Corporate Governance and the Politics of Property Rights in Germany

J. Nicholas Ziegler

Political Science Department
University of California, Berkeley
Barrows Hall 210
Berkeley, CA 94720-1950

Tel. 510-642-4533
Fax. 510-642-9515
Email: <nziegler@socrates.berkeley.edu>

A revised version of this paper will appear in

Politics and Society (June 2000)
Abstract

This paper analyzes debates over corporate governance in Germany. Germany is a critical case for property rights, because the German and Anglo-American concepts of property differ dramatically when applied to industrial assets. In particular, the Anglo-American concept of the firm as an instrument for maximizing shareholder value collides with the German view of the firm as a political construction for balancing the interests of contending social partners. In analyzing this tension, the paper examine three types of political contestation: the enactment of formal-legal changes in the rules of corporate governance; state promotion of a deeper equity market and a more sympathetic culture for shareholding; and the mobilization of labor against Anglo-American practices for hostile takeovers in the market for corporate control. While these instances show evidence for the features of incrementalism and negotiated change that are well-known in German politics, the appearance of increasingly powerful transnational coalitions reveal a potential for change that is much greater than indicated by the modest extent of formal-legal change to date.
Corporate Governance and the Politics of Property Rights in Germany

J. Nicholas Ziegler

Few issues have moved from the dull and dreary to the politically contested as quickly as the rules of corporate governance. Since these rules specify the rights and obligations of owners, managers, and employers, they are central to the practical meaning of property in industrial economies. Fundamental though the concept of property may be, even thinkers as sympathetic to market institutions as John Stuart Mill have pointed out that its meaning is far from self-evident.

The idea of property is not some one thing, identical throughout history and incapable of alteration, but is variable like all other creations of the human mind.¹ This variation in the way different societies and periods define property is precisely what makes corporate governance an increasingly contested issue in an era of economic globalization.

Germany is a critical case for the definition of industrial property because its rules for corporate governance differ dramatically from the Anglo-American model. Over the last several decades, the U.S. and British business communities have consolidated a financial conception of control in which shareholder value is the primary objective of management.² Germany’s institutions of social partnership have by contrast provided the clearest case among advanced industrial democracies where long-term stakeholders – including banks and employee groups – have a regular voice in corporate affairs. In accordance with this stakeholder approach to the firm, German law treats the firm as a
constitutional construction for structuring a process of ongoing negotiation among
different groups within the firm. During most of the 1980s, Germany’s relational
approach to corporate governance appeared more successful than the “short-termism”
from which U.S. firms seemed to suffer. More recently, however, a number of German
firms have encountered serious financial difficulties that went undetected by German banks
until they necessitated conspicuous rescue packages which in turn threw Germany’s
stakeholder model of corporate governance into question.

The German approach to corporate governance poses a revealing problem for one
of the central components in economic globalization, capital mobility. As usually defined,
globalization entails a lowering of barriers to cross-border transactions. Lower barriers
expose producers to increased competition from outside national boundaries. Just as
purchasers of retail and industrial products gain a larger choice of suppliers in an
increasingly international economy, purchasers of corporate assets also have a larger
choice of assets to invest in. When holders of capital search over a broader geographic
domain for attractive investments, they presumably look for a better return on their
investment. The ability of investors to predict the return on their ownership shares is
largely defined by the rules of corporate governance. Unlike the relatively simple criteria
by which capital holders measure return on investment, however, the rules by which
enterprises are financed, managed, and organized are among the institutional features
where national economies differ most sharply. Because capital holders have such a clear
stake in these rules, corporate governance is an area where capital confronts national
institutional arrangements particularly starkly.
The literature on globalization and its political consequences has hinged precisely on this question -- the convergence or continued diversity of existing institutions. This approach has been crucial in illuminating and delimiting the consequences of international economic change. At the same time, this formulation has often pushed the debate toward two dichotomous alternatives: either that globalization has become a dominant process overwhelming all other forms of politics, or that globalization is inconsequential. More recent contributions have articulated a growing consensus that, while globalization matters and matters very much, it is hardly an anonymous force which proceeds automatically or with uniform effects everywhere. Instead, globalization is a complex process, itself comprised of numerous political choices, which leave plenty of latitude for alternative strategies of economic growth and adjustment.

