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Introduction: Private Ordering in a Globalizing World: Still Searching for the Basics of Contract

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Introduction
Private Ordering in a Globalizing World: Still Searching for the Basis of Contract†

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THE UBIQUITOUS RETURN TO CONTRACT

Contractual governance ranks high on the agenda of contemporary law and policy debate. Contracts as concepts[1], tools[2] or frameworks[3] of societal ordering and self-regulation occupy a central place in fields ranging from individual business agreements to complex, cross-border commercial relations, from standard form contract arrangements to hybrid contractual regimes in public service delivery. Contract is dead,[4] long live contract![5] The debates over the rise and fall and rise of free-

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1. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762) (G.D.H. Cole trans.), available at: http://www.constitution.org/jjr/socon.htm (last visited August 14, 2007).

2. Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV 155 (2000).

3. Roy Kreitner, *Frameworks of Cooperation: Competing, Conflicting, and Joined Interests in Contract and its Surroundings*, 6 THEORETICAL INQUIRIES L. 59 (2005).

4. GRANT GILMORE, THE DEATH OF CONTRACT (1974).

5. Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369 (2004).

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dom of contract are legendary[6] and endless,[7] and symposia abound.[8] There are many reasons for the attention presently given to contractual governance. They are so plentiful, in fact, that it is hard to imagine how to incorporate them into first-year teaching materials in such a way that students are at least alerted to the wide-ranging assessments and contestations that surround contractual agreements and contract law. Yet, given the centrality of contractual bargaining in the dominant areas of legal practice, it seems desirable already to introduce first-year law students not only to historical and more contemporary struggles over "freedom of contract" – mostly circling around notions of duress, unconscionability, bargaining power and consumer protection – but also to the most recent phenomena of the "turn to contract," be it in private,[9] public,[10] or even international law.[11] These current debates deserve particular attention in light of the larger trends they are mirroring. Far from being mere ivory-tower incantations of allegedly internal questions limited to doctrines and rules of contract law, the unceasing discussions over the scope and limits, advantages and disadvantages of contract, contract law and contract adjudication are reflective of deeper changes in our understanding of legal regulation. Whether it is the current attack on contract adjudication in the United States[12] and on consumer protection laws in Germany[13] and Europe,[14] or the plea for a largely

6. P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

7. THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999).

8. *See, e.g., id.* (collection of essays presented at colloquia held in 1996 and 1997, sponsored by the George Mason University Law and Economics Center and the Donner Foundation); IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS (David Campbell, et al. eds., 2003) (collection of contributions to the 2001 Conference on "Implicit Contracts" at the London School of Economics and Political Science); Symposium, "Freedom *From* Contract," 2004 WIS. L. REV. 261 et seq. (2004); Symposium, "'Boilerplate': Foundations of Market Contracts," 104 MICH. L. REV. 821 et seq. (2006).

9. *See* Scott, *supra* note 5.

10. *See* Freeman, *supra* note 2.

11. *See* ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006).

12. *See, e.g.,* ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814 (2006).

13. Michael Martinek, Vertragstheorie und Bürgerliches Gesetzbuch, Lecture at Keio-University, Tokyo (Dec. 17-19, 2005), available at: http://www.jura.uni-sb.de/projekte/Bibliothek2/text.php?id=375; Claus-Wilhelm Canaris, *Wandlungen des Schuldvertragsrechts - Tendenzen zu seiner "Materialisierung"*, ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 273 (Wolfgang Grunsky, et al. eds., 2000).

14. For a guide to the debate, see Gralf-Peter Calliess, *The Limits of Eclecticism in Consumer Law: National Struggles and the Hope for a Coherent European Contract Law: A Comment on the*

uninhibited regime of contractual self-regulation for transition economies,[15] the signs clearly point to a turning away from welfarist intervention into contractual arrangements.[16]

The complexity of the economic, political, cultural and geographic environment in which these changes of the regulatory landscape are occurring is only insufficiently captured through allusions to "globalization." We are today already benefiting from a host of instructive and insightful assessments of the changes, which are reshaping the relations between state and society, leading to a redefinition of traditional concepts of actors and norms, and of the meaning and concept of "government" and democratic rule.[17] While historical contract law studies regularly concerned themselves with the context in which rules and principles were emerging – in other words, the political economy of governance by contract[18] – the view prevailing in today's assaults on welfarist contract law adjudication seems to be much more matter-of-fact, more concerned with the desired efficiency of contracting arrangements[19] than with issues of distributive justice tied to such exchanges.[20] In this light, contract lawyers are challenged to reassess the field, to assert what the law of contract is, or should be, addressing. The manifold appear-

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ECJ's and the FCJ's "Heininger"- Decisions, 3 GERMAN L. J. (2002), available at http://www.germanlawjournal.com/past_issues.php?id=175.

15. Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 THE WORLD BANK RESEARCH OBSERVER 1, 3 (1998).

16. For an overview, see Thomas Wilhelmsson, *Welfare State Expectations, Privatisation and Private Law*, in FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS 3 (Thomas Wilhelmsson & Samuli Hurri eds., 1999).

17. *See, e.g*, JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION (2001); GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007).

18. See, in that regard, the debate between Horwitz, Atiyah and Simpson: Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974); ATIYAH, *supra* note 6; A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

19. *See* Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537 (1981); *see also* critiques by Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 493-95, 505 (1985); David Campbell, *Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones*, 14 IND. J. GLOBAL LEGAL STUD. 279, 288-89 (2007) ("Arguably, the main misuse of the concept of contract in economic contracts is the implication that these contracts create incentives for efficiency by normally imposing financial parameters that are binding, which plays on the connotations of sanctity in private contract.").

20. See the excellent analysis by Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1 (2006).

ances of contractual governance in today's commercial relations, public service delivery and international relations invite a critical perspective on the regulatory nature of these arrangements and of the role that (contract) law can play in this context, if any.

LAW AND THE POLITICAL ECONOMY OF PRIVATE ORDERING

The papers collected in this issue of the *Indiana Journal of Global Legal Studies* were first presented at an international conference, held in November 2006 in Toronto under the auspices of the interdisciplinary CLPE Comparative Research in Law & Political Economy Network of Osgoode Hall Law School. True to the Network's interdisciplinary program, bringing together scholars from law, economics, sociology, history and political science, the conference explored the current trends in public and private contractual governance. The conference's theme itself, "Governing Contracts," invited an exploration of the dual perspective that informs contemporary reflections on contractual governance. While "governance *through* contract" appears to be emerging as the dominant scheme of legal regulation "after the welfare state,"[21] both public and private, its alter ego, "governance *of* contract," in contrast, seems to be relegated to another epoch by current proponents of a new, "liberated" freedom of contract. With an emphasis on autonomy and freedom from state intervention, contracting parties are believed to be better able to operate through self-chosen rules than by being subjected to standards that are not of their making and that reside in the discretion of the presiding judge.[22] As a result, whether it be in the context of domestic economic exchanges or within the ambiguous sphere of "state-making,"[23] the current view on governance through contract disconnects the ideology of individual autonomy and self-governance from the political economy of state transformation, driven by politics of austerity and the shifting of public to private responsibility.[24] This leads to an ef-

21. Peer Zumbansen, *Law After the Welfare State, or, The Ironic Turn of Reflexive Law*, (unpublished manuscript, on file with author).

22. *See* Posner, *supra* note 15.

23. See the insightful discussion by Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL 253 (David M. Trubek & Alvaro Santos eds., 2006).

24. For an excellent, if depressing, assessment, see RICHARD SENNETT, THE CULTURE OF THE NEW CAPITALISM (2006). *See also* Günter Frankenberg, *Udo Di Fabio's Die Kultur der Freiheit and Richard Sennett's The Culture of the New Capitalism*, 7 GERMAN L. J. 721 (2006) (book review); Campbell, *supra* note 19, at 286-87 ("But it is now, in my opinion, so obvious as no longer to need arguing, that the state has not retreated at all. The *form* of state intervention has been changed, with the concept of

fective insulation of any future assessment of "regulating contracts" from questions regarding where contracts should fit within the larger regulatory framework of public and private regulation.[25] Such questions appear to be removed from a legal discourse proper[26] and, instead, delegated to political science or philosophy. Within this context of an increasing *de-legalization* and *technicization* of contract on the one hand, and the proliferation of contractual governance in almost all sectors of societal life on the other, the following papers explore various contexts and frameworks of "governing contracts," ranging from the contestable contractualization of public service delivery,[27] to a re-conceptualization of contractual governance in its relation to and tension with democratic self-rule,[28] to an exploration of modes and ways of generating, translating and realizing societal knowledge in the context of an increasingly knowledge-dependent state.[29] It is this last aspect in particular that suggests we take a closer look at the ubiquitous references to a "re-treating" state.[30] Recent studies of changing welfare-state regimes suggest, indeed, not a reduction of state activity, but a dramatic transformation of the modes in which governmental action is structured, altogether leading to a substantial ex-

