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Conflicting Sovereignties in the World Wide Web of Contracts - Property Rights and the Globalization of the Power System

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Conflicting Sovereignties in the
World Wide Web of Contracts

Property Rights and the Globalization of the Power System

JEAN-PHILIPPE ROBÉ

I.

In the Wesphalian construction of the world, jurisdiction over the Earth is divided among States sharing one distinguishing characteristic: sovereignty. States’ constitutions define how their domestic political systems operate. Constitutions also usually specify fundamental rights preserving a sphere of autonomy for individuals outside of the reach of public institutions. This translates into summa divisiones within official legal systems between public/ private, power/property, objective competence/subjective rights and norm/ contract. This is the classical, top-down, view of the structuring of the world power system.

In this article, I will analyze the world power system from the bottom up. I will view the global economy as a world wide web of contracts connecting property rights holders.

Some of the contracts in this world wide web are pure sale and purchase contracts: a product is sold and purchased instantaneously for a price. Buyer and seller accept no obligation with respect to their future conduct. A property right is exchanged against a price; but there is no relationship. We have a pure market transaction. These contracts are numerous – probably the most numerous ones. But the pure market transaction is just one extreme of the spectrum of economic exchange.

There are many other types of contracts in the economy. Actually, the most interesting contracts serving as a conduit for economic exchange are probably those having duration. They connect contracting parties through time in connection with property rights. A lease connects a landlord and a tenant trough time; a distribution contract connects a manufacturer and a distributor through time. At the time of execution of the contract, the rent and the commission of the distributor are set taking into account what “market prices” exist then. Subsequently though, for the duration of the contract, they evolve in accordance with contractual and/or regulatory
rules – not market prices set outside of the contractual relationship or the regulatory environment in which they take place. Rents, salaries, and many other forms of remuneration of the use of assets through time, are all subject to contractual and, often, regulatory rules constraining their evolution.

Further, whereas the pure market transaction is one extreme of economic exchange in the world wide web of contracts, at the other extreme, there are clusters of contracts having duration serving as the legal conduits of continuous economic exchanges among numerous parties. Some of these clusters are “households”. Others are “firms”, the significant ones in terms of size being gathered around corporations.

**Households.** Each reader of this article, as a rights and liabilities bearing individual, is both (a) the holder of property rights and (b) the center of a nexus of contracts connecting her to other property rights holders to satisfy many of her needs (hopefully not all of them). In the morning, she wakes up in an apartment or house she either owns or leases, i.e. she either has a property right over an apartment (say) or has a contract with a landlord – who owns the property right over the apartment – allowing her to use it against a rent. To make her life more comfortable, she has contracts with utilities companies supplying her with water, gas, electricity, phone services, and so forth. These contracts allow her to have her morning shower, preferably hot. Then she goes on having breakfast, eating the object of her property right over her morning croissant. If she is among those of us cursed with the need to work to make a living, then she goes to work. She takes her bicycle or car or scooter (she either owns or rents from the owner). And at work, she delivers the services she has been hired for under an employment contract; in exchange for which she gets a paycheck allowing her to pay for (hopefully) all of the above. In some cases, she makes a surplus which she can save. She (maybe with a partner and children) is a “household” entangled in a nexus of contracts with other property rights holders.

We are all in the same position as individuals. Of course, the sets of property rights and nexuses of contracts around us are all different. But we are all integrated in the economic system in this fashion. And all of our contracting parties are themselves at the center of nexuses of contracts and we are all somewhat connected to each other via the world wide web of contracts.

