly refers to the company's constitution as a contract between the members and the company.[56] Australian law goes even further, including directors as parties to the contract.[57] Not all jurisdictions will consider the constitution as a contract, but this does not negate that shareholders retain control over the incorporation process, and therefore obtain capture of the company.

Thus, from incorporation onwards, the company is very much the vehicle of the shareholders and directors. The legal characteristics of companies between jurisdictions act like a menu for would-be

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50 Susan Watson, 'The Corporate Legal Person' (2019) 19 *Journal of Corporate Law Studies* 137.

51 See Hardman (n 41). See also the English case of *Sebry v Companies House* [2015] EWHC (QB) 115, where the evidence of the English corporate registry (Companies House) revealed 'Companies House does not seek to verify or check information which it makes available except in very limited respects. Document Examiners are employed to ensure that information provided by companies about themselves or by others providing information about companies or directors comply with the requirements of the Registrar. Their function is not to exercise any judgment about whether the contents of those documents are accurate, reliable or complete. They consider only the form of the information and not its substance.' [59].

52 In the UK, this is a form IN01 –- <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946155/IN01-V8.0.pdf>; *The Registrar's Rules 2009*, vol 2, Sch 2 issued under *Companies Act 2006* (UK), s 117.

53 See William Cary, 'Federalism and Corporate Law: Reflections Upon Delaware' (1974) 83 *Yale Law Journa*l 663; Oren Bar-Gill, Michal Barziza & Lucian Bebchuk 'The Market For Corporate Law' (2006) 162(1) *Journal of Institutional and Theoretical Economics* 134; Roberta Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 *Journal of Law, Economics and Organization* 225.

54 See Henry Hansmann & Reinier Kraakman, 'The End of History for Corporate Law' (2000) 89 *The Georgetown Law Journal* 439; Henry Hansmann, 'How Close is the End of History?' (2006) 31 *Journal of Corporation Law* 745.

55 From Larry Ribstein, 'Delaware, Lawyers and Contractual Choice of Law' (1994) 19 *Delaware Journal of Corporate Law* 999, 1007; Jonathan Hardman, 'Further Legal Determinants of External Finance in Scotland: An Intra-UK Market for Incorporation?' (2021) 25 *Edinburgh Law Review* 192.

56 *Companies Act 2006* (UK) s 33.

57 *Corporations Act 2001* s140.

shareholders to invest in.[58] This is continued in terms of the decision-making process over the life of the company. Most jurisdictions provide, either by statute or by default rule,[59] that operational decisions sit with the directors, and major decisions sit with shareholders.[60] This is not, perhaps, surprising as shareholders and directors have chosen from the menu the jurisdiction in which they would like to incorporate, and so are likely to pick jurisdictions which provide them with most power. Thus, rather than the edges of the firm being objectively determined, they are instead set by only those constituencies in charge of establishing the corporate vehicle.

The residual claim in the company's assets also sits with shareholders. This has been used to justify decision rights sitting with shareholders,[61] and shareholders being the ultimate recipients of fiduciary duties.[62] There is nothing legally inevitable about the residual claim sitting with the shareholders – Kelly and Parkinson argue that it is entirely conceivable to create a corporate from, even under existing doctrinal rules, in which the residual claim sits with other constituencies.[63] However, as the terms of the company are selected by the shareholders and directors, it seems unsurprising that they would provide themselves with the residual claim.

Most jurisdictions require incorporation as a pre-condition of the company doing anything.[64] As such, companies can be incorporated without any business activities, and sit ready to be utilised in a corporate structure.[65] Accordingly, we see differences between the company and the firm. Whilst the firm is objectively identified ex post from the voluntary actions of all factors of production, the company is subjectively established ex ante by certain factors, who choose (following competition between different states) to establish the company in the jurisdiction that most suits them.

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[58] Brett McDonnell, 'Sticky Defaults and Altering Rules in Corporate Law' (2007) 60 *SMU Law Review* 383, 422.

[59] Susan Watson 'The Significance of the Source of the Powers of Boards of Directors in UK Company Law' [2011] *Journal of Business Law* 596.

[60] These shareholder decisions, though, are often crude and lack nuance – see Victor Brudney, 'Corporate Governance, Agency Costs, and the Rhetoric of Contract' (1985) 85 *Columbia Law Review* 1403.

[61] Frank Easterbrook and Daniel Fischel, 'Voting in Corporate Law' (1983) 26 *Journal of Law and Economics* 395.

[62] Jonathan Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' (1991) 21 *Stetson Law Review* 23.

[63] Gavin Kelly and John Parkinson, 'The Conceptual Foundations of the Company' in John Parkinson, Andrew Gamble and Gavin Kelly (eds) *The Political of Economy of the Company* (Hart Publishing, 2000).

[64] In the UK, see *Companies Act 2006* (UK) s 51.

[65] For the challenges that this provides to traditional company law analysis, see Les Sealy, 'Directors' Wider Responsibilities – Problems Conceptual, Practical and Procedural' (1987) 13 *Monash University Law Review* 164.

Thus the company is conceptually different from the firm.[66] This feels intuitive. After all, the creation of a legal person is often seen as a matter of practicality,[67] which lets the firm flourish – someone has to create this legal entity. This intuition is reinforced by the usual approach to positive[68] economic analysis of the law – that somehow this must be the best/only way of structuring business organisations as it is the way that business organisations are structured.[69] However, there is no inevitability about the delta between the firm and the company. This difference is reinforced when we consider that law provides the tools necessary to reduce this delta but chooses not to use these tools accordingly.

Let us consider simplistic examples where more than one company, together, exist within a firm, and where more than one firm exists within one company. Thus the former could well apply to a corporate group – shareholders decided to set up a subsidiary company of the main, parent company, and some of the firm's activities are undertaken out of that legal entity.[70] This is commonly undertaken to split the firm's liability across different legal entities whilst enabling the aggregation of assets between the two.[71] In other words, structuring a corporate group uses the legal tool of limited liability to reduce the risk of cross-contagion from a liability affecting the whole firm. The effect is that parties to whom such liability is owed (be it actual or contingent) are harmed by the bifurcation of the firm into separate legal entities.[72]

When faced with one firm across multiple legal entities, partnership law provides the legal conceptual framework to align the two concepts. Thus under English law, a partnership arises as a matter of fact and is not predicated upon registration.[73] Any persons jointly undertaking business for profit are deemed to be a partnership, other than shareholders in a registered company.[74] This means that two

66 Jean-Philippe Robé, 'The Legal Structure of the Firm' 2011 (1) *Accounting, Economics, and Law A Convivium*, article 5.

67 See discussion in Jonathan Hardman, 'Reconceptualising Scottish Limited Partnership Law' (2021) 21 *Journal of Corporate Law Studies* 179.

68 Milton Friedman, 'The Methodology of Positive Economics' in *Essays in Positive Economics* (University of Chicago Press, 1966) 30-43.

69 Sometimes through use of a 'hypothetical bargaining model' – Stephen Bainbridge, 'In Defense of the Shareholder Wealth Maximisation Norm: A Response to Professor Green' (1993) 50 *Washington and Lee Law Review* 1423.

70 See discussion in Lynn LoPucki, 'The Death of Liability' (1996) 106 *Yale Law Journal* 1, 48.

71 Richard Squire, 'Strategic Liability in the Corporate Group' (2011) 78 *The University of Chicago Law Review* 605.

72 Halpern et al discuss the New York case of *Walkovsky v Carlton* (1966 223 N.E.2d 6), in which a taxi company was structured so that each of its 10 taxis was held in a separate company, meaning that when one taxi negligently injured a passer-by, the assets of the other company were protected: Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *The University of Toronto Law Journal* 117.

