Rethinking the Nature of the Firm: The Corporation as a Governance Object

“It is important to recognize that most organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals.”¹

By Peer Zumbansen **

I. Introduction

The present paper attempts to bridge two discourses – corporate governance and contract governance. As regards the latter, a group of scholars has recently set out to conceive of a more comprehensive research agenda to explore the governance dimensions of contractual relations, highlighting the potential of contract theory to develop into a more encompassing theory of social and economic transactions.² While one dimension of this research is driven by a renewed interest in the contribution of economic theory to a concept of contract governance, another part of this undertaking has been to move contract theory closer again to theories of social organization. Here, an emphasis on the “social” or “public” nature of contracts is being made to return to a critical reflection on

the classical model of one-off, spot contracts for an exchange of goods or services. The inspiration, as it were, for this enterprise arguably comes from corporate governance debates over the last two decades, which focused on competing claims of ‘convergence’ versus ‘divergence’ as part of an ambitious investigation into universal standards, the ‘end of history’ and the underlying ‘varieties of capitalism’. Meanwhile, the fundamental transformation of the state, which domestically and transnationally forms the background of the growing prominence of contract as a governance tool, must be seen as the other dimension of a renewed interest in ‘governing contracts’.

Today, half a decade onwards from a long and expanded debate among corporate lawyers and political economists over the convergence or divergence of corporate governance systems, scholars and courts alike have moved on to address the pressing regulatory challenges in this field, the contours of which have became just as blurred as the proverbial ‘nature’ of the business enterprise itself. This context provides an excellent opportunity to bring together the ‘internal’ and ‘external’ regulatory perspectives on the corporation. On the ‘inside’, there is a continuing struggle between contractual and organizational depictions of the nature of the firm, while – on the outside – we see a continuing transformation of a regulatory framework, which is increasingly disembedded from the state. An approximation of both perspectives allows us to rethink the nature of the corporation as a subject and object of governance, for which the concept of contract

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has, however, to be expanded in order to become adequate for the complex architecture of the modern corporation.8

After a very cursory historical sketch of the trajectory of corporate law studies (II.), the next section will offer some more contextual evidence for the increased interest among governance and regulation scholars in the area of corporate law (III.). It is against this background that section IV. will then present a more detailed discussion and critique of contractual governance in order to challenge the otherwise oversimplifying appropriation of ‘contract’ to explain complex power relations within and beyond the corporation. Section V. concludes.

II. Studying the Corporation

Beginning a series of reflections on the nature of the firm today would require a particular combination of erudition and irony that prompts in fact a more collective, discursive effort than a singular scholarly undertaking. Too deep is our scepticism with regard to any attempt at conclusively delineating and re-crafting a comprehensive theory each and every element of which remains exposed to further contestation and deconstruction. Referring to the corporation as an object of study and investigation opens up – at best – a vista at a historical and intellectual universe which is in every respect overwhelming. And yet, we are drawn to the corporation, to its beginnings9 and its ‘ends’10, investigating

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8 While the present paper will sketch the historical and theoretical background and suggest the outlines of a contractualized concept of the corporation, a second paper will focus more specifically on the question of the board’s fiduciary duties to suggest that an approximation of contract theory and corporate governance, with relevant regard to securities regulation, promises insights into the longstanding conundra that characterize the corporation as a contractual organization. The second paper will further elaborate the contention made here that stakeholder interests can be advanced by reformulating the corporate contract – arguably establishing a principal-agent relationship between shareholders and management – as a public contract. In taking issue with two recent Canadian Supreme Court Rulings involving large-scale corporate change of control transactions – People’s [Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68, [2004] 3 S.C.R. 461], and BCE [BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, [2008] 3 S.C.R. 560] – the follow-up paper will explore the (partially lost) opportunity of crafting a more adequate theory of the firm by moving beyond the Court’s interest in ‘interests’ and its formula of the ‘good corporate citizen’. Centrally, that paper will draw on relational contract theory and legal pluralism on the one hand and on ‘social norms’ and evolutionary theory on the other to argue for a systemic approach to corporate governance, allowing us to take a fresh look at directors’ duties and corporate social responsibility.

9 See eg Walther Rathenau. Vom Aktienwesen (Berlin: S. Fischer, 1918), 11: “Through its path from the family enterprise and association to the large corporation there has occurred a substitution of the foundation
them as complex relationships between individual and collective instantiations of power, as intricate spheres of organizational design, as carriers of ‘public’ purpose, of knowledge production and transformation, as social spheres and spaces, as illustrations of the tension between markets and hierarchies or between different ‘stakeholders’. Seen in this light, corporations offer myriad opportunities to study

of our business associations, their organs and forms of governance and administration; but neither science, legislature nor judiciary have taken notice of this inner morphing of the grounds of being and of the forms of impact; alone a series of ever recurring conflicts, taken as contingent or arbitrary, have penetrated public opinion. […] The administration of a large corporation exceeds – as concerns scope, personnel structure and impetuous shift of tasks – the government of a small state today or that of a large one of one hundred years ago. I would not know of a time nor a place on earth, including America, where year in, year out with the same velocity, security and responsibility a similar daily stock of executionary and administrative work of constructive nature would have been accomplished as is the case in the governing echelons of our large corporations.” [Translation PZ]; Compare with Adolf A. Berle/Gardiner C. Means. The Modern Corporation and Private Property [1932]. With a new introduction by Murray Weidenbaum & Mark Jensen (Brunswick, NJ/London, England: Transaction Publishers, 1991), 309: “…a concentration of power in the economic field comparable to the concentration of religious power in the mediaeval church or of political power in the national state.”

10 Christopher D. Stone. Where the Law Ends. The Social Control of Corporate Behavior (New York et al.: Harper Row, 1975); see also Dalia Tsuk-Mitchell, The End of Corporate Law, 44 Wake Forest Law Review 703 (2009), 729: “Having helped to eradicate any meaningful force out of corporate law, all that the Delaware courts have left to elaborate at the turn of the twenty-first century are ideals they are unwilling to enforce.”