Individuals have always been connected to other individuals located in the known world of their time in this way: when coffee was introduced in Europe in the sixteenth century, coffee drinkers were contractually connected to the coffee shop owners who were contractually connected to the coffee roasters who were contractually connected to the coffee importers who were contractually connected to the coffee exporters who were contractually connected to the coffee growers. And so on. Globalization in this perspective appears like being just more of the same thing. What is new is that now (almost) everyone is connected to (almost) everyone in respect of
(almost) every decision of allocation of the household’s resources. Each household is closely contractually connected to the world economy – via the *world wide web of contracts*. As a consequence, each decision relating to the allocation of the resources of the household affects countless interests located in many corners of the world. Robert Reich has made a powerful case that in the present economy, the power of the individuals (the households) has been aggregated at both ends of the allocation of their resources: purchases and savings.\(^1\) Purchases are made from retailers using the aggregated bargaining power of households to get the lowest prices from suppliers, ultimately found in low costs jurisdictions; savings are made in mutual or pension funds in which professionals mobilize the households’ savings to get the highest returns – maximize “shareholder value”. In both cases, when household purchase goods, services or investment products, in the main they indirectly purchase *normative environments*. And they (we) want to buy and invest in cheap environments (ensuring low prices for the purchases and high returns for the investments). And they (we) want to live in expensive ones providing them (us) with high income and social rights.

**Firms.** One of the other forms of clusters of contracts in the *world wide web of contracts* is the one allowing firms to operate. One of the key elements in the analysis of the (large) firm is that the legal persons serving as the contracting party opposite the contributors of property rights to the firm are *corporate* persons, creatures of the law. They are usually disregarded in the economic analysis as mere “legal fictions” of no importance because only individuals are deemed to be “real”.\(^2\) A crude understanding of methodological individualism leads to a neglect of this “metaphysical lawyers’ invention”. The corporation is reduced to a set of “contracts” among shareholders and managers. No one has ever seen any of these “contracts”, but with this theoretical construction, firms/corporations can then be deemed to be operating like markets.\(^3\)

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\(^3\) See the efforts by Alchian and Demsetz to demonstrate that “the firm and the ordinary market [are] competing types of markets” (Armen A. Alchian & Harold Demsetz Production, Information Costs and Economic Organization, 62 Am. Econ. Rev. 777 (1972), at 795) and those of Jensen & Meckling for who “the “behavior” of the firm is like the behavior of a market” (Michael C. Jensen & William H. Meckling *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, Journal of Financial Economics, V.3, No. 4, 305 (1976), at 8–9). Or see also Cheung for who “it is futile to press the issue of what is or is not a firm”; see Steven N. S. Cheung *The Contractual Nature of the Firm*, Journal of Law and Economics, 26(1):1–21 (1983), at 17–18.)
The existence of corporations, however, plays a fundamental role in the structuring and operation of the economy. Because a corporation has legal personality, real rights and liabilities are allocated by the legal system to these legal fictions. Corporations – and more appropriately groups of corporations for large firms – around the globe are the tools used for the creation of the relatively stable clusters of contracts connecting property rights holders in the world wide web of contracts allowing firms to operate. As a consequence of the neglect of the role of corporations – and for some other reasons as well – there is a widespread confusion in the economic (but also legal and political) literature between the concept of “corporation” and the concept of “firm”. The two words are often used interchangeably, “company” or “enterprise” being also sometimes used as synonyms. The consequences of this linguistic and conceptual confusion are endless.

In my analysis, the two have to be distinguished sharply: the corporation is a legal person owning property rights and at the center of a cluster of contracts; the firm is the economic activity existing as a consequence of the control over property rights obtained via the cluster of contracts.

Because we live in a world in which ownership and binding obligations are defined by law, firms’ legal structure cannot be disregarded. The builders of firms structure them using legal instruments: contracts, property rights and corporations. It is immediately obvious that firms are structured using corporations; they are not corporations.

Why is it that the legal structure of every firm of some significance is built around corporations? The reasons are numerous:

(1) At the outset, creating a legal person to own or control key assets used in the business avoids having to agree on detailed contracts among the shareholders to specify who will do what in what circumstances and get what in return. This is made possible by the fact that when a corporation is created to hold the assets of a business, the residual control rights in connection with the various assets contributed are owned by the “artificial” legal person, not by any of the contracting parties – who would have ex post bargaining advantage in the absence of a separate legal person to own the assets and operate the business – for as long as the corporation exists.