73 *Partnership Act 1890* (UK). See also Hardman (n 67).

74 *Partnership Act 1890* (UK), s 1.

shareholders holding shares in a company are not partners with each other, but it does not preclude a shareholder being deemed to be in a partnership with the company, and therefore does not prevent a parent and subsidiary company being deemed to be a partnership. A partnership has to arise by some kind of agreement (implicit or explicit), and so is conceptually different from co-ownership, which can happen passively.[75] Sharing gross proceeds is not grounds for partnership,[76] but sharing profits is prima facie evidence of a partnership relationship.[77] Being a partnership makes each partner jointly and severally liable for the debts of the partnership.[78] English law provides no special separate legal person for a partnership.[79] How partners conduct the affairs of the partnership is governed by a series of default rules which can be amended between the partners.[80]

The UK's leading partnership law text[81] states 'the formation of partnerships between members of the same group of companies is by no means unusual.'[82] Going further, though, this tool exists for law to align the company to the firm: law could deem every corporate group (and any situation whereby one firm was split across multiple companies) a partnership, with each company experiencing joint and several liability for the debts of the partnership. Such an approach arises as a matter of partnership law, not of company law, and to the author's best knowledge has not been utilised purely to align the company to the firm. Indeed, some further features of partnership law may well obstruct a more wholesale application of partnership law to company groups.[83] It is submitted that we can infer from this lack of automatic use of an existing tool to align the company to the firm that law choses to keep them as conceptually different.

An alternative delta exists when there are multiple firms within a single company. Transfer pricing is the theoretical[84] and practical[85]

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75 *Partnership Act 1890* (UK) s 2; Roderick I Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 20th ed, 2020) paras 5-08 – 09.

76 *Partnership Act 1890* (UK) s 2(2).

77 *Partnership Act 1890* (UK) s 2(3).

78 *Partnership Act 1890* (UK) s 9.

79 *Re Barnard* [1932] 1 Ch 269, 272; Laura Macgregor, 'Partnerships and Legal Personality: Cautionary Tales from Scotland' (2020) 20 *Journal of Corporate Law Studies* 237.

80 *Partnership Act 1890* (UK) s 19.

81 See Michael Twomey, 'Lindley & Banks on Partnership' (2011) 22 *International Company and Commercial Law Review* 270.

82 Banks (n 75) para 11-04.

83 For example, the requirement in *Partnership Act 1890* (UK) s 1(1) to carry out a business in common could be argued to preclude a parent and subsidiary relationship, as it could be argued that the business is to be run for the ultimate benefit of the parent, rather than purely in common.

84 Bengt Holmstrom & Jean Tirole, 'Transfer Pricing and Organizational Form' (1991) 7 *Journal of Law, Economics & Organization* 201.

85 See Janet Dine and Marios Koutsias 'The Three Shades of Tax Avoidance of Corporate Groups: Company Law, Ethics and the Multiplicity of Jurisdictions Involved' (2019) 30 *European Business Law Review* 149.

method of ensuring that true value is deemed to have transferred between (often connected) firms to ensure that adequate tax is paid on any such transfer and wider business income.[86] Similarly, most jurisdictions contain prohibitions on the amount that a company can distribute to its shareholders.[87] In the UK, this has been interpreted widely, so that a transfer from a company to its sister company with a shared parent company at an undervalue constituted a distribution in respect of the amount of the undervalue.[88] Thus tools exist to ensure true value is provided for transfers between legal entities, and restrict transfers out of legal entities. As with partnership law, it is entirely feasible to conceive of law applying these tools to different firms within a company. That law has not done so further provides evidence of a deliberate delta between the company and the firm.

Thus we can conclude that the firm is the economic concept applicable to all factors of production engaged in a team enterprise, whereas the company is the legal entity which is set up, and controlled, by shareholders and directors. This is conceptually different from the firm, and appears to be deliberately so.

III The Nexus of Contracts

There is a significant crossover between the firm and the company, and company law has been referred to by a number of economists. Veblen argued that a theory of the firm was incomplete without the legal characteristics of the company.[89] Indeed, he went further and argued that the economics of the firm are actively influenced by its legal characteristics.[90] Commons agreed, arguing that these were set by the state – and the foundations of economic analysis were constituted by the legal concepts which governed how firms operate in the real world.[91] This idea that legal rules dictate economic outcomes is redolent of the lawyer Hale, who argued that even ostensibly neutral law provided a distributive impact upon all those who operate within the sphere.[92] Thus, rather than economics driving legal analysis, there is a strong argument that the economics should be, and is, influenced by the legal framework. Demsetz argued that it is a 'mistake' to 'confuse'

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86 Eduard Baistrocchi, 'The International Tax Regime and the BRIC World: Elements for a Theory' (2013) 33 *Oxford Journal of Legal Studies* 733.

87 See Eilis Ferran, 'Revisiting Legal Capital' (2019) 20 *European Business Organization Law Review* 521.

88 *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626.

89 Thorstein Veblen, *The Theory of Business Enterprise* (Charles Scribners, 1904) 141; Geoffrey Hodgson, 'Veblen, Commons and the Theory of the Firm' in Dietrich & Krafft (n 15).

90 See further David Gindis, 'From Fictions to Aggregates to Real Entities in the Theory of the Firm' (2009) 5 *Journal of Institutional Economics* 25.

91 John Commons, 'Marx Today: Capitalism and Socialism' (1925) 13 *Atlantic Monthly* 682; Hodgson (n 89).

92 Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470.

the economic firm, which is designed to explore the price mechanism, with anything that exists in the real world, including legal form.[93]

Jean-Philippe Robé has previously argued that there is a difference between the firm and the company.[94] To an extent, this is inevitable as one is the language of economists and the other is the language of lawyers.[95] Indeed, even the precise meaning of the word 'company' is not clear – it has historically been used to describe a wide variety of legal entities.[96] The issue, then, becomes what to do about this delta. Robé holds that we should consider them to be entirely separate concepts,[97] whereas Deakin et al argue that a company is a type of firm, whose structure is dependent on corporate law.[98] More pertinently, it has been argued that each definition exists on different levels – despite each having a different 'home' language there is a legal aspect to the firm, and an economic aspect to the company.[99] To an extent, all approaches are true depending on the definitions deployed. We agree with Robé that the narrow definitions of firm and company are not identical, and we agree with Deakin et al that there is a need to connect the company to the firm. We do not, agree, though, that the difference between the concepts provides an irredeemable gap between them, nor that a company is merely a type of firm: as noted above, many firms can exist within one company.

How, then, to map the conception of the firm to the modern company? Corporate law literature tends to provide a tacit assumption that the boundaries of the company and the boundaries of the firm are identical. Thus when Berle and Means published[100] the text that would set the 'master problem for research'[101] in corporate law, they focused on the 'separation of ownership and control'.[102] This is not inherent in a company, and they acknowledge that their concept is only applicable to the largest of American companies.[103] They were, in addition, only concerned with the position between the top company and its ultimate

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93 Harold Demsetz, 'The Structure of Ownership and the Theory of the Firm' (1983) 26 *The Journal of Law and Economics* 375, 377.

94 Robé (n 66); Jean-Philippe Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol University Press, 2020).

95 Geoffrey Hodgson, 'Much of the "Economics of Property Rights" Devalues Property and Legal Rights' (2015) 11 *Journal of Institutional Economics* 683.