This paper argues that the increasingly international scope of competition is indeed exerting strong pressure on the rules and practice of corporate governance in Germany. The effects of this globalization process are, however, far from uniform. Even though cross-border capital mobility is central to the force of globalization, corporate governance is an issue where the political interests of capital are much less coherent than those of labor. Organized labor in Germany has consistently tried to maintain the distinctive legal provisions that give German employees an institutionalized voice in business enterprises. Within Germany’s business community, some firms are likely to benefit more than others from access to non-German sources of capital. But this distinction has not yet led to any lasting cleavages -- for instance between large and small firms, finance and industrial enterprises, or export and import oriented firms. Instead, individual firms are assessing and
reassessing their interests in surprisingly piecemeal fashion.

Amidst the business community’s fragmented preferences, one pattern is clearly emerging. The politics of corporate governance are becoming more transnational as domestic actors seek political allies outside Germany to support their preferred institutional agendas at home. If globalization refers to an economic process, it is not automatically forcing changes in domestic institutional arrangements. Instead, it is provoking a parallel political process of transnational alliance-building, in which domestic actors find allies abroad. Although their preferences on the issue of corporate governance are fragmented, business firms have shown significantly more success than labor in concluding transnational ties. The actors for whom transnational ties appear most effective, however, are a set of less well-known organizations -- including shareholder membership associations and certain state agencies -- that seek to bring German institutions of economic governance closer to the Anglo-American model. The evolution of corporate governance in Germany therefore depends critically on the relative ability of domestic actors to use transnational coalitions. If the proponents of neoliberal reform can use transnational coalitions to enhance their influence within Germany, they will be able to circumvent Germany’s customary politics of social partnership and shift the country’s rules of corporate governance more decisively toward the Anglo-American model.

This article illustrates the incipient transnational politics of property rights in three steps. First, it reviews the received model of corporate governance in Germany and contrasts it with the Anglo-American model. Second, it examines the main mechanisms which might link the economic processes that comprise globalization to changes in the
institutions of corporate governance. Third, it analyzes three types of politics that
surround changes in the rules and practice of corporate governance in Germany. These
cases show clearly that formal-legal change has been limited, but that the customary
patterns of social partnership in Germany are vulnerable to erosion from a persistent
campaign by the proponents of neoliberal reform to create a culture and a set of
institutions more conducive to Anglo-American arrangements for financing and running
industrial enterprises.

I. The German Model of Corporate Governance

Germany’s framework for governing industrial enterprises represents Western Europe’s
closest approximation to the ideal of the stakeholder firm. The stakeholder concept
became popular in the early 1990s among English-speaking critics of the financial
conception of control that prevailed in the Anglo-American economies. Germany’s
stakeholder features stem less from any recent reform impetus, however, than from a
century of workplace struggle in which labor and owners have found mechanisms for
industrial peace and regularized consultation. The two principal features of this approach
to corporate governance include a legally institutionalized role for employees and a pattern
of ownership concentrated among long-term shareholders, particularly the universal banks.
These features by no means provide an exhaustive account of relevant laws and
practices, but they are the key features that underpin Germany’s model of organized
private enterprise at the firm level. As portrayed by Andrew Shonfield in the 1960s, this model of organized capitalism included a complex set of producer organizations that facilitated tri-partite peak bargaining between industry associations, national labor organizations, and the state. This pattern of peak bargaining -- which culminated in the regular meetings for Concerted Action (Konzertierte Aktion) in the 1970s -- provided Germany’s clearest example of neocorporatist wage bargaining and facilitated a pattern of negotiated industrial change. As such, the pattern of peak bargaining -- and the firm-level arrangements that accompanied it -- was closely associated with Germany’s successful industrial adjustment in the 1970s and early 1980s.\(^9\)