15 Marina Welker/Damani J. Partridge/Rebecca Hardin, Corporate Lives: New Perspectives on the Social Life of the Corporate Form, 52 Current Anthropology S3 (2011), S4: “…understanding corporations as social forms, actors embedded in complex relations, and entities that produce and undergo transformation, with all the friction that entails.” (reference omitted)


governance structures, whether or not we still think they can be demarcated along the boundaries between an ‘inside’ and an ‘outside’.18

The following observations are inspired by the evolution of the corporation as a site of investigation among not only legal scholars but also economists, sociologists, political scientists, historians as well as anthropologists, who have shown how the corporation as an academic subject has long ceased to belong to legal scholars alone. It is perhaps only a little less trite to observe that the same is true for the field of corporate law itself. Theory and practice of the field suggest that today we must approach and understand corporate law not only as a point of conflict between allegedly diametrically opposed ‘theories of the firm’, or between shareholder and stakeholder conceptions, but also as implicating a vibrant, multilayered regulatory regime, which is characterized by overlapping, intervening and conditioning authorities, non-traditional rule makers, ‘mixed’ norms and new, not exclusively state-based, enforcement and compliance mechanisms.

The present paper, then, is informed by an interest in corporate governance, broadly understood. Such studies have today an unavoidably interdisciplinary nature, given the multifaceted nature of the corporation and the resulting concert of interpreting and analysing disciplines that rally around the subject. At the same time, corporate lawyers have always been confronted with a mix of relatively concrete ‘problems’ or challenges that arise from the governance and operation of the corporation and larger considerations regarding the societal status, nature or ‘responsibility’ of the corporation. These contestations have over time contributed to a considerable differentiation and deepening of the field, making the corporation an objet trouvé of a very particular kind. In other words, the corporation has long been in the centre of research that analyzes the governance framework and architecture of the corporation, the nature and pressures of

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different ‘interests’ in and around the corporation, as well as its larger place and role in society. In more than one way, the currently observable ‘open-mindedness’ of corporate law as an intellectual and interdisciplinary undertaking bears some resemblance to an earlier period in history roughly a century ago, when legal scholars’ work on the corporation displayed a heightened degree of sensitivity to the interplay between the internal governance dimensions of the corporation and the evolving normative infrastructure of corporate, or company law in relation to a fast-unfolding market society. Research on the corporation and its place in a politically and economically volatile environment became fuelled by parallel and increasingly discursive and collaborative endeavours by legal scholars on the one hand, and economists on the other, something that unfolded again in intensified fashion in the nineteen-seventies and –eighties. Meanwhile, and in contrast to a much debate and contestation around the growing role of corporations on the national and global scale from political, historical, or sociological perspectives, the law & economics’ movement spread like a ‘prairie fire’ through corporate law academia and law schools in general, but showed little interest in the deeper political economy dimensions of the corporation and its regulatory framework. Next came a period of greater interest again among corporate lawyers in market structures, this time allowing for a closer exchange between theoretical models and ‘real

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world’ evidence from vibrant and integrating markets. In the shadow of the experience of the takeover-frenzied eighties, the ‘roaring nineties’ and the burgeoning exuberance of the ‘new economy’ before its fall, corporate governance as a field for lawyers and economists as well as comparative political economists emerged as a truly global research and policy area. At a time, when starting associates in New York, Frankfurt or Paris were being paid premium salaries to work on mergers and acquisitions boom, legal scholars were touring the global conference circuit to propagate or to debate, as the case might have been, the triumph of converging corporate governance systems.

The ensuing two decades of corporate governance research were particularly vibrant, as legal scholars, economists, sociologists and political economists, unpacked from their particular perspectives the distinctions in the historical and socio-economic-political trajectories of different corporate law regimes. Then came Enron, and corporate

governance research became confronted with a freshly amplified ‘public’ interest in the corporation and its regulation, when accounting practices, interlocked corporate entities and executive compensation became newspaper items. Since then, inspired by comparative studies and by the research on the ‘varieties of capitalism’, corporate governance scholars are now routinely collaborating from their home bases in law, management studies, CSR or organizational psychology, in the course of which they second-guess the extremely influential assertions put forward by a group of scholars generally referred to as “LLSV”, who had relied on empirical studies to ascertain a strong correlation between ‘legal origins’, ownership structures and shareholder rights.

Scholars in Europe and in North America challenged these findings on various fronts and contributed to an altogether much more differentiated picture of corporate governance regulation.

Meanwhile, another perspective had opened up from which scholars have been studying the corporation and its regulatory infrastructure. Their primary interest appears to be in the corporation as a hybrid entity, caught between being a subject and an object of rule. 

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making.\textsuperscript{37} This ambivalent nature of the corporation, then, is one which lends itself perfectly to what has in our day become a multi-pronged investigation into the evolving nature of the corporation, as it appears on both sides of its artificially constructed boundaries.\textsuperscript{38} On the ‘inside’, then, scholars have been hard at work to lay bare what makes the corporation ‘tick’, that is how we ought to best understand, shape and influence the roles played by various members of the corporate organization.\textsuperscript{39} On the corporation’s ‘outside’, the picture is just as perplexing: in light of the indisputable fact that the corporation remains the dominant force in a globally integrated economy\textsuperscript{40}, scholarly attention has increasingly been directed at the complex regulatory and normative landscape in which the corporation operates. These studies\textsuperscript{41} coalesce to sketch an increasingly detailed map of the interplay between ‘hard’ and ‘soft’, ‘public’ and ‘private’ norms, that shape corporate activities.\textsuperscript{42}

\begin{itemize}
  \item \textsuperscript{38} See already John Dewey, \textit{The Historic Background of Corporate Legal Personality}, 35 Yale Law Journal 655 (1926).
\end{itemize}
On the following pages, the gaze shall again be directed ‘inward’, as it were, towards the ‘inner’ life of the corporation. The goal of this reorientation is to take a closer look at the interaction between two theoretical constructs in their assessment of the corporation. One – corporate governance – is in fact merely another framework through which scholars have been studying the organizational design and power structure of the modern business corporation for some time now. The other one, however, is concerned with ‘contract governance’ and aims at approximating an in itself highly differentiated body of work on and around contracts and contract law to the research done under the corporate governance umbrella. The hope is that a parallel view and border-crossing engagement with both approaches can unlock some of the deadlocks which are inherent to each. In order to more fully understand the upsides (and, downsides) of contract thinking with regard to the corporation, it will be helpful to contextualize the present interest in contract governance against the background of a fundamental transformation of the regulatory state, which gives rise to still further unfolding processes of decentralization, privatization and to both institutional normative pluralism. These processes raise significant questions with regard to law as a tool of societal governance.