96 See Deakin, Gindis & Hodgson (n 14); Philip Cottrell, *Industrial Finance 1830-1914* (Methuen, 1980) 39.

97 Robé (n 66) 7.

98 Simon Deakin et al, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 *Journal of Comparative Economics* 188.

99 Deakin, Gindis & Hodgson (n 14).

100 Adolf Berle & Gardiner Means, *The Modern Corporation and Private Property* (Harcourt, Brace & World, 1932).

101 Roberta Romano, 'Metapolitics and Corporate Law Reform' (1984) 36 *Stanford Law Review* 923, 923.

102 See Cécile Cézanne, 'Berle and Means' in Dietrich & Krafft (n 15).

103 Berle & Means (n 100) 110.

shareholders, and so ignored wholly owned subsidiaries.[104] Thus, the analysis of Berle and Means is limited to situations where the boundaries of the firm and the boundaries of the company are identical.

The link between the economic concept of the firm and the legal concept of the company was next picked up by Jensen and Meckling.[105] They were very heavily influenced by the work of Berle and Means,[106] and they created the concept of the nexus of contracts.[107] They use the word 'nexus' three times. In one usage, they state that the legal form of the company is a nexus for contracting;[108] in another they state that the firm is a nexus of contracts;[109] and in the final use they state that the 'private corporation or firm' is a nexus of contracts.[110] It is unclear whether Jensen and Meckling intended to argue that the firm or the company operates as a nexus of contracts.

The most logical explanation for this uncharacteristic lack of clarity is their reliance on the argumentation structure of Berle and Means – if you only envisage a big, publicly listed company which contains one firm, has dispersed shareholders, and has no subsidiaries, then there is no difference between the boundaries of firm and the boundaries of the company, and so the terms can be used interchangeably to identify the nexus of contracts. However, it is important for company law theory to identify whether the nexus of contracts is a firm characteristic which some companies have, or a company characteristic which some firms have. If the former, then the nexus of contracts applies to firms and is not inherently part of company law, if the latter then it underpins company law.

Fama adopted the former approach.[111] Easterbrook and Fischel not only adopted the latter approach but argued that this inevitably follows Jensen and Meckling.[112] It is thus from here that it is argued that each *company* is merely a set of contracts.[113] From such analysis a number of normative concepts flow. If the company is just a nexus of contracts,

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[104] See Berle & Means (n 100) 183.

[105] Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305. For a discussion of the origin of their work, see David Gindis, 'On the Origins, Meaning and Influence of Jensen and Meckling's Definition of the Firm' (2020) 74 *Oxford Economic Papers* 966.

[106] In Jensen & Meckling, ibid, the phrase 'separation of ownership and control' is mentioned on pages 306, 307, 309, 327, 328 and 355.

[107] See William Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407, 410.

[108] Jensen & Meckling (n 105) 310.

[109] Jensen & Meckling (n 105) the second mention on 311.

[110] Jensen & Meckling (n 105) the first mention on 311.

[111] Eugene Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288.

[112] 'So we often speak, following Jensen and Meckling, of the corporation as a "nexus of contracts" or a set of implicit and explicit contracts': Frank Easterbrook & Daniel Fischel, 'The Corporate Contract' (1989) 89 *Columbia Law Review* 1416, 1426.

[113] See the critical tone in Lewis Kornhauser, 'The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel' (1989) 89 *Columbia Law Review* 1449.

then all interactions with the company are voluntary and so there is less place for mandatory rules – corporate law should provide a facilitative space for those interacting with the company to freely bargain.[114] This idea of corporate law maximising contractual freedom, especially for shareholders and directors, remains a common normative statement, and hypothetical bargaining (ie working out what participants would do in the absence of law) remains a dominant method for establishing what corporate law should be for any individual question.[115]

Unfortunately, this represents a slight misalignment. It is submitted that neither the company nor the firm are perfectly described as a nexus of contracts. A company reflects only the interests of shareholders and directors – thus neither employees nor suppliers are internal to the company. A firm reflects all aspects of the factors of production and stakeholders who fall within the 'team' - an employee is within the firm, a supplier is outside it.

Fisher Body was a separate firm and became subsumed into the firm of General Motors. A nexus of contracts, however, does not differentiate between internal and external, and treats all aspects of production as identical. Thus an employee and a supplier are treated the same as a director or a shareholder. Fisher Body was a party to General Motors' nexus of contracts before and after its acquisition. So if neither a company nor a firm fits the nexus of contracts perfectly, which fits it best? There are a number of reasons to think that the firm is the appropriate concept rather than the company. The firm is objective, determined by operational choices; the company subjective and its limits are determined by a narrow category of those needed for the firm to operate. A nexus of contracts implies an objective analysis. This does not remove the need for voluntary interaction, but once the factor of production has agreed to be, and actually been, internalised, parties cannot then pretend that it is not. As such, the firm is established by the interaction of all relevant factors of production; the company is established by shareholders. This points to the firm being a better nexus than the company.

As a corollary, the firm is identified factually ex post, the company established ex ante. It seems obvious that a dormant incorporated company is less of a nexus of contracts than a de facto trading entity. Conversely, a company cannot be the only nexus of contracts – non-company vehicles also represent the confluence of various factors of production/stakeholders. As such, the nexus of contracts cannot be said to be inherently or exclusively a characteristic of a company.

On the other hand, if a firm is the wider economic concept for joint team production within any legal form, it seems evident that it should

[114] Easterbrook & Fischel (n 112); Roberta Romano 'Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws' (1989) 89 *Columbia Law Review* 1599.

[115] Bainbridge (n 69).

be considered closer to the nexus of contracts. Indeed, whilst Coase identified the firm as being an economic black box[116] which saves the costs of transacting externally, Alchian and Demsetz identified that there are costs operating within the firm as well as operating outside it.[117] This equivalence of economic phenomena applying to internal and external dynamics opens the door to overlap the firm with the nexus of contracts. As such, we can argue that each nexus must have a firm. The firm is inherently narrower than the nexus as it only includes the aspects of the nexus governed by authority. Thus there are aspects of the nexus of contracts which are not internal to the firm: a shareholder is internal for the company and the firm and part of the nexus, an employee is external to the company but internal to the firm and part of the nexus, whereas a supplier is external to the company and the firm but is still part of the nexus of contracts. For that reason we can see the firm and the nexus as concentric circles, with the firm inside the nexus. There is no inevitability that a company will appear within either, nor that if it were to appear within either it would do so in a uniform manner.

So long as the company's boundaries align to a firm, and only a single firm, then this does not matter. However, we have seen that these are two conceptually different terms, and the boundaries do not inevitably overlap. Neither fully reflect the reality of the modern economy – both the firm and the company must interact with others.

The danger of conflating the company and the firm is that it lets Easterbrook and Fischel, and all those who follow them, provide a normative statement about the company. If it is the company that is inherent to the nexus of contracts, then law's role is minimal in company law. However, if the firm is inherent to the nexus of contracts, then these normative considerations apply more closely to the vaguer economic concept of the firm and not to the legal concept of the company. In other words, if the company is the heart of our nexus of contracts, this has profound effects on company law, normally to justify shareholder wealth maximisation within the company.[118] If, however, the firm is the heart of the nexus of contracts, then these implications do not arise for company law. Instead, the general voluntary, contractual elements apply to the more ethereal firm, and what we are told is the economic conception of the company is actually based upon a false premise.

Indeed, law texts have often struggled to fully align the company to the nexus of contracts. The *Anatomy of Corporate Law* states that the

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116 Ronald Coase, 'The Institutional Structure of Production' (1992) 82 *American Economic Review* 713, 714; Ulen (n 24) 307.