(2) Limited liability protects the investors in equity from the company’s misfortune. As a consequence, they can give up residual control rights to professional managers in a better position than them to manage the firm.

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(3) The strong legal personality of the corporation isolates its own assets from the shareholders and their misfortunes. The corporation’s legal personality therefore strongly partitions assets. Shareholders do not own the assets operated by the corporation and do not have access to them. The only ones having access to the corporation’s assets are the managers.

(4) The corporation, as the owner or controller of strategic property rights used in the firm’s operation, is the contracting party purchasing the inputs required in the operation of the firm, selling the output and pocketing the difference. It may, for example, lease an office to install desks, chairs and computers to be in a position to hire employees who will produce a service distributed by a network of franchisees, etc. Each corporation is therefore at the center of the cluster of contracts with contributors of resources needed but not owned by the corporation, be they employees, financiers, landlords, etc. Firms are thus legally structured around corporations via semi autonomous clusters of contract allowing the exercise of power over a set of property rights.

All the firms in the world are interconnected via the world wide web of contracts. Firms, as semi-autonomous power systems, have loose boundaries because the cluster of contracts connecting property rights over which they exercise their authority does not end abruptly like the limits of a State’s territory. In between, there are all sorts of arrangements, extending through time, in particular when the matching, both qualitative and quantitative of individual enterprise plans is necessary. This is the case, in particular, for certain suppliers of inputs and certain distributors of output. This is the case for joint-ventures. But at the core of any firm, there is a cluster of contracts allowing the exercise of economic power over the resources (including individuals) connected. Those in control of the corporations have power over the allocation of the property rights connected to the corporations via the clusters of contracts. One such cluster allows operating the firm called “Microsoft” (for example); and another one allows operating the firm called “Toyota”.

The denial of the significance of the existence of firms has severe consequences. John Kenneth Galbraith goes as far as considering it a fraud to talk about a “market economy” while neglecting what he calls the “corporate system”:

“Reference to a market system is ... without meaning, erroneous, bland, benign. ... No individual firm, no individual capitalist, is now thought to have power; that the market is subject to skilled and comprehensive management is unmentioned even in most economic teaching. Here is the fraud. Another name for the system does come persuasively to eye and ear: “the corporate system”. None can doubt that the modern corporation [Galbraith means the
"firm"] is a dominant force in the present day economy ... Nonetheless allusions to it are used with caution or not at all. ... Better the benign reference to the market."\(^5\)

To understand the significance of the firm and its mode of relationship with the rest of society (markets, other firms, political institutions, individuals, etc.), it is necessary to go beyond a superficial understanding of the notions of "contracts", "property rights" and "corporations" which lie at its core. In this effort, not only do we have to take into account how these instruments allow firms to effectively operate in the social system. It is also necessary to go one step further and understand the position of these instruments in the overall system of regulation of society, and what has changed with their concentration within large global firms.

II.

An effective method of understanding the global ordering of the economy is actually to start at the bottom. Each sovereign State – whether liberal or not – sees its authority limited at the border: by other sovereign States. But within its borders, the liberal sovereign States see its sovereignty effectively limited by holders of property rights. Of course, we have all learned from Bodin, Austin, Montesquieu, etc. not to confuse sovereignty and property, imperium and dominium. In a global world built on liberal principles, however, this is a taboo which is preventing a proper understanding of the world power system.

The liberal system, which apparently strictly separates spheres of social life into public/private, political/economic, etc., has always been a comprehensive political system, from the ground to the top. Property rights are a part of what was supposed to be a coherent system in which property rights holders were to build society via contracts, with a limited residual role left for the Night Watchman State. An invisible hand was supposed to do most of the job. Things actually worked out differently with the surge of the large firm and the need to deal with the vast ancillary "externalities"; but to understand it, we have to take property rights seriously ... We have to understand them as a decentralization of sovereignty.