Labor’s role in these arrangements rests on the principle of codetermination (Mitbestimmung), or joint decision-making. Codetermination includes both top-down cooperation between management and labor in the supervisory boards (Aufsichtsräte) of large stock companies (Aktiengesellschaften) as well as bottom-up representation of labor in works councils (Betriebsräte) at the plant level. These two aspects reflect specific principles of organization -- constitutionalism and more radical workplace democracy -- that collided in the Weimar period and have remained in tension in Germany’s legislation since 1945. A strong form of codetermination reappeared quickly after World War Two in the coal and steel sectors (Montanindustrie) where unions obtained equal representation on the supervisory boards in 1951. One of organized labor’s key goals for the next 25 years was to extend the strong provisions of Montanmitbestimmung to all sectors of the German economy.\(^9\) In 1952, the Works Constitution Act (Betriebsverfassungsgesetz) followed a more paternalistic concept of Catholic-conservative constitutionalism by giving
employees only one-third of the seats on the supervisory boards and guaranteeing strict procedural independence of the works councils from the unions. Only when this legislation was broadened in 1972 and 1976 did labor achieve roughly equal representation on supervisory boards of large firms (over 2000 employees) – though without the neutral tie-breaking procedures that had been stipulated in 1951 for the coal and steel sectors.

The laws of the 1970s also allowed closer links between unions and the works’ councils and gave the latter extensive rights on decisions affecting hiring, layoffs, overtime, and vacations, as well as access to detailed information (though not joint decision-making authority) on company finances and investments.

According to these provisions, significantly different forms of codetermination apply to various segments of German industry. By the mid 1980s, roughly 5 million employees (30.5% of the private-sector workforce) worked in firms that had parity or near-parity representation on the supervisory boards as well as works councils at the plant level. By the mid 1990s, after the addition of East German firms, the corresponding figure was 5.6 million (an absolute increase but a relative decline to 24.5% of the private-sector workforce). Another segment of mostly medium-sized firms fell under the 1952 legislation, which allowed codetermination at the plant level but stipulated only minority employee representation consisting of one third of the seats on the supervisory board. Firms in this category accounted for 3.1 million employees in 1984 and 3.4 million employees in the mid 1990s (representing 18.9% and 15.0% of the private-sector workforce, respectively). Finally, a large number of much smaller firms fell outside the legal provisions for either form of codetermination and a few larger firms, particular in the
service sectors, have found ways of avoiding employee representation. This category accounted for 8.3 million employees in 1984 and 13.8 million employees in the mid 1990s (or 50.6% and 60.5% of the private-sector workforce, respectively). While codetermination thus predominates in the large manufacturing sector, it allows for a great deal of diversity in German industrial relations across the economy as a whole.

The role of Germany’s large universal banks in industrial governance took shape in the final third of the nineteenth century -- well before the works councils of the Weimar period gave labor recognized representation. As Alexander Gershenkron pointed out, the universal banks were founded by German industrialists for the explicit purpose of accumulating and concentrating the capital needed to finance Germany’s rapid industrialization. Without legal requirements to separate equity holding from other banking activities, the banks quickly moved into retail banking, current-account services for large clients, and long-term lending as well as equity financing. Andrew Shonfield showed how the universal banks reconsolidated their power in the postwar period by maintaining equity positions in Germany’s large joint-stock companies. The centrality of the banks rested partly on the distinctive two-board structure of Germany’s large stock companies: the managing board (Vorstand) handled operational management; while the supervisory board (Aufsichtsrat) approved major investment and personnel decisions. The supervisory board of most major firms included several senior bank executives and was typically chaired by a representative of the company’s lead bank. In addition to their own equity stakes in such firms, the large banks customarily held and exercised proxy voting rights (Depotstimmrechte) for their retail customers. Since the large universal banks such
as Deutsche Bank, Dresdner Bank, and Commerzbank typically voted together, they were often able to exercise substantial majorities of a large enterprise’s shares. In Shonfield’s now-classic discussion of the steel industry, this system of interlocking directorates and voting rights allowed the banks to coordinate industrial growth and to prevent the firms under their tutelage from engaging in competition that undercut the health of the sector as a whole.