117 Alchian & Demsetz (n 12).

118 See Stephen Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 *Northwestern University Law Review* 547.

term is 'ambiguous', and that it is best to consider the firm a nexus *for* contracts rather than a nexus *of* contracts.[119] It then states that:

> The core element of the firm as a nexus for contracts is what civil lawyers refer to as "separate patrimony." This involves the demarcation of a pools of assets that are distinct from other assets owned, singly or jointly, by the firm's owners (the shareholders).[120]

Here, we see a conflation of the use of 'firm' into the realm of the 'company'. The 'firm' does not inevitably have a separate patrimony.[121] Not all firms will be owned at all, and if they are it may not be by shareholders.[122]

These statements are better applying to companies rather than the economic concept of the firm. Indeed, here it is ambiguous as to whether the authors are referring to the wider economic concept of the firm, or the narrower legal concept of the company. This ambiguity results in slippage of use across the two and leads to blending – the two concepts become blended into one.[123] This creates confusion – are the authors talking about the firm or the company? It implies a complete analytical picture where, in fact, we see gaps. It is one thing to reason that there is an inherent and inevitable identical overlap between the company and the firm, but another to accidentally do so without sufficient reflection. Watson argues that we should see the corporate fund, rather than the company itself, as a nexus for contracts.[124]

We can avoid the need to make these adjustments if we stop trying to link the concept of a nexus for contracts to a company, but instead link it to a firm. This leaves open the conceptual question of how the company interacts with this nexus. Ultimately, if the firm is inherently linked to the nexus of contracts, and the company is not, what is the company? It is submitted that we can view the company as occasionally appearing as one aspect of, or party to, the nexus of contracts. As noted above, it is a shareholder and director vehicle. It therefore acts as the conceptual centralisation of power for residual claim and decision making stakeholders. The corollary of the company being captured by certain of the factors means that it is not inherently identical to the central nexus, but a constituent part of it where it appears. We shall call all factors of production and other stakeholders in the nexus of contracts not represented by the company the 'business' throughout this article.

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[119] Kraakman et al (n 1) 5.

[120] Ibid.

[121] The company does, and partnerships are still firms (in the economic sense as well as the legal sense) even though they do not.

[122] Charities are also firms, as can be a number of ostensibly ownerless vehicles.

[123] Pierre Schlag, 'How to Do Things with Hohfeld' (2005) 78 *Law and Contemporary Problems* 185, 194; Arthur Corbin, 'The Law of Contracts. By Samuel Williston' (1919) 29 *Yale Law Journal* 942, 944.

[124] Susan Watson, 'The Corporate Legal Entity as a Fund' [2018] *Journal of Business Law* 467.

Technically, there must be two aspects of the 'business'– the other constituencies that the company interacts with in respect of the firm, and the other constituencies that the company interacts with in respect of the nexus of contracts.[125] Space forbids us from fully decoupling these aspects, and so 'the business' will be used interchangeably in this article to refer to both. Thus we will use the terminology that the firm has a nexus of contracts, and that the business is the collective term for all parts that are not the company within both this firm and this nexus of contracts.

The separate concept of the business is already implicit within legal analysis. As companies are incorporated prior to trading, they must either build up or acquire a business. 'Businesses' are frequently bought and sold by companies.[126] The majority of legal literature on this subject comes from insolvency law, where an insolvent company sells its business to try to pay as much of a dividend as it can to its creditors.[127] Indeed, legal systems are so concerned about directors and shareholders flipping the business into a new company whilst leaving firm creditors unpaid that legislation is enacted in most jurisdictions to restrict the activities of such 'phoenix companies' so set up.[128] Similar restrictions exist to ensure that creditors of the old company receive adequate compensation for any transfer of the business.[129] Thus, law protects those that the company interacts with in the firm's nexus of contracts from the company being left unable to meet its obligations.

Law acts in other ways to stop the participants in a firm's nexus of contracts from being left with liabilities owed by a defunct company but future performance sitting with another company. Thus employment law in Europe states that should a business be transferred, employees associated with that business are automatically deemed to be employed

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[125] Indeed, it is possible to argue that there must be two nexuses of contracts – one internal to the firm's governance and one which includes all external relations. As this article attempts to demonstrate that the 'company', the 'firm' and the 'nexus of contracts' are conceptually different, and that their boundaries do not automatically overlap, we will avoid the extra complication of sub-dividing the concepts into different categories.

[126] See discussions in Thomas Bates, 'Asset Sales, Investment Opportunities, and the Use of Proceeds' (2005) 60 *The Journal of Finance* 105; Ulrich Hege et al, 'Equity and Cash in Intercorporate Asset Sales: Theory and Evidence' (2009) 22 *The Review of Financial Studies* 681.

[127] See, eg, Graeme Smith, 'How Insolvency Practitioners Value a Business' (2015) 28 *Insolvency Intelligence* 20; Ian Fletcher, 'Pensions Again – "Just When You Thought It Was Safe to Go Into Administration"' (2014) 27 *Insolvency Intelligence* 59; Mark Hyde and Iain White, 'Pre-Pack Administrations: Unwrapped' (2009) 3 *Law and Financial Markets Review* 134.

[128] See, eg, Lee Aitken, '"Piercing the Corporate Veil" and the "Remedial Constructive Contract"' (2013) 129 *Law Quarterly Review* 21; Helen Anderson, 'Creditors' Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness' (2006) 30 *Melbourne University Law Review* 1.

[129] See Jennifer Payne, 'Debt Restructuring in English Law: Lessons from the United States and the Need for Reform' (2104) 130 *Law Quarterly Review* 282.

by the purchaser, normally a new company.[130] Similar legislation exists to ensure that employees retain a similar pension entitlement.[131] Another area in which liabilities associated with a business follow that business rather than the company is in respect of contaminated land – if the legal entity which caused the contamination cannot be found (eg because the relevant company has been wound up), then the occupier is liable for the costs of remediating the contaminated land.[132]

These rules demonstrate that law recognises the concept of the business and recognises that activities taken by a company in its self-interest may be harmful to the wider firm and its nexus of contracts. In other words, it is a tacit acknowledgment that the company is conceptually different from the firm, and that the company has been captured by two specific parts of a firm's nexus of contracts. It is also tacit acknowledgement that regulation is required to avoid abuse of this position by the company to the harm of the business.

This analysis helps us re-imagine how laws affecting the company need to be approached conceptually. Company law is currently aimed at internal stakeholders. It is therefore inevitable that those wishing to promote a shareholder-centric normative approach focus on the company and for company law to do so. It means that these concepts are inevitably subject to shareholder capture. Whichever element we change of the current conception of the company, we leave the rest of the descriptive framework, and all normative considerations abounding therefrom, intact.

If we try to limit the votes of shareholders within the corporate framework,[133] or argue others should be the beneficiaries of duties owed by directors,[134] or argue that the residual claim should sit elsewhere,[135] we risk failure due to inconsistency with the rest of corporate law. This is because the entire framework of the company and company law are inherently internal stakeholder captured. Adjusting any element of company law leaves intact the underpinning premise, and therefore is vulnerable to the correct counter-argument that such a

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[130] Simon Deakin, 'Changing Concept of the Employer in Labour Law' (2001) 30 *Industrial Law Journal* 72.

[131] In the UK, see *Transfer of Employment (Pension Protection) Regulations 2005* (UK) (SI 2005/649).

[132] *Environmental Protection Act 1990* (UK), s 78F; Sarah Nield, 'The Polluter Pays: But Who Is a Polluter Who Can Pay?' (2008) 6 *Conveyancer and Property Lawyer* 539; Justine Thornton, 'Contaminated Land: The Latest Developments' (2009) 1 *Journal of Planning & Environmental Law* 8.

[133] Or even focusing on allowing only directors to vote. See Margaret Blair & Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247; Stephen Bainbridge, 'The Case for Limited Shareholder Voting Rights' (2006) 53 *UCLA Law Review* 601.