'contract' being at the heart of the change. The 'new public management' seeks to marshall an economic efficiency; it identifies with the conduct of private sector business to public purposes by basing public sector activity on 'contracts.' The retreat of the state actually has been a process of the maintenance or even the expansion of the public sector. This expansion has taken place under the guise of 'contract,' so that now the larger part of public expenditure is described as being 'quasi-contractual' or 'hybrid.' Obfuscation about the size, extent, and nature of public intervention is at the heart of the 'third way' followed by contemporary government.") (footnote omitted).

25. Kerry Rittich's work is particularly clairvoyant here. *See* Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199 (2004); Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853 (2005).

26. For a masterful depiction of the interpenetration of contract law and political governance, see Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); *see also* the discussion of Cohen and Hale in the regulatory landscape of the early 21st century in Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007).

27. Peter Vincent-Jones, *The New Public Contracting: Public versus Private Ordering?*, 14 IND. J. GLOBAL LEGAL STUD. 259 (2007).

28. Alfred C. Aman, Jr., *Bureaucracy, Contracts and Democracy in Administrative Law: Outsourcing Prison Health Care in New York City*, 14 IND. J. GLOBAL LEGAL STUD. 301 (2007).

29. Karl-Heinz Ladeur, *The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making*, 14 IND. J. GLOBAL LEGAL STUD. 329 (2007); *see also* KARL-HEINZ LADEUR, DER STAAT GEGEN DIE GESELLSCHAFT (2006).

30. SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (1996).

pansion of state action.[31] Revisiting and revitalizing the analysis of relational contracting (as contrasted to "classical," "discrete"[32] contracting[33]), some authors in this issue[34] argue that the ideological landscape has changed since relational contract emerged as a powerful counter to the then already neo-liberal conception of contract. They identify the challenge of contemporary contractual governance to lie in a better understanding of the structural conditions of a transformed welfare state, conditions that shape the freedom of each and every contract in its roots. Without such a clearer view, the manifold expressions of "client" and "consumer driven" services, etc., are too easily aligned with likewise optimistic descriptions of emerging new forms of decentralized governance,[35] which are in danger of making invisible the particular politically, culturally, economically and historically shaped interests at stake.[36]

Assessments of the "social models"[37] of contract regimes and regulatory frameworks for contracts oriented around the political economy and legislative histories of particular nation-states[38] are poignantly positioned alongside conceptions of an emerging new law of contract in a dramatically de-territorialized sphere of economic interaction.[39] The latter builds partly on historical narratives

31. PETER VINCENT-JONES, THE NEW PUBLIC CONTRACTING: REGULATION, RESPONSIVENESS, RELATIONALITY (2006); *see also* Campbell, *supra* note 19, at 286-94 (arguing that the contractualization of state activity ought to be seen not as a coherent shift in the mode of public governance – as so described by Vincent-Jones – but rather as an expression of a problematic expansion of state activity).

32. *See* John P. Esser, *Institutionalizing Industry: The Changing Forms for Contract*, L. & SOC. INQUIRY 593 (1996).

33. *See* David Campbell, *The Relational Constitution of Contract and the Limits of "Economics": Kenneth Arrow on the Social Background of Markets*, *in* CONTRACTS, CO-OPERATION, AND COMPETITION: STUDIES IN ECONOMICS, MANAGEMENT, AND LAW 307 (Simon Deakin & Jonathan Michie eds., 1997); David Campbell, *Ian Macneil and the Relational Theory of Contract*, *in* THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL 3 (David Campbell ed., 2001).

34. Campbell, *supra* note 19; Zumbansen, *supra* note 26.

35. Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, European Governance Papers, No. C-07-02 (2007), available at http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf.

36. Campbell, *supra* note 19; *see also* Simon Deakin, *Reflexive Governance and European Company Law*, CLPE RESEARCH PAPER SERIES 2007, available at: www.comparativeresearch.net.

37. Andreas Maurer, *Consumer Protection and Social Models of Continental and Anglo-American Contract Law and the Transnational Outlook*, 14 IND. J. GLOBAL LEGAL STUD. 353 (2007).