The definition of strong, supposedly "sacred" and "natural" property rights has been one of the instruments used to implement the movement from a holist to an individualist society. They were tools to increase individuals' autonomy; means to move from a society of status to a society of free

contracting individuals. Combined with the acknowledgement of freedom of contract, strong property rights allow the highest level of decentralization of decisions. But large corporations, by concentrating property rights via contracts, allowed building “private” firms, in fact, the constitution of private political and legal orders. The corporate governance debate – which has concentrated on issues in the governance of the public corporation – has almost totally ignored the more fundamental issue of the firm as a governance system. It is the firm, however, as an “organized economic activity”, which is the governance system, of a peculiar kind. It is due to the properties of the property rights it concentrates under a unified command through contracts executed with the owners of the property rights via corporations. Although firms have always been part of the constitutional system of allocation of power within liberal States, this was hardly apparent as long as firms were small and the economy was predominantly national. Firms’ political decisions and normative production could somehow be misunderstood or misinterpreted as “national”, in the same fashion that there are still people believing France exports wine and the United States softwares (of course, States or nations don’t export; corporations do, either through the market or through distribution contracts within their cluster of contracts). When analyzing a global economy, these shortcuts lead to errors in the reasoning which have dramatic consequences.

Contracts. Each contract concluded is a part of the governance system of a liberal society. In liberal societies, there is a (usually constitutional) principle of freedom of contract: contracting parties are free to agree among themselves on the definition and content of obligations they will privately define and which then will be applicable to their relationship. Contracting parties are free to agree or not on an exchange. But once they have reached a binding agreement, they are bound by it and the State enforcement system (courts and police forces) may be triggered to force the respect of agreements freely entered into. A contract is therefore a serious thing. It is a manifestation of freedom; but once entered into, it is strongly binding. Its breach can lead to the use of public force, at the request of private parties. All contracts are thus inherently linked to the system of governance in our societies. This allows many things and, in particular, planning by the contracting parties.

Regulatory constraints, which limit the contracting parties’ autonomy to regulate their own affairs, are only exceptions to the principle of freedom of contract. For example, as long as there is no regulation on working hours, an employer and an employee are free to “agree” that the employee will work 12 hours a day, 6 days a week for an agreed weekly consideration. It is only if a statute is constitutionally adopted to limit this “freedom” that they

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will not be able to agree on a working week longer than – for example – 40 hours.

Of course, irrespective of certain unreal theories, the content of agreements is heavily dependent on the allocation of property rights in society. It is easily observable that individuals with no property other than their right to lease their services rarely hire wealthy individuals to work for them. Because contracts are binding and those in control of property rights are in a better position to impose the terms of contracts on those devoid of property, many laws in effect are nothing but a reduction of the authority of property rights holders, by prohibiting certain contractual clauses (in my example, 12 hours of work per day 6 days a week). Contracting parties are still free, as a matter of example, to agree on the content of the agreement which will bind them. But there are norms creating, as an exception to this principle of freedom, limits to what they can agree on. Whether or not the State could interfere in this auto regulation of society has actually been a major constitutional issue, and many early “social laws” have been declared “unconstitutional” as excessive infringements of constitutional rights. It was unconstitutional to move the frontier of the “public” into what was perceived as purely private matters, left to individuals’ sovereignty. But even in this “interventionist” scheme, in which there are limits to what can be agreed on, and therefore on what a party in a stronger bargaining position can impose on the other, the controllers of property rights still have the ability to contractually convert their authority over property into an authority over people. This ability may be reduced; it can’t be eliminated. It remains as a matter of principle. This is inherent to the liberal constitutional scheme, because of property rights’ properties. It is important to understand this because firms (as the organized activities deriving from nexuses of contracts centered on corporations) are major autonomous organizations built on the basis of the freedom of contracts originally contemplated to benefit the individual only. Like individuals, they are not forced to contract with anyone. But unlike most individuals, they can now escape most regulatory environments and contract in territorial jurisdictions affording less protection to their contracting parties.