[134] For example, by introducing non-shareholder constituency statutes that make directors act in the interest of others: Eric Orts, 'Beyond Shareholders: Interpreting Corporate Constituency Statues' (1992) 61 *George Washington Law Review* 14.

[135] Kelly & Parkinson (n 63).

change would jar with existing doctrinal company law. Making a major change to the premise is vulnerable to the correct counter-argument that it would be a dramatic change for company law.

This does not mean that there is no conceptual space to argue for limitations in the activities of the company. Indeed, we argue in the next section that revisiting the nexus of contracts to be based around the firm, and involve the company interacting with the business, provides conceptual space to argue for more protections for non-shareholder constituencies. But it means that we must be careful grounding those arguments in the right space, and not target internal aspects of the company, or company law, which risks being inherently captured.

Mayer's statement that '[c]ompany law is regarded as being the source of rights and rules imposed upon its constituent members'[136] therefore needs an important caveat. It may be argued that company law *should* provide rights and rules in respect of all factors of production and stakeholders. However, it currently does not do so – it cares primarily about shareholders and directors. Thus we need to caveat Mayer's statement by limiting the relevant constituent members to directors and shareholders. Mayer decries that the statements of companies about their purpose somehow rings hollow:

> Our scepticism derives from the fact that we know full well that 'from the CEO down' what they are really committed to is their own and their owners' interests, and ours and our societies' only feature to the extent that they are consistent with theirs. Where they diverge then we know who will come off the better, and we do not expect it to be us.[137]

By treating the firm as the nexus of contracts, in which the company and the business interact, we can see some inevitability about this statement. The company will only bring to the nexus the decisions in the interests of their particular internal constituencies. The company may well prepare a menu of options to interact with the business within the nexus, but each of those options will be acceptable to the company, and therefore there is a limit to what can be achieved by picking between these options. Indeed, we can see the value in delineating between the firm, the company and the business in Mayer's following paragraph, where he argues that companies can 'encourage employees to make firm specific human-capital investments in education and training that they cannot readily transfer to another corporation.'[138] Here we see again blending and slippage between the firm and the legal vehicle. Firm specific investments can follow the firm. This concept

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[136] Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press, 2018) 149.

[137] Mayer (n 136) 152.

[138] Ibid.

will be elaborated upon later, but for now conceptual clarity as to the role of the business, firm and company can help aid specificity.

This risks presenting a rather nihilistic view of the space for non-shareholder stakeholders in their interaction with the firm: the company, through jurisdictional competition for company law, is an inherently shareholder based vehicle, and therefore there is a lack of conceptual space for non-shareholders. Identifying that the firm and the company are different, though, provides such conceptual space. Introducing the business as the collective term for all non-shareholder and director stakeholders provides us with the clarity that we need to conceptualise the interaction between the company and others in the firm. Indeed, it highlights how existing structures are captured by only some parts of the nexus of contracts, and that others lose out. The next part reviews ways in which our conceptualisation of the business can act to help non-shareholder constituencies.

IV The Business

A. *Collectivising Power*

The first way that our reconceptualisation helps is to provide clarity as to what the company does in the nexus of contracts. It is not the nexus itself, but it is a dominant constituency. Whilst the business is a disparate, diverse set of actors who have to individually interact with the company, the company is its own legal entity, and so a centralised point of action for all shareholder and director constituencies to act through. Thus when the company interacts with any aspect of the business, it collectivises the power of the company's two constituencies.[139]

This creates a, or exacerbates any existing, power imbalance suffered by the supplier, or employee, by the centralisation of owner and manager power through the legal entity of the company. If every supplier negotiated separately with each owner, and each manager, then each supplier's comparative power would be stronger, and they would be able to engage in arbitrage between different constituencies, in the same way as the company does between suppliers.[140] That internal constituencies all collectivised into one legal entity strengthens their bargaining position. The act of collectivisation by shareholders and directors, even aided by law as much as it is, could, of course, prove logistically difficult. UK company law deploys two methods to

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[139] See also Jeroen Veldman & Martin Parker, 'Specters, Inc.: The Elusive Basis of the Corporation' (2012) 117 *Business and Society Review* 413.

[140] Arbitrage has been seen traditionally as the ability to buy one on exchange and sell on another at a higher rate, but has been used to explore how market participants can use jurisdictions with lower regulatory burdens: Victor Fleischer, 'Regulatory Arbitrage' (2010) 89 *Texas Law Review* 227.

facilitate such collectivisation and maximise the ability of the company to act as such a centralising power. First, shareholders make their decision by majority rule.[141] This avoids inefficiencies associated with the need to push for unanimous control,[142] as it lets a number disagree without affecting the company's ability to proceed with the action. This means that it avoids any particular shareholder from acting as a hold out[143] by refusing to provide their consent to a course of action unless they obtain a private benefit. If this were attempted under majority rule, then the consent of this shareholder becomes fungible, and capable of being exchanged for a non-holdout shareholder, lowering the incentive to act as a hold out in the first place.[144]

Second, any director can bind the company.[145] This is normally seen as a stakeholder-friendly metric – as those interacting with the company need worry less that the company can subsequently claim that they are not bound to a bad bargain.[146] However, it provides a flip side – the bargaining power of the collectivised company is at the fingertips of each and every director.

Most importantly, though, this centralisation of power for certain constituencies and not others arises by a matter of corporate law. Economically, each disparate stakeholder would have a certain amount of bargaining power within the nexus of contracts, and company law lets certain stakeholders collectivise and not others. As such, inherent bargaining strengths are changed by company law – this centralisation provides a boost to those who are so centralised, and a corresponding chill[147] to those that company law chooses *not* to centralise. In other words, company law changes the baseline economic position. Company law strengthens the hand of shareholders and directors – to the disadvantage of the business. (Recall that the 'business', as that term is used in this article, represents all factors of production and stakeholders in the nexus of contracts other than the shareholders and directors.)

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141 See Jonathan Hardman, 'The Plight of the UK Private Company Minority Shareholder' (2022) 33 *European Business Law Review* 87.

142 Melvin Eisenberg, *The Structure of the Corporation, A Legal Analysis* (Beard Books, 1976); John Hetherington & Michael Dooley, 'Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem' (1977) 63 *Virginia Law Review* 1, 3-4.

143 Lloyd Cohen, 'Hold Outs and Free Riders' (1992) 20 *The Journal of Legal Studies* 351.

144 Brian Cheffins, *Company Law Theory, Structure and Operation* (Oxford University Press, reprint, 2007) 68-69.

145 In the UK, see *Companies Act 2006* (UK) s40. See discussion in Eva Micheler, 'Disguised Returns of Capital – An Arm's Length Approach' (2010) 69 *Cambridge Law Journal* 151. As with all elements of doctrine advanced, this is UK specific and may not be extrapolatable into other jurisdictions.

146 See discussion in Michael Whincop, 'Nexuses of Contracts, the Authority of Corporate Agents, and Doctrinal Indeterminacy: From Formalism to Law and Economics' (1997) 20 *UNSW Law Journal* 274.

147 Duncan Kennedy, *Sexy Dressing etc. Essays in the Power and Politics of Cultural Identity* (Harvard University Press, 1993) 89.

This dynamic of inherent centralised power sitting with the company, giving it advanced bargaining power when dealing with stakeholders, has been seen elsewhere. Indeed, a parallel dynamic underpinned the UK labour law justification for trade unions, which became a method for labour to collectivise to undo a power disparity between the individual worker and centralised capital.[148] Our reconceptualisation of the nexus of contracts lets us see that this problem is actually endemic to every non-shareholder and director stakeholder. Thus it is not limited to employees – it also applies to all other components of the business, be they suppliers, customers, landlords, tenants, tort victims, or all others. Thus when Ferreras argued in favour of 'economic bicameralism' – that is requiring each company to answer to a 'two chamber parliament', with one chamber consisting of shareholders and the other chamber consisting of employees,[149] we can see that she did not go far enough – all other aspects of the business should be included in any such solution.