III. The Lawyer’s Mindset and the New Twist in Law & Economics

Oliver Wendell Holmes Jr. notes towards the end of his landmark essay on ‘The Path of the Law’, that “We cannot all be Descartes or Kant, but we all want happiness”. As students of this text once knew, he continues to remark:

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45 Oliver Wendell Jr. Holmes, The Path of the Law, 10 Harvard Law Review 457 (1897), 478. See also Holmes, On Receiving the Degree of Doctor of Laws, Yale University Commencement, June 30, 1886, reprinted in OWH Holmes Jr, Collected Legal Papers (2007 [1920]), 33: “The power of honor to bind men’s lives is not less now than it was in the Middle Ages. Now as then it is the breath of our nostrils; it is that for which we live, for which, if need be, we are willing to die. It is that which makes the man whose gift is the power to gain riches sacrifice health and even life to the pursuit. It is that which makes the scholar feel that he cannot afford to be rich.”
“And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”

There is much in these lines to ponder on, for sure. Holmes’ essay, all throughout, reads—and was meant—as a wholehearted assault on dearly held beliefs regarding the objective nature of abstract legal principles, the separation of law and morality and the construction of legal rules in following the command of logic. Heralded—by none other than one of the founding fathers of Law & Economics and one of the great, innovative and continuously surprising legal minds of our day, as a prophecy coming true, Holmes’ essay placed a great number of the core treats of the coming legal evolution before his readers’ eyes—over 110 years ago.

Where Holmes pointed to the rising significance of science and economics for the theory and practice of law, the ensuing legal evolution seems at a minimum to have proven him right. What sets the present apart from the past, however, is that precisely this transformation of legal science into its present-day conundrical mixture of legal theory and philosophy, regulatory theory (and/or ‘governance’) and economic theory, not

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46 Ibid.
47 Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011), 1017: “And suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be.”
49 See also Holmes, ‘Law in Science and Science in Law’, in ibid., COLLECTED LEGAL PAPERS (2007 [1920]), 210, 210: “A hundred years ago men explained any part of the universe by showing its fitness for certain ends, and demonstrating what they conceived to be its final cause according to a providential scheme. In our less theological and more scientific day, we explain an object by tracing the order and process of its growth and development from a starting point assumed as given.”
50 Arguably, the new paradigm in administrative sciences. See, eg, Claudio Franzius, Governance und Regelungsstrukturen, 97 Verwaltungsarchiv 186 (2006); Philippe Moreau Defarges. La Gouvernance [Que sais-je? no. 3676] (Paris: Presses Universitaires de France, 2003); Oliver E. Williamson, The Economics of
only goes beyond the initially sketched parameters, but fundamentally undermines a view that would conceive of law as of a field and its ‘neighbour’ disciplines.52 ‘The centre cannot hold’53 – law’s autonomous status within a densely structured context of social order theories is undermined, already by Holmes himself, by exposing it to a complex set of questions touching on the nature, function and form of law, eventually challenging the boundaries between law and non-law. And this, precisely, proved to be the aftermath and legacy of Holmes’ and his colleagues’ anti-formalist attack, a powerful engagement with the assumptions, theories and policies of legal argument.54

This context provides promising, if not intimidating, entry points for law’s engagement with itself and all that it might – and might not – be. Lawyers like Holmes were well aware of the vulnerability of the edifice of norms, court rooms and law school curricula long before the advent of globalization and, on the one hand, the much lamented exhaustion of the state’s regulatory capacities55, and, on the other, the legal system’s increased generation of ‘regulatory laws’, which – due to their complex nature – raise particular compliance challenges.56 With this in mind, we have to remain aware of the continuously mounted challenges of law’s empire, as they are promulgated by

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52 See eg Dieter Grimm (ed.‘eds.), Rechtswissenschaft und Nachbarwissenschaften, 1976.
53 William Butler Yeats, The Second Coming (1920)
56 Kristin E. Hickman/Claire A. Hill, Concepts, Categories, and Compliance in the Regulatory State, 94 Minnesota Law Review 1151 (2010), 1159-1174. “…regulatory laws tend to differ from other types of law in the complexity of both their subject matter and the programs they establish.” Id., at 1174
economists\textsuperscript{57}, sociologists\textsuperscript{58}, geographers\textsuperscript{59} or anthropologists\textsuperscript{60}, just to name a few of the disciplines with a keen interest in law as a governance tool.\textsuperscript{61} To reflect on the origins of interdisciplinary thinking of and around law as it pertains to the corporation is especially crucial at a time, where scientific advances propel a rapidly growing knowledge base with regard to just about anything connected to legal reasoning with the potential of the ubiquitous excitement about ‘law and…’\textsuperscript{62} having an almost overwhelming effect on us as regards an awareness and appreciation of much older engagements with law’s interdisciplinary foundations.

The current interest in law’s psychological\textsuperscript{63} and behavioural economic\textsuperscript{64} dimensions gives the indisputable triumph of law & economics over other ‘law & society’ movements yet another twist – with important consequences for our understanding of the embeddedness of law in a rich context of theoretical and empirical studies of human – individual and collective\textsuperscript{65} – as well as of institutional behaviour.\textsuperscript{66} To be sure, the

\textsuperscript{60} Sally Engle Merry, Measuring the World: Indicators, Human Rights, and Global Governance, in: Law in Transition: Rights, Development and Transitional Justice forthcoming (Zumbansen/Buchanan, eds., 2012)
\textsuperscript{64} Cass Sunstein (ed.^eds.), Behavioural Law & Economics, 2000
\textsuperscript{65} Eric A. Posner/Cass R. Sunstein (ed.^eds.), Law & Happiness, 2010
dialogue between economics, sociology and evolutionary theory has considerable roots, out of which have arisen a number of very promising research avenues, altogether fostering a more expansive and interdisciplinary interest in norm-creation and societal ordering. Building on but going beyond the Legal Realists’ attack of the impenetrable judicial mindset, law & psychology scholars and behavioural economists alike have more recently taken us a good way towards a better understanding of the motivational forces behind legal but also wider social decision-making.