Property rights. The contracts used to legally build the firm transfer the control over property rights to its corporate structure. Contrary to the common wisdom, a property right is not a right over a thing. It is more appropriate to understand a property right as a right against others in connection with an object of right (which is not necessarily a “thing”). Having a property

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8 As a matter of example, the U.S. Constitution was drafted in 1787, promulgated in 1789 and amended with the Bill of Rights in 1791. But it is in 1886 only that the U.S. Supreme Court asserted that corporations are “persons” within the meaning of the fourteenth amendment (Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886)).
right means having the decision making authority *in principle* in connection with the object of the property and having the possibility to trade it. A property right is *not* a bundle of rights, something *finite*. What are finite – although they change through time – are the *restrictions* on property rights.

As rights *against others* in connection with their objects, property rights are part of the governance system of a liberal society. The owner may request judges to order bailiffs and police forces to protect his rights against violators. Property rights are a means to decentralize authority – an authority which may be supported by the use of official *force*. The content of what can be done with a property right is always dependent on the content of the rules of society, e.g. in liberal systems, first of all upon *law*. But the restrictions deriving from legal rules are the *exceptions* to a *principle* of free decision making with regards to the objects of the rights. Property rights are constitutional rights protected by fundamental norms at the roots of liberal legal orders. They are authority decentralized to its highest extent (originally, to the *individual*) to its highest degree (an unrestricted authority *as a matter of principle*). They give authority *in principle*, legal norms reducing the autonomy of decision making in connection with them being the exception. They are, in reality, a *decentralization of sovereignty*. And it is not possible to reverse this decentralization and remain within a liberal system.

That property is a source of autonomy is also true, of course, for the property rights concentrated within firms via contracts and corporations: those in charge within the firm are legally entitled to be the decision makers in connection with the property rights the firm controls through its corporate structure, either because it owns them or via the contracts executed with contracting parties (other property rights holders). The only constraints the firm faces as a governance system are (a) the contractual constraints found in the various contracts transferring the control over the property rights and (b) the various constraints deriving from applicable laws, regulations or case law. Contracts and laws create constraints; but otherwise, those in charge of the firm management are the ultimate decision makers in connection with the concentrated property rights.

This is always true. In all firms. Whatever their size. But when property rights are concentrated on a large scale, the great constitutional divisions of our society between public/private, power/property, and norm/contract simply do not work anymore. When concentrated, property rights give birth to *deterritorialized* powers – *sovereign* powers – agglomerating the autonomy granted by property rights. The institutional setting of our liberal societies has been put in place in a world totally different from ours. In a society where large firms did not exist, in a society in which there were almost no business corporations, freedom of contracts and absolute property rights were devices used to decentralize decision making authority to the highest extent to *individuals*. But these very same instruments – which were sup-
posed to free the individual and give him autonomy from *public* power –, have been used to build large “private” organizations around corporations benefiting from legal personality (that mere “legal fiction” ...). Those in control of large concentrations of property rights through contracts enjoy the degree of autonomy originally designed for the individual only – not to protect the autonomy of the holders of large *private powers*. The corporate revolution – now having led to globalization – is therefore an enormous challenge to our whole global system of allocation of jurisdiction over the Earth. It is based on the official constitutional structure of liberal States but led to a mode of operation of the global economy in total contradiction with it. The contradiction is all the more severe that a proper theory of the firm is lacking and corporations are misunderstood as the property of shareholders, the managers being the servants of these masters.