We can borrow from labour law to argue that what these disparate aspects of the business need is a forum through which to collectivise. The more heterogeneous any particular group is, the harder it is to assign voting or control rights to them.[150] Thus practical questions preclude the interaction of a full business 'trading union'[151] for the business interacting with the company. This is because there are insurmountable questions which arise from such an attempt to provide a single central point for the business – questions like: should all suppliers have equal votes? Should a supplier's vote equate to a customer's vote, or should one have a particular weighting? These questions will seem familiar, because they are of course the questions that are used to justify retaining shareholder and director control over the company's decision making. Bifurcating the company from the business, though, means that we do not need to risk the challenges of these questions.

Instead, we can provide a centralised point of information for those within different categories interacting with the company. We can imagine having different such fora for different types of stakeholders: suppliers can discuss frequent challenges that they have when interacting with the company within one forum, as can customers in another, as can landlords, etc. A forum for potential tort victims may

[148] See Ruth Dukes, *'Otto Kahn-Freud and Collective Laissez-Faire: An Edifice Without a Keystone?'* (2009) 72 *Modern Law Review* 220; Keith Ewing, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1.

[149] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy through Economic Bicameralism* (Cambridge University Press, 2017), Ch 8.

[150] See E Norman Veasey & Christine Di Guglielmo, 'How Many Masters Can A Director Serve? A Look at the Tensions Facing Constituency Directors' (2008) 63 *The Business Lawyer* 761.

[151] This is a deliberate pun on employee 'trade unions'.

prove particularly fruitful to speed the knowledge and understanding of those who have been wronged by the company, and thus bring matters to a swifter conclusion, helping undo some of the moral hazard arising for shareholders when directing the activities of the company.[152]

Such fora would provide the possibility for particular stakeholders to understand recurring themes when interacting with a particular company – giving space to provide a collective response to it. If all suppliers' payment terms are being slowly extended,[153] the suppliers' forum would provide the opportunity to understand that this was being systematically undertaken by the company, and for suppliers to provide a systematic response to this. A model for this exists in respect of the public provision of water services in Scotland – whereby a forum of consumers is represented at the public body and negotiates to reach a price settlement.[154] The author does not propose that any new fora act to directly negotiate terms, but to inform each private party of recurring issues arising when interacting with any particular company.

In addition to such fora acting as opportunities for private exchange of knowledge, they could also act as spaces in which companies must disclose certain information. If companies are mandated to co-operate with such fora, then they can also be compelled to provide information to them. Centralised information about all physical locations the company operates at would provide information about the firm's general approach to its carbon footprint and wider sustainability. Thus, rather than such information being hidden in the details of long and complicated reports which are targeted at shareholders rather than other stakeholders, [155] with adequacy of disclosure decided by such shareholders,[156] this disclosure can be aimed at those who actually need it, and they can judge the adequacy of disclosure for their own purposes. This is likely to increase the compliance burden upon the company, and therefore (as with most advanced disclosure and reporting requirements), it makes sense to only be relevant when either company

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152 See Charles Goodhart & Rosa Lastra, 'Equity Finance: Matching Liability to Power', (2020) 6 *Journal of Financial Regulation* 1; Henry Hansmann & Reinier Kraakman, 'Towards Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879.

153 Such as in the case of the failed UK construction company Carillion. See House of Commons, 'Carillion: Second Joint Report from the Business, Energy and Industrial Strategy and Work and Pensions Committees of Session 2017-2019' HC769 published 16 May 2018 available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/769/769.pdf>; Andrew Keay, 'Financially Distressed Companies, Preferential Payments and the Director's Duty to Take Account of Creditors' Interests' (2020) 136 *Law Quarterly Review* 52.

154 See Sarah Hendry, 'The Customer Forum: Putting Customers at the Centre of Regulating Water Services' (2016) 18 *Water Policy: Official Journal of the World Water Council* 948. The author is grateful to Victoria Baumfield for the analogy.

155 See Georgina Tsagas & Charlotte Villiers, 'Why Less is More: Concrete steps Towards Sustainability in Non-Financial Reporting' (2020) *Accounting, Economics and Law: A Convivium* <https://doi.org/10.1515/ael-2018-0045>.

156 Under the traditional 'comply or explain' model: see Andrew Keay, 'Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight?' (2014) 34 *Legal Studies* 279.

financial performance exceeds certain metrics, or firm performance does.[157]

Of course, these fora would need to be carefully regulated to ensure that only firm-specific matters were discussed. Such activity is likely to currently be considered collusion under competition laws, and therefore illegal activity on behalf of the relevant stakeholders.[158] This merely reinforces how uneven the current legal framework is on the business – two stakeholders have a collectivised vehicle which law facilitates, whilst all others risk illegal activity for achieving a functional equivalent. Provided that such fora were limited to the particular firm (including any other companies within the firm), then the major concerns should be avoided, and should help realise the potential bargaining power of a category of stakeholders in their interactions with the company.

B. *Proximity*

The second major implication of reconceptualising the nexus of contracts along these lines is to identify the interactions of various stakeholders to various aspects of the firm. The use by shareholders and directors of an intermediary vehicle between them and the business to collectivise their power has the effect of removing them one step from the business, and removing stakeholders one step from the company. We shall review these in turn.

First, the company contracts with the business in the firm. Limits to the nexus of contracts analysis tend to focus on ownership of property, which can fill the conceptual gap that contractual analysis cannot reach both economically[159] and in legal analysis.[160] So we can disaggregate the company's involvement in the firm to a series of contractual and ownership rights. Neither of these are unfettered in any jurisdiction.[161] Reimagining the nexus of contracts ends the conflation between the company and the business, which currently interacts with the company

[157] The UK adopts this approach for different requirements to be contained in a company's accounts, based on turnover, balance sheet size, and number of employees. In particularly, the smaller a company is the more exemptions it has from the general framework – thus UK law recognises medium sized-companies (*Companies Act 2006* (UK) ss 465 and 467); small companies (*Companies Act 2006* (UK) ss 382 and 384); and micro-entities (*Companies Act 2006* (UK) s 384A). It would follow that a firm which fell into these categories should not need to comply with any such requirements.

[158] Eg, EU law regulates any coordination between undertakings which restricts free competition: see *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission of the European Communities* ECLI:EU:C:1975:174.

[159] Grossman & Hart (n 39).

[160] John Armour and Michael Whincop, 'The Proprietary Foundations of Corporate Law' (2007) 27 *Oxford Journal of Legal Studies* 429.

[161] In respect of restrictions for property, see Kwan Lee and Joseph Ooi, 'Property Rights Restrictions and Housing Prices' (2018) 61 *Journal of Law & Economics* 335; in respect of restrictions of contractual discretions, see Richard Hooley, 'Controlling Contractual Discretion' (2013) 72 *Cambridge Law Journal* 65.

but could do so elsewhere if the company transferred its interest in the firm to another company. Too often, analysis has focused on limitations as to what shareholders can do in the company,[162] and not enough on limitations for what the company can do with the firm or the firm's nexus.