What insights should we as corporate law scholars and as legal scholars more generally begin to draw from these suggestions? In order to begin to unpack the interdisciplinary promise for a better understanding of law today, the picture needs to be more accentuated. Lawyers in different areas such as, but not limited to, criminal law, tort law, constitutional or even international law have long been addressing structures and effects of, for example, collective human behaviour. At the basis of such engagement has been the recognition that the attribution of different legally scrutinizable forms of guilt, responsibility or accountability but also – in international law - authority requires a particular legal theoretical effort to address, for example, incomplete or inchoate chains of causation. Early on, lawyers recognized that in order to make sense of the intertwined

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70 Elinor Ostrom, Challenges and growth: the development of the interdisciplinary field of institutional analysis, 3 Journal of Institutional Economics 239 (2007)

71 See only Roscoe Pound, Mechanical Jurisprudence, 8 Columbia Law Review 605 (1908).


nature of individual and collective behaviour in either extreme circumstances\textsuperscript{75} or in, say, organizational corporate contexts\textsuperscript{76}, they would have to expand traditional legal categories.

To be sure, the work in organizational psychology and behavioral economics has a number of further applications that deserve our attention. Such applications become apparent where we return to the earlier projects undertaken primarily by law & society scholars to render a more complete picture of the embeddedness of legal regulation in heterogeneous normative and institutional settings. Path breaking work in that regard was carried out in the area of contract law\textsuperscript{77}. Lawyers\textsuperscript{78}, legal pluralists\textsuperscript{79}, for that matter, as well as sociologists\textsuperscript{80} were among those who pointed to the myriad forms in which informal norms governed behaviour in far more subtle and sophisticated ways than a formalistic legal model would imply. Standing on the shoulders of legal sociological scholars who explored the interaction between formal and informal order systems\textsuperscript{81}, legal theorists were able to draw an impressively more layered and differentiated picture of ‘contracts in action’\textsuperscript{82}.

These evolutionary steps are important to keep in mind when today we learn that a new breed of ‘social norms theorists’ harbour deep scepticism vis-à-vis allegedly incompetent

\textsuperscript{75} Christopher Browning. Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland (New York: Harper Collins, 1992)
\textsuperscript{76} Canadian Dredge & Dock Co. Ltd. v. The Queen [1985] 1 S.C.R. 662
\textsuperscript{79} Sally Falk Moore, \textit{Law and Social Change: the semi-autonomous field as an appropriate subject of study}, 7 Law & Society Review 719 (1973)
\textsuperscript{80} Mark Granovetter, \textit{The Strength of Weak Ties}, 78 American Journal of Sociology 1360 (1973)
\textsuperscript{82} Stewart Macaulay, \textit{Non-contractual Relations in Business: A Preliminary Study}, 28 American Sociological Review 55 (1963); as well as the 1986 landmark casebook: \textit{Contract Law in Action}. 
or overzealous judges when adjudicating complex contractual arrangements. In fact, serious attempts to make sense of the formal/informal regulatory environment, which characterized, shaped and informed contractual governance had been undertaken not only through extensive empirical research but also with particular scrutiny of the economic dimensions of these regulatory patterns – already a long time ago. What this work produced, among other insights, was a growing awareness of the layers of contractual bargaining, that could not fully be explained by reference to either the (subjective) will of the parties on the one hand, or to an established (objective) purpose dimension of the arrangement on the other. Instead, an economic sociology and empirical legal studies approach taken to the scrutiny of contractual arrangements revealed both long-term as well as organizational dimensions which prompted a fundamental reconsideration of the confines of a contractual agreement. This shift in perspective eventually gave way to an increasingly differentiated understanding of the adaptive and, arguably, constitutionalizing dimensions of contract.

IV. The Promises (and Pitfalls) of Contract Governance

Today, in a world, where the ‘materialization of contract law’ has a sour ring to it, because even stern adepts of consumer protection law have grown aware of the intricacies

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86 Terence Daintith/Gunther Teubner (ed.^eds.), Contract and Organisation. Legal Analysis in the Light of Economic and Social Theory, 1986
of judicial engagements with fast-evolving, sensible areas of social organization, contract theorists have begun to turn their curious minds to an even more layered analysis of contractual governance, both with regard to a political critique of power relations as regards a better understanding of contractual networks. Again, these developments are crucial elements in the formation of a new regulatory landscape, which can be described neither with reference to the state as sole law-producer nor with reference alone to legal rules when we attempt to depict present and emerging regulatory structures. It should be against the background and in light of legal scholars’ attempts to make sense of the legal sociological, legal pluralist and evolutionary theories as well as prospects of an emerging transnational normative order that we continue to posit the project of ‘contract governance’ vis-à-vis complementing bodies of theory interested in social ordering. A confrontation between legal and non-legal approaches to contract governance should be mindful of the questionability of law’s boundaries as such – today as in the past. As Holmes said, “It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final stage of expression, or what have been the
changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. The study pursued for such ends becomes science in the strictest sense.”

Contract governance comes onto the scene with considerable baggage, baggage which needs to be studied closer if we want to unpack the continued prominence which contractarian thinking enjoys in the field of corporate governance. The layered inheritance of contract governance expresses itself in the double dimension of contract governance itself – which can mean that contracts govern or that we are concerned with the governance of contracts, or with the governance of contracts that govern. Traditional law & economics scholars would likely embrace the former interpretation, while progressive lawyers interested in the materialization of law would tend to focus on the scope of adjudication and judge-made contract law. Contract governance, understood as a conceptual framework, is an ingenious proposition as an intellectual undertaking and as a research enterprise because it naturally captures both of these dimensions. And because of this it is possible to see the ‘inside’ and the ‘outside’ of contract governance, which not only illustrates the complex assumptions that go into the project from the start but also explains its promise for a continued depiction of the corporation as a contractual structure. But, what has forcefully been shown as regards the interpretation of the business corporation as a nexus of contracts, can just as aptly be applied to the idea of contract governance itself. In both cases – in corporate governance as in contract governance – the construction of a complex governance architecture on contract as a self-explanatory and auto-legitimizing principle renders detaches the contract from its legal-

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97 This last dimension connects contract governance and contract theory with what administrative, and more particularly, environmental lawyers have learned to address from the perspective of regulatory theory. Here, the focus is in particular on reflexive forms of governmental ‘intervention’, see eg Eric Orts, Reflexive Environmental Law, 89 Northwestern University Law Review 1227 (1995); see for more background Michael Power, Constructing the Responsible Organization: Accounting and Environmental Representation, in: Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization 369 (Teubner/Farmer/Murphy, eds., 1994).