**Corporations.** Corporations are at the center of the global constitutional revolution. At the time when liberal principles were enshrined in our sacred texts (the United States Constitution and its Amendments, the French *déclaration des droits de l’homme et du citoyen*, and the like), there was no business corporation to speak of. Their future importance, role and impact on society were not envisaged in the slightest way – how could they? In America, despite their great wisdom, the Founding Fathers did not contemplate them; and in Europe, there was a clear resistance against corporations (in Great Britain, the Bubble Act of 1720 forbade all joint-stock companies not authorized by an Act of Parliament. In France, all corporations were prohibited in 1791, in the aftermath of the 1789 French Revolution, by the *décret Lagarde* and the *loi Le Chapelier*, etc.).

With the industrial revolution and the development of modern transportation, local clusters of contracts (firms) could *technologically* spread above State borders. Competition among firms led to a competition among States to supply firms with favorable legal norms. In corporate law, this translated into the well-known “race to the bottom” in the United States. The State of Delaware soon established for itself an improbable competitive advantage in the competition for the supply of flexible corporate law. In the course of a few decades, almost unlimited freedom of incorporation was available to structure firms. The United States were first in the race for a number of reasons, including an absence of historical resistance against corporations, an expanding and young economy making it necessary to facilitate the concentration of capital and virtually free trade within the United States territory. In Europe, it took more time for the corporate revolution to take momentum; it was first necessary to reverse decades of opposition to the creation of corporations and it is only in the wake of free trade treaties, towards the last third of the nineteenth century, that freedom of incorporation spread from one country to the next (1856 in England, 1867 in France, 1869 in Spain, 1870 in Germany, 1873 in Belgium, etc.).
State competition, the corporate revolution and, of course, technological progress have led to the development of large firms and to globalization. The process of globalization of the economy now translates into global competition. The States are now part of a competitive system of a new kind in which many States are commercializing their sovereignty via low regulation, low taxation, high bank secrecy, and so forth. War is not the medium of this new competitive game; the production of rules favorable to firms is. We are witnessing the autopoiesis of a new constitutional system, in which firms are an essential component, in a very peculiar way. The development of modern corporate law has allowed developing firms to the gigantic organizations some of them are but without any legal recognition of their existence as such. The social organization which can be developed via the gigantic clusters of contracts connecting property rights used in production and distribution is the firm, but it has no legal existence. It is not a positive single legal concept. It is not a legal "entity".

In the classical view of governance, firms are equated with corporations, themselves treated as "property", the shareholders being the "owners". Managers are their agents. Management of the firm is then logically for the benefit of the "owners" only. Other interests are left either to fend for themselves via contracts or are to be defended via regulations adopted by the State. And although we live in a world of divided, competing States facing difficulties to adopt norms internalizing so-called "externalities", the dominant ideology of corporate governance assumes a perfect functioning of the political system. This assumption is of course excessively bold in the face of a rapid devaluation of the States’ ability to influence economic outcomes.

The widely accepted agency theory of the firm, and the (at times, disastrous) corporate governance principles deriving from it, is fundamentally wrong. It is based on significant errors in the legal analysis of what a firm really is in the world wide web of contracts:

(1) Notwithstanding a widespread confusion, shareholders do not own firms and nor do they own corporations: they own shares issued by corporations. The notion of "share" is difficult to understand and easy to mis-characterize, which opens the door to ideological manipulation. But the shareholders enjoy the privileges of the owner only towards what they

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10 See generally Henry Hansmann & Reiner Kraakman The End of History for Corporate Law, 89 Georgetown Law Journal (2001) pp. 439–68. For these authors, "there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value"; at 439.

own: the shares; they don’t and can’t have these privileges towards the corporation having issued the shares. Shareholders do not own corporations or firms; no one does! There is no duality of the corporation as both “person” and “thing”. The corporation is a legal “person”; but it is not a “thing” which could be “owned”. The “things” owned are the shares issued by the corporation. Owning a share gives rights: a right to dividends; and the right to participate in shareholders assemblies and vote on rare decisions. These rights derive from the shareholders’ residual claimants’ position in firms’ constructions. But owning shares does not give title to the corporation or to a portion of the corporation. Owning 100% of the shares is not akin to owning the corporation and owning one share is not being a “co-owner” of a corporation. A shareholder owning 15 of the 100 shares issued by a corporation does not own 15% of each share: she owns 100% of 15 shares and is totally autonomous in her decisions relating to her shares from the other shareholders. She is not co-exercising any rights.