The legally sanctioned role of banks and labor in Germany’s joint-stock companies produced a pattern of corporate governance almost the reverse of the U.S. model. According to the standard account of Adolf Berle and Gardiner Means, the ownership of large American corporations came to be spread across a diffuse collection of small shareholders, thereby giving managers a great deal of discretion. In Germany, by contrast, ownership was concentrated among a much smaller number of banks and other financial institutions. Managers enjoyed considerable insulation from the short-term pressures of an anonymous equity market, but were subject to the ongoing scrutiny of long-term stakeholders represented on the supervisory board. In the United States, neither organized labor nor other stakeholder groups were granted any legal voice in company decisions. These arrangements meant that the primary tension within firms in the United States occurred between dispersed owners and powerful managers. Formal treatments of this tension appeared in principal-agent theory and in the concept of shareholder value, which provided a basis for analyzing the ties between ownership and control of the firm.

Taken to its logical conclusion, the shareholder-value approach excluded provisions for employee codetermination, which for shareholders represented a substantial infringement
on property rights. Yet it was just these provisions that enabled the large enterprises in Germany to integrate the social partners within the firm.

This view of the large firm -- governed by rules that impose long-term consultative strategies on contending social interests -- understates the degree of organizational diversity and experimentation in German industry. Although joint-stock companies with 2000 employees or more include most of Germany’s large manufacturing concerns, they account for somewhat less than half of the country’s private-sector workforce. The small- and medium-sized firms in the German Mittelstand matter because they provide very different adjustment capacities than the large, integrated firms that anchor Germany’s more centralized industrial orders. While most manufacturing firms in the Mittelstand have some form of codetermination, they fall well outside the purview of the large universal banks. Instead they rely on Germany’s complex landscape of public savings banks (both regional and municipal) and cooperative credit societies (mostly municipal). In 1986, the savings banks and cooperative societies accounted for as much as 32% and 18% of loans to Germany’s manufacturing industry in 1986, while the main private banks provided 18.8% of such loans. In 1996, the figures were 32.8% for the savings banks, 18.3% for the cooperative societies, and 21.1% for the major private banks. As these figures suggest, firms in the Mittelstand have developed a multitude of coordinating and financing mechanisms that rest on local institutions rather than the country-wide perspectives of the universal banks. Indeed, the limits of the universal banks were further revealed after German reunification, when the government Trust Authority (Treuhandanstalt) responsible for privatization designed a range of financing measures that
left the larger banks free to pursue less risky business elsewhere. Thus, although
corporate governance is an issue that most directly affects the larger joint-stock
companies, the entire range of smaller and more regionally embedded actors is relevant
because they provide much of the organizational experimentation which could generate
new recipes to augment or supplant the rules that regulate the large and more visible
firms.20

II. Mechanisms of Change

Given the complex history of Germany’s diverse enterprise forms, one cannot assume that
changes in these forms proceed automatically from forces in the international economy.
To be sure, there are plenty of signs of pressure to alter the German model of corporate
governance. Yet, the sources of this pressure are not self-evident. Moreover, the
metaphor of pressure may be inadequate to show how the changes associated with
globalization might lead to changes in the rules of corporate governance. Rather than an
impersonal force pushing uniformly in all directions, globalization works its effects on
domestic legal arrangements through a series of quite specific mechanisms.

The mechanism of change most often invoked by practitioners is competitive
selection. Proponents of this causal mechanism argue that globalization -- the broadened
scope of competition and the lower price levels it allows -- is making competition more
severe. Analysts working along these lines argue that the German model of corporate
governance is under pressure because it is inefficient. Some authors have found evidence that German firms relying heavily on close bank ties show a lower return on investment than firms with arms-length financial ties, but these findings have been consistently contested by advocates of bank-based financing.\(^{21}\) Equally important, such studies at the firm level neglect the question of what kind of efficiency is being measured. Authors who focus on distinctive national variants of capitalism argue that the German economy, like the Japanese economy, sacrifices short-term allocative efficiency in order to achieve longer-term efficiencies in coordinating the activities of entire sectors and supply chains.\(^{22}\)