This isolating depiction of contract governance as autonomous from other, allegedly ‘state’-based forms of law-making and regulatory governance repeats what a number of law & economics scholars have been arguing with regard to the autonomy of so-called ‘social norms.’ The latter are identified and heralded as the glue of highly differentiated, modern market societies, whose complexity renders any attempt by the state’s regulatory apparatus and the judiciary futile.\footnote{Eric A. Posner. \textit{Law and Social Norms} (Cambridge, MA & London, UK: Harvard University Press, 2000)}

There is, certainly, another reading of the idea of contract governance, which depicts it as a comprehensive societal ordering framework.\footnote{Hugh Collins, \textit{The Voice of the Community in Private Law Discourse}, 3 European Law Journal 407 (1997); Peer Zumbansen, \textit{The Law of Society: Governance Through Contract}, 14 Indiana Journal of Global Legal Studies 191 (2007)} Such a reading would hope to undo the ‘discovery of social norms by law & economics’ scholars\footnote{Robert C. Ellickson, \textit{Law and Economics Discovers Social Norms}, 27 Journal of Legal Studies 537 (1998)} in order to appreciate the concept of contractual governance as part of a comprehensive, ‘embedding’ theory of a liberal society.\footnote{Hugh Collins. \textit{Regulating Contracts} (Oxford/New York: Oxford University Press, 1999), 3} To ponder upon the embeddedness of contract governance in a framework of both institutional and normative reference points is meant to ensure that the connection between society and the practice (and theory) of contracting is never left out of sight. That connection, however, is severed when one plays contract governance off against the governance of contract, as is done by social norms theorists and proponents of a neo-formalist approach to contract law.\footnote{Robert E. Scott, \textit{The Death of Contract Law}, 54 University of Toronto Law Journal 369 (2004)} In contrast, the genius of contract governance has always been the recognition that these two dimensions cannot be separated in a way
that one would potentially trump the other. To do so would render absurd the fact that contracting is part of societal interaction. To recognize contractual governance (as governance through contract) as part of society, however, connects the theory of contract governance with the theory of society. And the latter is far more complex than to be captured in the scrutiny of this or that instance, where courts wandered into the judicial resolution of complex contractual relationships. Contract governance cannot be reduced to a theory of social norms independent from the theory of society in which it is embedded. This theory, however, is not fully accessible for the law itself, as it has its own – legal – ‘rhymes and reasons’. But the differentiation of the legal system occurs as the law ‘reacts to the world’ over time. In doing so, it receives impulses from economics, politics, religion and these perturbate, impregnate and challenge the law and its toolkit. This is where we are at.

V. Coming Full Circle? The Corporation and Contract Governance

For lawyers, to be taking ‘on board’ economics, be that in the way that economists engage with psychology and behavioural sciences, or in the way that they continue to push our imagination to better understand the nature of ‘institutions’\(^\text{108}\) and ‘norms’\(^\text{109}\), can be fruitful and rewarding in that it reminds us of the complex enterprise that legal theoretical analysis of corporate governance should be considered. The promise lies in connecting social norms theory, new institutional economics, behavioural economics and evolutionary theory with law’s earlier engagement with sociology\(^\text{110}\) or political theory\(^\text{111}\) in order to unfold the true potential of a historically evolving interdisciplinary exploration of this area of law – and social, economic and political theory. Such ‘connecting’,

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however, cannot simply mean to build on earlier findings in the form of stacking newer
trends in ‘interdisciplinary’ studies (à la ‘law and…’) onto new ones.\textsuperscript{112} Instead, a
connection must take into account the yet unfulfilled promise of these ‘longstanding’
endeavours to deconstruct, unpack and lay bare the unquestioned assumptions and
holisms of theories such as (economic) efficiency\textsuperscript{113} or market freedom\textsuperscript{114}, or theories
about ‘the corporation’.\textsuperscript{115} Such an enterprise could potentially have a farther reach but is
likely to be complemented by a serious set of challenges arising from the diversity of
materials, questions of method and avenues of conceptualization than we are accustomed
to in the ordinarily pursued law & economics approach to corporate law.\textsuperscript{116}

The caveat which is in order here originates from the implicitly individualistic
assumptions that appear to inform some of the current interest in behavioural economics,
but that also have been underlying other law & economics approaches, for example in
lawyers’ engagement with game theory.\textsuperscript{117} Such focus on individual or collective (again
seen as divisible into separate actors) behavioural patterns suggests that there is still a
widely held belief in the possibility to trace results back to \textit{choices} – however ‘irrational’
these might be. Contrast this assumption with the lessons we are beginning to draw from
the financial crisis. The latter illustrates the shortcomings of governance and

\textsuperscript{112} I am grateful to Amar Bhatia (University of Toronto) for having emphasized this point.
\textsuperscript{113} Duncan Kennedy, \textit{Cost-Reduction as Legitimation}, 90 Yale Law Journal 1275 (1981)
\textsuperscript{114} David Campbell, \textit{Breach of contract and the efficiency of markets}, in: The Legal Foundations of Free
Markets 140 (Copp, ed., 2008); John N. Adams/Roger Brownsword, \textit{The ideologies of contract}, 7 Legal
Studies 205 (1987), 208 (questioning the postulate of a non-interventionist role of courts in market
dealings)
\textsuperscript{115} This task is similarly recognized among anthropologists: see Marina Welker/Damani J.
Partridge/Rebecca Hardin, \textit{Corporate Lives: New Perspectives on the Social Life of the Corporate Form}, 52
Current Anthropology S3 (2011), S6: “…an anthropological effort to pluralize, relativize, and contextualize
corporate forms geographically and historically should participate in an interdisciplinary analytical
framework that is actively engaged with the body of substantive empirical work on corporations carried out
in other fields.”
\textsuperscript{116} See eg Frank H. Easterbrook/Daniel R. Fischel. \textit{The Economic Structure of Corporate Law} (Cambridge,
MA/London, UK: Harvard University Press, 1991); for suggestions to widen the hitherto pursued dialogue
between economics and corporate law, see Klaus Jürgen Hopt, \textit{Comparative Company Law}, in: Oxford
Handbook of Comparative Law 1161 (Reimann/Zimmermann, eds., 2006), final section.
\textsuperscript{117} See eg Anne van Aaken, \textit{Effectuating Public International Law Through Market Mechanisms?}, 165
Journal of Institutional and Theoretical Economics 33 (2009); for a critical discussion of lawyers’ usages of
game theory, see Simon Deakin, \textit{Legal Evolution: Integrating Economic and Systemic Approaches},
(2011).
‘intervention’ theories that are oriented around linear cause-effect and responsiveness relations between ‘problem’ and ‘solution’. Indeed, if we consider the current research into the ‘origins’ and ‘causes’ of the economic and financial crisis, we find that the analytical regulatory theory toolkits of cause-effect relations as well as market-state distinctions are at odds with the indeed more ‘systemic’ grounds for the crisis. The consequences of this shift in perspective, however, are still far from clear. But, what is emerging is a sense of a need to seriously reflect conceptualize regulation on the basis of recognizing complex systemic boundaries, spheres and co-evolutionary dynamics.