This is not to say that this ceases to be a matter for company law. Company law used to be obsessed with limitations on activities of companies.[163] With the decline of the ultra vires doctrine,[164] in the UK at least, questions of capacity have declined in academic importance. The decline of the concept of ultra vires in the UK 'simply removes all limitations on the powers of the board to contract for the company'.[165] Revisiting the nexus of contracts lets us see why this should not be the case: there should be limitations on how the company controls the firm and its nexus. Whilst these limitations were traditionally seen as protective of shareholders rather than third parties,[166] there is no reason why this argumentation structure could not equally be deployed to protect third parties. This means that company law should provide restrictions on the activity of the company in respect of the firm. This uses the same argumentation structure that had previously been deployed against shareholder and director primacy within the company.[167] This argumentation structure challenges the traditional view that somehow ownership of assets gives the company a privileged place in the nexus, and that ownership of the residual claim in respect of the company transfers that privileged place to shareholders.[168] By arguing that there is nothing inherently special about any such

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[162] See, eg, David Millon, 'Communitarianism in Corporate Law: Foundations and Law Reform Strategies' in Lawrence Mitchell, ed., *Progressive Corporate Law* (Westview, 1995); Benedict Sheehy, 'Scrooge – The Reluctant Shareholder: Theoretical Problems in the Shareholder-Stakeholder Debate' (2005) 14 *University of Miami Law Review* 193.

[163] See, eg, in the UK context, Lorraine Talbot, 'A Contextual Analysis of the Demise of the Doctrine of Ultra Vires in English Company Law and the Rhetoric and Reality of Enlightened Shareholders' (2009) 30 *The Company Lawyer* 323. Linked to this, but conceptually separate, was the relevance of the knowledge of third parties that something had not been undertaken in accordance with internal procedures and their ability to presume that any had been complied with: see Kevin Lindgren, 'The History of the Rule in Royal British Bank v Turquand' (1976) 2 *Monash University Law Review* 13.

[164] Chrispas Nyombi, 'The Gradual Erosion of the Ultra Vires Doctrine in English Company Law' (2014) 56 *International Journal of Management* 347.

[165] See Paul Davies and Sarah Worthington, *Gower Principles of Modern Company Law* (Sweet & Maxwell, 10th ed, 2016) para 7-09.

[166] Paul Omar, 'Powers, Purposes and Objects: The Protracted Demise of the Ultra Vires Rule' (2004) 16 *Bond Law Review* 93.

[167] Ie, that the business is not solely to be run in the interests of the shareholders of the company. A participant at the Conference correctly summed up the argument as 'managers would have to run the business in the interests of others than the shareholders' – however, this arises because the company has limitations on what it can do in respect of its interactions with the business, rather than general restrictions on which constituencies of the company should be dominant.

[168] Henry Hansmann, 'Ownership of the Firm' (1988) 2 *Journal of Law, Economics, and Organization* 267.

ownership rights, and/or that they should be fettered as all ownership rights are, this dominant narrative can be challenged.

Previous attempts to challenge it have failed because whilst the argumentation structure was sound, this analysis suggests its target was not – the company is inherently a shareholder and director vehicle, and the rules for companies are inherently picked by shareholders and directors through the incorporation process and the market for it. It is therefore unsurprising that previous attempts to challenge shareholder and director dominance within the vehicle were repudiated as inconsistent with other rules. This is avoided if we focus instead on the link between the company and the firm. A company can exit a firm, in the same way that a shareholder can exit a company,[169] and it is important that company law prevents the company from manipulating this process to the benefit of some parts of the nexus of contracts, to the cost of the firm overall. In other words, whilst the argumentation structure deployed in this article argues that the company should be left to director and shareholder control, this has the effect of meaning that all shareholder and director interaction with the business must occur through the company. Having collectivised their power into one legal vehicle, their involvement in the nexus should end with that legal vehicle. Restrictions can be placed, though, on what this legal vehicle can do in respect of the business. This is elaborated upon in the next part.

There is another aspect of proximity, though, which is of relevance. Non-shareholder and director constituencies are contractual counterparties of the company, and therefore external to it. As such, non-shareholder and director stakeholders become less proximate to the company. This follows, as most stakeholders care about the continuation of the business rather than the specific company which currently sits within the nexus of contracts. Thus employees make firm specific investments, rather than company specific investments.[170] Consider a factory in a small town which is the only employer in that town. Here, the community definitely have an interest in the factory continuing. However, they do not care which legal entity runs it. The long-term relationship between the community and the factory is best explored through the business rather than through the company.

To evidence this, consider if the factory was barely covering its costs. But one piece of machinery contained, unexpectedly, a particularly

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[169] Indeed, this may be logical in the same way that it can be logical for shareholders to exit the vehicle. See Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States* (Harvard University Press, 1970); Anat Admati and Paul Pfleiderer, 'The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice' (2009) 22 *The Review of Financial Studies* 2245.

[170] Gary Becker, 'Investment in Human Capital: A Theoretical Analysis' (1962) 70 *Journal of Political Economy* 9; Avi Weiss, 'The Role of Firm-Specific Capital in Vertical Mergers' (1992) 35 *Journal of Law & Economics* 71.

valuable metal whose scrap value considerably exceeded its operational value, and such value can only be realised by the total destruction of the factory. From the company's perspective, success is liquidating the firm of running the factory and realising this value for use in the next firm. From the community's perspective, success is the continued operation of the factory. As such, this revisiting of the nexus of contracts naturally reduces the argument that stakeholders should have more of a say in the running of the company, as they are less proximate to it than shareholders and directors are. This should not matter, though, if there are restrictions on what the company can do in respect of the firm.

Thus, the proximity argument tells us that shareholders and directors are less proximate to the business, and therefore should only be able to interact with the business through their vehicle, which should have restraints on what it can do. It also, though, tells us that external stakeholders are less proximate to the company, and thus should not have the same locus to influence internal decision making of the company as do shareholders and directors.

C. *The Company as Trustee*

So how can we restrict the activities of the company in respect of the firm? External stakeholders have short-term interests in the company – as the legal entity which must pay staff costs, act as employer, etc. This arises as a result of legal necessity – such activities need a separate legal person for ease, and the company obliges as a matter of market practice. It is best, then, to consider that the company is acting in such capacity on behalf of the firm. In other words, the company is the individual entity acting on behalf of the firm within the nexus of contracts. This centralised body for internal constituents has, at the same time, become the entity which holds legal title to the firm's assets. Once we start, though, to consider the company as a party to the nexus of contracts rather than the nexus itself, it is not inevitable that the company should do so entirely on its own behalf. Instead, perhaps the company could be said to hold such assets on behalf of the firm.

We can argue, therefore, that this reconceptualisation lets us argue that the company should be seen as the de facto trustee of the firm. Once again, this copies previous argumentation structures, but applies them differently. Thus it has frequently been debated who directors should be considered trustees for.[171] Once again, this has been easily defeated by arguments based on the internal coherence of company law – which is set to appease shareholders. We can apply that same structure to arguing that, actually, the company is the trustee of the firm, with all parties to the nexus of contracts acting as beneficiaries of that trust. Thus the

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[171] Beginning with the classic debate between Dodd (n 7) and Adolf Berle, 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365.

company could have the same limitations on their activities in respect of the firm as trustees have in respect of the trust.[172]

Currently, the company acts as a self-interested trustee for the firm – it utilises the firm for its own ends. Reconceptualising the nexus of contracts accordingly helps us revisit this. If the company is only one party to the nexus of contracts, we need to start re-evaluating how the company fits into the economy more generally. By conflating the company with the firm, we have allowed argumentation structures to be dismissed as being irrelevant. Perhaps we should abandon the company to shareholder interests, but limit how it can interact with the business as trustee of the firm. A recognition that the company is not the firm, and that the firm should be the most important actor within the nexus of contracts (in an economic sense, not in a legal personality sense), we can gain clarity about how the company should fit into economic analysis, and therefore understand how best to tackle elements of the status quo that are sub-optimal.