Another mechanism of convergence in organizational form is coercion, where more powerful organizations impose structures or practices on less powerful organizations. Given that countries retain sovereignty over basic issues in commercial law, it is hard to see how convergence in corporate governance could result through a process of pure coercion. Although the European Commission is promoting a uniform set of guidelines for corporate governance, it has shown a singular inability to extract agreement from member countries on this central issue.\(^{23}\) A sub-species of the coercive mechanism could, however, occur when firms in one country need access to another country’s markets so badly that they would adopt the other country’s legal features or regulatory requirements. If German firms displayed such a need to tap U.S. sources of capital and adopted U.S. governance arrangements as a condition, then one might describe this mechanism as a case of market-power tantamount to coercive isomorphism.\(^{24}\)

A third mechanism of organizational convergence is the diffusion of organizational templates, or mimetic isomorphism. Cases where organizations imitate other presumably
successful models exemplify this mechanism. Since they do not rest on coercion or constraint, cases of mimetic isomorphism often indicate a form of volunteristic industry self-regulation. Such mechanisms were suggested in corporate governance by industry-initiated studies in the U.K. and France, where industrial commissions defined a set of “best-practice” norms that their members then urged firms to adopt voluntarily. Interestingly, such “best-practice” codes have barely appeared in Germany.

Partly because they focus on well-defined populations and fields of organizations, these three mechanisms do not directly illuminate the exercise of power among unlike organizational actors. As a result, political scientists have often presented domestic politics as a distinct mechanism of change. In this form of adjustment, organized actors see themselves as benefitting more or less from particular changes and mobilize accordingly. For changes in the rules of corporate governance, the best evidence for such political mechanisms would include bargained compromises among political parties, unfamiliar coalitions and cleavages, or outright confrontations between opposing interest groups. Recent efforts to change the rules that govern joint-stock companies in Germany show precisely such instances. Such examples of political conflict do not exclude the presence of other mechanisms of adaptation. But they do show that these mechanisms reflect an explicit effort by the leading actors within Germany to redefine the terms on which business enterprises relate to other domains in German society.

III Deliberation, Promotion, and Confrontation
Given the range of processes that are potentially involved, the links between globalization and changes in the German model of corporate governance can best be understood by examining evidence for all of the mechanisms outlined above. The interest-group politics that lead to the enactment of formal-legal changes are crucial. Since a change in corporate governance entails changing the rules by which actors are organized as well as connected to each other, however, interest-group analysis alone is not likely to offer a full explanation. Insofar as the nature of the actors themselves is at issue, these actors are very likely to show contingent and shifting preferences as they debate the underlying purposes and contours of alternative sets of rules. To explore these possibilities, the following sections examine three different types of political contestation: efforts to alter the formal rules of corporate governance; de facto shifts in the ownership and the administration of corporate assets; and explicit confrontations over changes in the practices associated with the German model.

III.A. Enactment: Changing the Rules?

The impetus to alter Germany’s received model of enterprise governance evolved through two phases in the 1990s. It came initially from the economic liberals in the Free Democratic Party (FDP) as well as Social Democrats (SPD) who who had long opposed the power of the banks. Several spectacular cases of financial distress among major
German firms led observers to question the effectiveness of Germany’s two-board system -- and the monitoring capabilities of bank representatives on the supervisory boards. Since several cases involved firms with particularly close bank connections – Metallgesellschaft, KHD, and the real estate holding company, Jürgen Schneider – critics revived the familiar theme of “bank power” (Macht der Banken). Within a few years, however, the neoliberal reformers repackaged their position in terms of the Standortdebatte -- the debate over the characteristics necessary to keeping Germany competitive as a site for investment. Questions about the domestic distribution of financial power were reframed in terms of their consequences for international holders of capital assets.