Realizing, then, that there is a fundamental inability to fully ‘translate’ rationalities of one system – law, economics, politics, religion, among others – into another, would prepare one for a perhaps more adequate understanding of how regulatory approaches that aim at universalizing the rationality of one system by imposing them on others are bound to fail. This can be illustrated by taking the example of law as a social system. “Legal forms encode information about coordination strategies which have proved more or less successful in particular social settings, including the economic domains of the market and the business enterprise.” This, however, does not mean that the economic system is able to either incorporate, let alone understand, this particular approach to the framing of coordination strategies within its own reference system – nor that this would work the other way around. ‘Law & Economics’, as an engagement between both systems, is too often presented as being able to draw on ‘shared’ concerns about ‘efficiency’, ‘costs’, ‘externalities’ or, of course, ‘rights’. Surely, however, each means different things to this or that system.

121 Ronald Coase, The Problem of Social Cost, 3 The Journal of Law and Economics 1 (1960), 15: “But is has to be remembered that the immediate question faced by the courts is not what shall be done and by whom but who has the legal right to do what.”
It seems clear, then, that contract governance offers a welcome opportunity to reach out – but also to reach back. This is not novel for lawyers, who are known to be constantly labouring on models of law, which are developed in response to what has been perceived as a heightened complexity of society. While this endeavour is in fact too often understood as one that lies within the primary competence area of public lawyers, contract lawyers have continued to claim that their field cannot be understood in separation from an encompassing understanding and theorizing of social complexity. The emerging research field of contract governance promises to shed some new light on the interaction and overlap between contractual and organizational governance dynamics by exploring the governance function of contract and corporate law as parallel regulatory paradigms, tightly interwoven in the face of highly volatile markets.

It becomes clear that both contract and corporate law need to be understood as being adequately ‘open’ to allow for a taking on board of the specific contextual particularities that characterize contract governance, in particular where its function consists of dealing with complexity, as with various forms of risk. The latter is of crucial importance in the assessment of directors’ responsibilities on the one hand and the availability of defences on the other. But, in light of an evolving jurisprudence on business judgment and entire fairness, what would this mean concretely? One way to think forward would be to use the framework and concept of contract governance to reach beyond the oppositional poles that characterize principal-agent relations within the corporation. Whereas contract thinking within the corporation is too often pitted against allegedly undue state ‘intervention’, a more differentiated model of contract governance would allow us to take the analysis to the next level. For that it is necessary to return briefly to the well known tension between classical and relational contracts. Depictions of complex contractual arrangements over time as relational were rendered in order to allow for a more adequate

124 See here in particular the contributions to Terence Daintith/Gunther Teubner (ed.e.d.s.), Contract and Organisation. Legal Analysis in the Light of Economic and Social Theory, 1986.
description of the combination of contract, bargain, organization, amendment and adaptation that characterize numerous contractual business relations today. Far from depicting anything ‘cosy’ or ‘familial’ in those relations, relational contract theory was primarily and predominantly interested in developing a more adequate rendering of the existing contractual governance practice in multi-polar, time-extended, business settings.

The proximity of relational contract theory to the investigative agenda of social norms theory is easy to see. Hence comes the need for a contextualization of the assumptions and arguments that are being put forward for each of the two theories. Relational contracting exists both in private market contexts and in public-private regulatory and collaboration contexts, and it is the transformation of the surrounding regulatory landscape towards further decentralization and proceduralization, which prompts a renewed interest in exploring what is often referred to as the ‘public dimension’ of such contractual arrangements. The qualification of a contract as ‘public’ in an area of infrastructure maintenance or service delivery, which was formerly governed and carried out under the auspices of the state, is surely less contentious than a depiction of long-term contractual arrangements with built-in or associated amendment and adaptation capabilities as ‘public’. The reason for that is the difference in context and the consequences of attributing ‘public’ qualities to a contractual arrangement commonly perceived as being of a private nature. The corporation springs to mind as the definitive example – at least from the mainstream’s perspective. To qualify contractual relations inside or outside of the corporation as ‘public’ and to base such a qualification on assertions of particular dimensions of responsibility or accountability, short-circuits the attempt of unpacking the concept of relational contract within the corporation with that of reformulating the nature of the firm through a comprehensive theory of corporate social responsibility. The opposition against such a move are well known.

Does this thought experiment already spell the end for the attempt to bring relational contract thinking into the ambit of the corporation? Is this equal to the touching of the third rail? A possible solution might be found if we returned to the initial impetus that led us to undertake a parallel study of contract governance and corporate governance. A driving idea at the basis of this project is the concern with the conceptual shortcomings of the dominant ‘theories of the firm’. Referenced as either shareholder or stakeholder theories respectively, we here regularly find the construction of two diametrically opposed explanatory frameworks, none of which sufficiently sophisticated to provide a satisfying answer to most of the conflicts arising at the inside and the outside of a corporation. On the one hand, we find an under-theorized concept of contract governance, a concept that basically operates with the most rudimentary assertion of contractual bargaining. On the other, we find assertions of an organization, holistic in nature, but implausibly overburdened with just about any social, political or public concern one would wish to place on the shoulders of the next best ‘powerful company’.