38. Luke Nottage, *Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice*, 14 IND. J. GLOBAL LEGAL STUD. 385 (2007).

39. Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007); Gralf-Peter Calliess, *The Making of Transnational Contract Law*, 14 IND. J. GLOBAL LEGAL

of medieval forms of commercial (self-) regulation,[40] and offers an intriguing view on current trends of de-legalization of contract law.[41] This work contributes to the presently pursued explorations of a law "outside,"[42] "without,"[43] or "beyond"[44] the state. It is of particular interest in the current debate over law *beyond* the state that we are witnessing an important merging of perspectives, literatures and viewpoints from both public and private law, domestic and international. Such an intradisciplinary discussion, which is otherwise rare among contract and international legal scholars, lies at the heart of the following papers. Whether there can be a law beyond the state raises fundamental questions that seem to be formulated (and answered) from within a legal paradigm that presupposes the existence of law.[45] In contrast, a legal pluralist approach[46] would maintain a fundamental skepticism towards the legalization of social relations in order to better trace the structures and dynamics of "emerging legal certainty."[47] While the former approach appears to hold on to and to struggle with the relevance and "experience with the state,"[48] the latter seeks to unfold the "political" at a certain

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STUD. 469 (2007); Gralf-Peter Calliess & Peer Zumbansen, Rough Consensus and Running Code: A Theory of Transnational Private Law (unpublished book manuscript, on file with author).

40. *See* Charles Kerr, *The Origin and Development of the Law Merchant*, 15 VA. L. REV. 350 (1929).

41. *See* Michaels, *supra* note 39, at 462 (discussion of Bernstein).

42. Among the most radical proposals to rethink the state-focused orientation of the global order is certainly PHILIP C. JESSUP, TRANSNATIONAL LAW (1956); more recent elaborations of post-national or global constitutionalism include HABERMAS, *supra* note 17; Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] (2003); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004). For an intermediate position, see Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 240 (2006).

43. See the contributions in the seminal collection GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

44. For a recent, differentiated positioning of law creation between state and non-state perspectives, see Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006), in particular at 888-889.

45. Michaels, *supra* note 39, at 465.

46. *See, e.g.*, Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV 719 (1973); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988); HARRY W. ARTHURS, "WITHOUT THE LAW": ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND (1985).

47. *See* EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW (Volkmar Gessner & Ali Cem Budak eds., 1998).

48. *See* Michaels & Jansen, *supra* note 44, at 888: "Our experience with the state makes a simple return to a pre-state situation implausible, but in turn our experience with a pre-state situation may

distance from the state, thereby laying a particular emphasis on the emancipatory nature of law,[49] crystallizing in the struggle over "rights."[50] The centrality of notions of private ordering in current deliberations over post-welfarist law, in which contractual governance plays the lead role, needs to be assessed against the background just described. Private ordering is not a natural occurrence,[51] but unfolds within a complexly structured regulatory and political framework.[52]

PERSPECTIVES

What follows from these brief introductory remarks is the insight that when discussing the public and private dimensions of contract law, and their intersections in a world of government delegation to societal actors, of cross-border contracts, and of emerging transnational governance regimes, any observer is standing on the shoulders of giants. We can see into the vast land, but we must also do our best to ascertain our own, emerging perspectives. As is becoming clear, a differentiation merely between public and private dimensions of contractual arrange-

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save private law against a possible decline of the state." This is the central thesis of PEER ZUMBANSEN, ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT. LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG (2000) [REGULATORY PATTERNS OF THE MODERN WELFARE STATE. LEARNING EXPERIENCES BETWEEN STATE, SOCIETY AND CONTRACT]; for a summary of the argument, see Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements*, *in* THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW 135 (Eyal Benvenisti & Georg Nolte eds., 2003).

49. *See* Marc Amstutz, Andreas Abegg & Vaios Karavas, *Civil Society Constitutionalism: The Power of Contract Law*, 14 IND. J. GLOBAL LEGAL STUD. 235, 236 (2007): "Contract law today has the further task of providing for the areas of social autonomy from which 'civil society' is built up . . . ."

50. For a kaleidoscopic view of the 20th century debates in the United States in this regard, see Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002), and Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

51. *See* Granovetter, *supra* note 19, at 505: "[...] the main thrust of the 'new institutional economists' is to deflect the analysis of institutions from sociological, historical, and legal argumentation and show instead that they arise as the efficient solution to economic problems."