(2) The assets managed by the managers of the firm are not owned by the shareholders: they are owned by a separate legal entity, the corporation (or a group of corporations). The partitioning of the assets and liabilities deriving from the interposition of the corporation’s legal personality between the assets and the shareholders has very significant consequences: the shareholders’ assets are isolated from the corporation’s misfortunes by limited liability; equally, the corporation’s assets are isolated from the shareholders by its legal personality. In the normal course of business, the bundles of assets and liabilities owned by the shareholders, on the one hand and by the corporation, on the other, are totally separate thanks to the corporation’s strong form of legal personality. It is of paramount importance to understand the significance of the corporations’ legal personality in the operation of these organizations structured around clusters of contracts connecting property rights we call multinational firms.

(3) In their role as managers of the corporation’s assets, the officers are the agents of the assets’ owner – the corporation itself. They are appointed by the board of directors but neither directors nor officers are the shareholders’ agents because the shareholders own neither the firm nor the assets controlled by the managers via the firm’s corporate structure.

(4) The managers – who are not owners – exercise power in the management of the firm. They are the only ones having access to the corporation’s assets. In their managerial role, they are not automatic machines concluding and enforcing perfect contracts in a perfectly regulated world.

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internalizing all externalities. They make unilateral decisions thanks to the property rights controlled by the corporate structure which are having effects towards the firm’s constituents and its environment. As holders of powers, they have fiduciary duties towards those subject to the consequences of their unilateral actions. Shareholders are understood by all as being among the beneficiaries of fiduciary duties. Because the corporate managers, as a consequence of the authority they get under corporate law, manage the firm – the organization built via contracts transferring control over property rights to the corporations used to legally structure the firm – the managers’ fiduciary duties extend beyond those they have towards shareholders.

It is the concept of fiduciary duty and not the concept of agency which has to be further researched and extended to broaden our understanding of the firm and the adequacy of corporate governance (or lack thereof) to society’s needs. An agency relationship is a pure private one in which the agent represents the principal in the sole principal’s interest. The agent owes a duty of obedience to the principal (which gives a further incentive to shareholders to misrepresent themselves as principals – owners). A fiduciary is in a totally different position. He is not a subordinate. He has a wide discretion to make decisions, but in furtherance of interests other than his own. All political officers are fiduciaries. Officers in large firms hold an office which clearly has more similarities with them than with heavily restricted and constrained agents. Global governance will never improve unless we understand firms along those lines and adapt firms’ governance to fit the needs and constraints of a global polity.

This is not to say that understanding the functioning of a globalized polity based on divided competing States hosting multinational competing firms is easy. And addressing the systemic market, legal and political failures of this global polity is a titanic task. I merely claim that the effort is hopeless with a false economic and legal theory of the firm whereas global firms are at the origin of many of the issues raised by globalization.13

A revision of the theory of the firm explaining its existence as the result of a nexus of contracts connecting property rights holders, and leading to the creation of an unofficial political and legal order is available and can be further developed. But to do so, social scientists must abandon their ideological understanding of liberal society as a market society.

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13 Today even more than fifty years ago, “what we need among other things is a twentieth century Hobbes or Locke to bring some order into our thinking about the corporation and its role in society”; in: E.S. Mason (ed), The Corporation in Modern Society, Cambridge, Harvard U. Press (1959), at 19. See also Adolf A. Berle, Jr. Power Without Property – A New Development in American Political Economy, Hartcourt, Brace and company, NY (1959), at 23.
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