The lesson to be learned from relational contracting is in fact within reach. Rather than merely pitting long-term contracting and adaptation arrangements against one-off exchange contracts, the here implied reference to relational contracting is being made from a methodological perspective. This means that relational contracting is to be understood as a governance framework (surely enough, with numerous loopholes and reasons for contestation129) for complex interactional arrangements is that it, perhaps better than canonical corporate law doctrine, allows us to better and more adequately incorporate contextual evidence into our governance of the contracts at issue. Again, the example of fiduciary duties might illustrate this. Where we (used to) force reified conceptions of the ‘purpose’ of the corporation into the demarcations of a duty of loyalty, the only viable response is a choice between ‘regulation’ or deference to business judgment. Where, however, we instead stress the idea of the corporation as a web of interlocking and overlapping contracts beyond the basic assertion of a ‘nexus of

contracts’, it becomes possible to perceive of the now more fully visible contractual arrangements all throughout and beyond the corporation as representations of a highly differentiated governance network. The difference between this conception and the otherwise dominant, if still slightly incoherent, model of the contractual corporation130 is that the contractual network concept forces us to more adequately consider the context in which the contractual arrangement is situated. This context is characterized by a deep and fundamental transformation of public accountability and sovereign stature as regards the creation, delivery and maintenance of services which are widely perceived as pertaining to the common good, in other words the large-scale transformation, if not the erosion of the (Western) welfare state.131 This has important consequences for our engagement with the corporation as a target and site of regulatory governance. As it becomes increasingly difficult to off-set the allegedly private nature of the corporation against the ‘public’ nature of regulation and intervention, the opposition of different interests within the corporation cannot even remotely be governed by implied understandings of allegedly public or private dimensions of the contracts different parties have entered into inside and outside of the corporation. Instead, a different set of categorizations must ensue which has to guide the interpretation of contractual rights. While there is not sufficient space here to elaborate this more fully132, the broader scope of such categories can already be sketched. The crucial element in the here suggested re-contractualization of the corporation lies in the new understanding of the contractual relations between different ‘stakeholders’ in and around the corporation. From the here proposed perspective, contracts cannot simply be understood ‘as such’, that is as instantiations of rights and duties creating relations between different ‘stakeholders’. Instead, what is suggested here is to move away from an individualistic perception of the ‘endpoints’ of the contractual relations, as it were, to a more systematic understanding. Whereas now, the endpoints of all contracts within the corporation are seen as being identifiable with particular positions, carriers of ‘interests’ and different degrees of ‘power’, an alternative

understanding would insist on expanding the scope of this ‘identification’ so that the context out of which bargaining positions are being assumed, defended and mobilized can be considered. This would lead to a particular enrichment in our understanding of the different contracting parties, an enrichment which would go significantly beyond diametrical opposition between ‘owners’ and ‘managers’, but also beyond that between investors and employees. If the identification of a contract’s endpoint allowed for an illumination of the larger context and framework, within which someone entered into and assumed a particular contracting position, it would become possible to take the contract’s and with that the corporation’s context and environment into consideration and to incorporate it in view of identifying who is at the respective ends of contractual relations within the corporation.

One could argue that this might simply result in a similar overburdening of contractual relations, which already characterized the theoretical policy proposals put forward by first and second generation consumer protection law scholars. The difference between both approaches, however, is already the different ‘moment in time’. Today’s attempts to develop a protective framework of consumer rights can, on the one hand, build on a far more acknowledged policy framework supporting its underlying cause, but at the same time consumer law advocates have to operate in a far more decentralized and volatile institutional and normative environment. This constellation suggests some structural similarity between the conditions of private contracting in the area of consumer goods as well as (formerly public) services and provisions on a global scale, on the one hand, and intra-corporate contracting on the other. The ‘interests’ represented by those at the endpoints of the respective contracts are different ones today than what they used to be. With a fundamental shift in the public and private provision of basic needs security, social insurance and old age security guarantees, the association of contracts with the

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‘market’ or the ‘state’ in order to delineate scope and extension of rights and responsibilities is no longer an option. Seeing relations within the corporation through a contractual lens allows for a better appreciation of the context out of which a contract arose.

The here implied empowerment, however, is not only associated with traditionally ‘weak’ parties in the corporate governance regime, such as employees, ‘creditors’, the ‘environment’, and ‘society at large’. Instead, this empowerment is felt at all endpoints of the contractual network structure. Directors, likewise, would hereby be given a far greater opportunity to have their position within the firm recognized and scrutinized, well beyond the routine assertions of a director discharging his/her duty of loyalty. The other reason why a comparison with earlier forms of consumer law is not appropriate has to be seen in the significantly altered regulatory landscape. Whereas before the law around consumer contracts had to keep an eye on both national and (some) international legislation as well as case law, today’s consumer law is an extremely fluid, mixed body of norms, some of which emerged from traditional, state-based sources, while many regulations today do not stem from traditional law makers anymore. Instead they both emerge from and contribute to the evolution of a volatile, transnational regulatory regime. The same can be said for corporate law, which has long become a fundamentally transnational regulatory field, the hybrid nature of actors, norms and processes of which makes corporate law a certain area for legal-sociological and legal-pluralist analysis.

So, while politics clearly matter in the continuously unfolding research agenda around contract and corporate governance, the term ‘politics’ on its own does hardly contribute to a further refinement of the fields as pertinent governance fields. What is ‘political’ about contract governance, just as it is about corporate governance or, to take another example, about the regulation of labour markets, is anything but a identifiable selection of different ‘interests’ or, even, stakeholders. The here present fallacy of methodological individualism turns out to trigger highly undesirable consequences, as it falls dramatically

short of capturing the complexity that ties contracts, corporations and, say, labour markets ‘together’. What is needed, then, to study this complex landscape, is a methodology, which appreciates the fundamental differences in systems’ description and construction of the world in order to imagine a non-unifying, pluralist approach to making sense of governance, regulation and of the “and” in law and economics.