52. *See* David V. Snyder, *Molecular Federalism and the Structures of Private Lawmaking*, 14 IND. J. GLOBAL LEGAL STUD. 419 (2007); Campbell, *supra* note 19, at 280-81: "Even the simplest contract is not a relationship between two parties, but is their relationship mediated through a third party, the state, which gives effect only to socially understood and politically endorsed intentions. The free market expressive of the choices of individuals is, at its heart, a social institution." See also the very insightful observations by Jan M. Smits, *Legal Culture as Mental Software, Or: How to Overcome National Legal Culture?*, MAASTRICHT WORKING PAPERS, FACULTY OF LAW 2007-2 (2007), available at http://www.unimaas.nl.

ments is likely to be inadequate to capture the structural and normative complexity of contemporary forms of contractual governance. This explains the continued interest in alternative concepts of contract, including mixed, hybrid and network contracts.[53] This present interest expresses the commitment of scholars around the world to question the boundaries between an allegedly internal and external view on contract. Contract scholarship has, in stark contrast to the astounding simplifications we find in contemporary pleas for a reformalization of contract governance, long been tracing the implications and effects of governance *by* and *of* contract within a regulatory economy.[54] The distinction between public and private dimensions of contract was hardly ever convincing, if – at best – it was invoked to illustrate the intertwining of different, yet interrelated, aspects of societal ordering.[55] The following papers, in different ways, testify to the thesis that contractual governance remains embedded in particular socio-economic, historical and cultural contexts. The nature of this embeddedness, however, is itself highly contested,[56] and contemporary developments in contract, corporate,[57] ad-

53. *See* IMPLICIT DIMENSIONS OF CONTRACT, *supra* note 8.

54. Rudolf Wiethölter, *Die Position des Wirtschaftsrechts im sozialen Rechtsstaat*, in WIRTSCHAFTSORDNUNG UND RECHTSORDNUNG, FESTSCHRIFT ZUM 70. GEBURTSTAG VON FRANZ BÖHM 41 (Helmut Coing, et al. eds., 1965); Christian Joerges, *The Science of Private Law and the Nation-State*, in THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION 47 (Francis Snyder ed., 2000).

55. For a brilliant exposition of the thesis of a co-originality of public and private autonomy, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 82 et seq. (William Rehg trans.) (1996).

56. *See* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944); for criticism thereof and of the functionalist approach adopted by New Institutional Economics scholars, see Granovetter, *supra* note 19; *see also* Jens Beckert, *The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology*, MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG/MAX-PLANCK-INSTITUTE FOR THE STUDY OF SOCIETIES, MPIfG DISCUSSION PAPER 07/1 (2007), available at http://www.mpi-fg-koeln.mpg.de.

57. *See, e.g.*, Gérard Hertig & Joseph A. McCahery, *Optional rather than Mandatory EU Company Law: Framework and Specific Proposals*, 3 EUR. COMPANY & FIN. L. REV. 341 (2006); John Armour, *Who Should Make Corporate Law? EC Legislation versus Regulatory Competition*, 58 CURRENT LEGAL PROBS. 369 (2005); Peer Zumbansen, *European Corporate Law and National Divergences: The Case of Takeover Regulation*, 3 WASH. U. GLOBAL STUD. L. REV. 867 (2004).

ministrative[58] and international law scholarship,[59] to name but a few areas, mirror the breadth of analytical approaches to studying the changing structures of norm creation and norm enforcement. If globalization is argued to have led to a dramatic denationalization of regulatory fields and functions,[60] this still begs the question how a territorial or substantive understanding of globalization impacts our study of the changing forms of government and the much-discussed shift to governance.[61] Present and future assessments of contractual governance will likely seek further opportunities to develop this dialogue across disciplinary and doctrinal boundaries.

58. *See* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); *see also* B.S. Chimni, *Cooption and Resistance: Two Faces of Global Administrative Law*, INTERNATIONAL LAW AND JUSTICE WORKING PAPERS, WORKING PAPER 2005/16 (2005), available at http://www.iilj.org/papers/documents/2005.16Chimni.pdf.

59. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); *but see* Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113 (2005); Martti Koskenniemi, *International Law: Constitutionalism, Managerialism and the Ethos of Legal Education*, 1 EUR. J. LEG. STUD. 1 (2007).

60. *See* Saskia Sassen, *Globalization or denationalization?*, 10 REV. INT'L POL. ECON. 1 (2003).

61. *See, e.g.*, Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).