This would help lower the gap between public conceptions of the role of organisations and legal analysis. For example, let us examine the recent debate over recent activities in European soccer. On Sunday 18 April 2021, twelve leading European soccer clubs announced that they were withdrawing from European soccer's pyramidal competition structure, and establishing their own 12-club, invitation only, 'European Super League'. Six of those clubs were English.[173] By Wednesday 21 April 2021, all six English clubs had withdrawn from the project, leaving it in tatters.[174] Fans were particularly unhappy at the perception of soccer being twisted away from sport towards pure profit. Fans of one of these clubs, Manchester United, were particularly vocal in their complaints about how their club was run – normally blaming the club's ultimate owners, the Glazer family.[175]

Amongst the demands of the Manchester United Supporters Trust (MUST) were that the club '[i]mmediately appoint independent directors to the board whose sole purpose is to protect the interest of the

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172 See Lionel Smith, 'The Duties of Trustees in Comparative Perspective' (2016) 24 *European Review of Private Law* 1031.

173 Ed Aarons and Sean Ingle, 'European Super League: Premier League 'Big Six' Sign Up to Competition, *The Guardian* (online, 19 April 2021) <https://www.theguardian.com/football/2021/apr/18/five-english-clubs-sign-up-to-european-super-league-report-says>.

174 Mike Hytner and Reuters, 'Agnelli Admits Super League Cannot Go Ahead After Nine Clubs Pull Out', *The Guardian* (online, 21 April 2021) <https://www.theguardian.com/football/2021/apr/21/european-super-league-vows-to-reshape-after-english-clubs-pull-out>.

175 Guardian Readers and Alfie Packham, 'What Next for Manchester United and Their Protecting Fans?', *The Guardian*, (online 12 May 2021) <https://www.theguardian.com/football/2021/may/11/what-next-for-manchester-united-and-their-protesting-fans>.

club as a football club, not its shareholders.'[176] The ultimate holding company of the club is Manchester United plc, registered in the Cayman Islands and listed on the New York Stock Exchange.[177] MUST had (and has) no inherent interest in this legal vehicle – if it were to sell the business and assets of the club tomorrow, MUST would no longer have or desire any engagement with this legal entity. Thus their demand to have board representation is predicated upon this board being the owner of the club. In other words, the supporters wish for more control over this company only and so long as it is the trustee of Manchester United. But this demand highlights the conflation that has taken place in everyday parlance. Law tacitly acknowledges that Manchester United plc is the vehicle of the Glazers, by giving them all the power and control over the plc's activities. If it did so overtly, but limited what the plc could do in respect of the club, we can cut through the analysis: supporters have their protection, and the Glazers keep their vehicle.

There is, of course, no argument that as a matter of law the company is the trustee for the wider business. However, once we start decoupling the various economic and legal concepts underpinning more theoretical company law, instead we can create a different conceptualisation of the role that the company plays within the nexus of contracts and the firm. In other words, once we acknowledge that the company is different from the firm and from the nexus, we open up space to argue what the role of the company is in respect of these concepts. The foregoing demonstrates how it is conceptually coherent to consider the company as acting akin to a trustee.

Considering the company as the trustee for the firm also helps clarify a number of points in respect of company law more broadly. First, it helps explain how a company can exit a firm by selling the business and assets of the firm to another legal entity.[178] This is the same as any trustee changing,[179] although of course the trustee in this case is also a major beneficiary of the firm.[180] It helps explain the interactions between the company and stakeholders: why stakeholders have long-term relationships with the firm, but short-term relationships with the

[176] MUST - the Manchester United Supporters Trust, 'An Open Letter to Joel Glazer: the Morning After the Night Before, And a Way Forward', MUST (Blog Post, 3 May 2021) <https://www.imust.org.uk/Blog/Entry/an-open-letter-to-joel-glazer-the-morning-after-the-night-before-and-a-way-forward-for-all-of-us>.

[177] See the Manchester United plc 2020 Annual Report, available at <https://ir.manutd.com/~/media/Files/M/Manutd-IR/documents/2020-mu-plc-form-20-f.pdf>.

[178] See sources cited at n 126 & n 127 above. See also Jonathan Hardman, 'Looking Beyond Separate Legal Personality, or How Many Titles Have Rangers Won?' [2022] *Juridical Review* 1.

[179] For a UK discussion, see LM Clements, 'The Changing Face of Trusts: the Trusts of Land and Appointment of Trustees Act 1996' (1998) 61 *Modern Law Review* 56.

[180] As custodian of the residual claim.

company. This is because the company is acting on behalf of the firm for the time being, akin to being the firm's trustee.

The firm can only contract through a legal entity, and it is evident to see why the company was chosen as such a vehicle – it is a collectivisation of two key constituencies of the firm. It is not inevitable, though, that this means that the company should be entitled to use that position to its own advantage. If the company is to act as the firm's trustee, it should act like a trustee too. This means that the long-term interest of the firm is different to the purpose of the company. Attempts to align the two results in proposals for either a minor change, which jars with company law generally and is easily dismissed as inconsistent with company law, or a major change, which risks being too radical to gain acceptance. Acknowledging the delta between the company and the firm avoids both risks. It lets us explore the interaction between the company and the rest of the firm, and to make changes which are internally consistent with company law. Ultimately, this lets us help redress the bargaining boost provided by company law to those constituencies who control the company.

V Conclusion

This article risks presenting a bleak perspective for non-shareholder constituencies, as it argues that the company has been captured by shareholders and directors, and this capture has been facilitated by law. However, there is hope through economic analysis by embracing the clarity offered by this stark proposition. If the company is inherently captured, then it cannot be equated to the firm. If this is the case, then the economics of the firm cannot be purely transplanted onto the company. Indeed, it is a closer – albeit still imperfect - fit for the nexus of contracts to apply to the firm rather than the company. If so, the company becomes a party to the nexus of contracts, rather than the nexus itself. This undermines some conceptual arguments about company law which are based on equating the company to the nexus of contracts. It also emphasises the requirement for clarity in respect of which concepts we are referring to. Statements such as 'the corporation should be recognized for what it is – a rich mosaic of different purposes and values'[181] need to be adjusted accordingly – the firm is such a mosaic, the company merely one large piece of that mosaic.

This reimagining creates conceptual space for a different concept – the business. The business is our collective term for the heterogeneous group of those in and out of the firm who are not represented by the company. In other words, the other parties to the nexus of contracts with whom the company interacts. Protections for the business exist in a piecemeal fashion – these can be systematically utilised to provide the

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[181] Mayer (n 136) 4.

business with more protection against the activities of the company. Indeed, as the company is, effectively, the concentration of power of certain stakeholders in the firm, we should facilitate the centralisation of power for other stakeholders, too. Other stakeholders are too disparate to in any way act in unison on behalf of the business, but by providing information fora for different types of stakeholders interacting with the business, those stakeholders themselves – and governmental bodies – will have more information about being involved with the firm, which can help them make joint decisions and return the bargaining power of the parties to what it would be in the absence of such centralisation by certain stakeholders.

We also need to re-evaluate what we consider company law to be. Statements such as '[c]ompany law is regarded as being the source of rights and rules imposed on its constituent members'[182] are universally acceptable because they contain an inherent ambiguity over the use of the word 'its'. Those who advance a shareholder-focused view of the word hold that 'its' to refer to the company – which, as a matter of company law doctrine, is shareholder focused. Those against that worldview consider 'its' to be the firm rather than the company. Without clarity as to this conceptual difference, though, it is unlikely that either viewpoint can be universally accepted. If we add clarity to our discussions as to which concept we are analysing at any given point in time, then we can correctly target pre-existing argumentation structures – which may mean that they can less easily dismissed.

182 Mayer (n 136) 149.