It follows that an enhanced interdisciplinary study of the non-contractual ‘foundations’ of contracting cannot stop at the sociological analysis of how and between whom promises are made and how they are implemented, enforced and institutionalised. Instead, as we have seen, it is of great relevance to take into account the individual and collective disposition of market actors but also the larger patterns and mechanisms of information transmission, such as those that underlie herding behaviour. The cautionary tale here, particularly for the legal and economic scholars who have recently begun to embrace ‘social norms’ and institutional economics as the foundation of a social theory of regulation, however, is that to focus on just this side of market behaviour might too easily provide a platform for a one-sided, that is de-contextual focus on “what people do”. One risk with such a disembedded behavioural analysis from the larger societal context in which human behaviour occurs, is that we cut the ties between longstanding sociological research into societal change and our present interest in contracts as prime modes of governance. Another one is that we risk severely underestimating the nature of the norms we are referring to under the umbrella of ‘social norms’. Building on legal sociology and legal pluralism on the one hand and on new institutional economics on the other, will go some way towards a more differentiated understanding of norms in the evolving complex regulatory landscape that characterizes the interaction of public, private, state-originating and non-state, informal norms today. But even that approach would have to take much more seriously different alternative types and shapes of norms, be these cultural, symbolic or in other ways non-legal. In other words, a more suitable methodological approach would attempt to see beyond and in between individual ‘motivations’, ‘beliefs’ or ‘rationales’ that drive people’s behaviour in order to overcome the focus either on market versus non-market spheres or the breaking up of a complex environment into different ‘interests’.
If, to reiterate the ‘context’ in which our current investigations are embedded, complexity is one, if not the crucial, determinative challenge facing any attempt at a regulatory response to the crisis, then it is important the core trait of complexity be acknowledged – namely that it cannot be broken down into or explained entirely through its constituent parts. Rather than trying to devise a meta-code oriented around a particular central or dominating goal or value, regulation will have to take into account the need to devise a process that appreciates the different functional rationalities at work within a particular regulatory ‘problem’. Such an approach would include a fundamental shift from normative to cognitive expectations in the structure – and the understanding – of regulatory processes. While this proposal was made with particular reference to the challenges facing legal theory in the context of a fragmented global legal order, it forcefully applies to the currently faced conundrum of ‘financial regulation’ as much as it does to the fields of contract governance and corporate governance. The latter areas constitute formidable examples of complex regulatory arenas in that they each defy categorizations along traditional forms of political versus non-political, state versus non-state, public versus private regulation. Both areas are both at the same time – and more. They are neither national nor international, neither formal nor informal. Our distinctions can only go so far in illuminating the component structure of financial regulation or contract governance. What the exhaustion of said distinctions illustrates, however, is the inadequacy to try to associate these governance processes with structures of either ‘regulation’ or ‘self-regulation’. This association would only make sense if the boundaries between both demarcated self-standing structures of norm generation and implementation. That, however, is not the case, where we base our distinction in the end on the appreciation of a particular level of deference or ‘autonomy’. In the case of

‘regulation’, this ordinarily depicts the state as having the choice to intervene or not to ‘intervene’. By contrast, ‘self-regulation’ depicts actors – individual or institutional – as exercising norm-generating authority on an autonomous basis, in other words one that is free from regulation as intervention. The fragmentary nature of this depiction has long been pointed to141, but beyond the clarification of the rights basis of the exercise of authority, there is the problem of over-individualizing who in fact is regulating or self-regulating. The current attempts to push regulatory theory towards a framework that can incorporate systemic linkages142 underline the importance to move beyond ‘interests’, ‘stakeholders’143 and towards a more differentiated system of ‘affectedness’144 as one of the keys to think about regulation and governance.

Surely, the correlation between an interest in ‘affectedness’ among constitutionalists and democracy theorists cannot render us blind to the ‘use of knowledge in society’, as forcefully demarcated by Hayek and elaborated by scholars, who emphasize the relevance of choosing the adequate locus or level of (self-)regulation.145 This connection between grass-roots perspectives on political legitimacy and the economists’ interest in identifying the ‘best’ level of rule generation is important, as it allows a more encompassing appreciation of the regulatory challenges arising in a landscape which displays increasingly prominent elements of deterritorialized, decentralized and non-

141 Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Political Science Quarterly 470 (1923); Morris R. Cohen, Property and Sovereignty, 13 Cornell Law Quarterly 8 (1927)
142 Again: Marc Amstutz, Eroding Boundaries: On Financial Crisis and an Evolutionary Concept of Regulatory Reform, in: The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation 223 (Kjaer/Teubner/Febbrajo, eds., 2011)
144 See the important work by Roger Cotterrell, Spectres of Transnationalism: Changing Terrains of Sociology of Law, 36 Journal of Law and Society 481 (2009), and David Held, Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective, 39 Government and Opposition 364 (2004); the theme of ‘affectedness’ is certainly a key notion in constitutionalism studies, see eg James Tully. Strange Multiplicity. Constitutionalism in an Age of Diversity (Cambridge: Cambridge University Press, 1995).
145 Friedrich Hayek, The Use of Knowledge in Society, 35 American Economic Review 519 (1945), 524: “…decisions must be left to the people who are familiar with those circumstances, who know directly of the relevant changes and of the resources immediately available to them.”; see, of course, Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 Journal of Political Economy 416 (1956), and for an application of such thinking in legal rule making: Erin A. O’Hara/Larry E. Ribstein. The Law Market (Oxford, UK: Oxford University Press, 2009).
traditional forms of legislation.\textsuperscript{146} Because an economic assessment of the merits of decentralization as well as, say, regulatory competition over harmonization\textsuperscript{147}, cannot drill deeply enough into issues of representation and legitimacy, it is crucial to take non-economic considerations into view, which approach the issue through the lens of pluralism and norm theory.\textsuperscript{148} Contracts can well be seen as having been crucial instruments and \textit{fora} of societal governance for a long time. But, that has never meant, nor should it today, that they can be studied in isolation from the context in which they perform regulatory functions. Parties don’t just simply enter into agreements outside or ‘in the shadow of the law’, because they deem it efficient. The ‘turn to contract’ occurs in the context of a richly structured field of public and private, intersecting modes of governance. To celebrate either contract or social norms as the (late) expressions of economic liberalism, will give little guidance to the questions we face today. Economic governance must correctly be understood as a call to arms – but not \textit{against} the alleged interventionist fervour of zealous governments or activist judges, but rather for the building of a comprehensive, interdisciplinary theory of (market) governance today.

So, what lessons are we able to draw at this point? The ‘awesome social invention’\textsuperscript{149} of the large publicly held corporation continues to be a focal point of intensive analysis. The recognition that the study of the corporation necessitates a reflection on the methods and theories with which we approach this undertaking would be an important prerequisite for an enhanced understanding the nature of the corporation.