This first phase of discussion began in the fall of 1994, when coalition discussions between the Christian Democrats (CDU) and Free Democrats included plans to improve procedures by which the supervisory boards could monitor their enterprises. By May of 1995, the Ministries of Justice and Economics -- both controlled by the economic liberals in the FDP -- formed a joint working group to consider reform of Germany’s main shareholding law (Aktiengesetz). From the beginning, the interests of the reformers was moderate. FDP members anticipated “careful corrections” rather than major revisions.28

The working group adopted moderate goals such as disclosing the interests of supervisory board members and improving its ability to obtain information from the lower management board (Vorstand). Many of the group’s recommendations -- which seem self-evident from American practice -- had never taken root in the German context of concentrated ownership and consensus management. Thus the working group recommended that supervisory board members be required to inform shareholders of their
seats on other company boards; that supervisory boards meet four times per years rather than two; that bank holdings of 5 per cent eventually be disclosed and that procedures for independent auditing be strengthened. The recommendation that board size for large firms be reduced from 20 to 12 members was one of the few that encountered opposition -- in this case from the trade unions and Labor Ministry. Even though the existing management-labor balance would be preserved, the unions felt that codetermination would suffer from an absolute reduction in the number of employee representatives. All parties, including the FDP, eschewed any changes in the balance of codetermination as a subject that had to remain taboo if compromise on other issues was to remain possible.

As this exercise in policy moderation proceeded within the Ministries, the rhetoric of industrial relations was growing more strident. A number of firms in the metalworking industry protested wage increases in 1996 by opting out of the employers’ bargaining association, Gesamtmetall. The head of the BDI (German Federation of Industry), Hans-Olaf Henkel, who had earlier taken IBM-Deutschland out of the regional collective bargaining agreement in Stuttgart, attacked the trade unions explicitly for undermining the spirit of individualism and self-determination that Germany needed.

The second phase of the debate began when the proponents of moderate reform within the FDP-controlled ministries restated their position in terms of the pros and cons of globalization. They argued that improved transparency and accountability in corporate governance were necessary if Germany was remain a competitive investment location (Standort) in a worldwide market. In developing their legislative proposals, members of the ministerial working group did not confine themselves to the customary dialog with
Germany’s organized interest groups. According to participants in the process, they also met directly with the association of international banks in Frankfurt as well as with individual investment banks and foreign pension funds. Among the latter, ministerial officials particularly mentioned the activist pension funds in the United States, such as the California public employees pension organization, Calpers, which was exporting its stance on corporate governance issues to Europe at the time. The Social Democrats meanwhile drafted more far-reaching legislation that would undercut the power of the finance industry directly by limiting banks to an equity stake of 5% in any listed company and by ending the banks’ practice of exercising proxy rights for shares held by their retail customers.

When the Bundestag held hearings on the two proposals in early 1997, the main social interests lined up in predictable fashion. The large industry associations formed a common front, not only with smaller firms in Chamber of Commerce, but also with the sector-specific associations for banking and for insurance. Their common position endorsed most of the changes proposed by the FDP, while opposing the SPD proposal as unnecessarily drastic. The trade union federation (DGB) as well as the white collar union (DAG) showed some support for the more aggressive limits on bank power proposed by the Social Democrats while opposing any reduction in the size of the supervisory boards.

A less familiar set of preferences came from the two shareholder groups, the Deutsche Schutzvereinigung für Wertpapierbesitz, e.V. (German Association for Share Ownership, or DSW) and the Schutzgemeinschaft der Kleinaktionäre, e.V. (Association of Small Shareholders, or SGK). Given the historical weakness of Germany’s stock markets,
these organizations, dedicated to the protection of individual shareholder rights, were curious actors in the country’s political landscape. During the 1990s, however, they became rapidly more prominent. Though generally aligned with the economic liberals, the shareholder associations frequently articulated more forceful protests than did the politicians in Bonn. The SGK deviated from the FDP’s position by endorsing limits on bank ownership of industrial firms at 10%. The DSW supported most of the FDP’s proposals, but also decried the “Japanization” of the German economy caused by interlocking directorates that often put the same individual on the supervisory boards of competing companies. With Otto von Lambsdorff (former head of the Free Democrats) as its honorary chairman, the DSW was one of the few organized constituencies supporting the FDP. Its influence was, however, magnified when the California pension fund, Calpers, announced that its position on legal changes in Germany were best articulated by the DSW.

Yet another set of preferences came from the Green party. The issue of enterprise governance -- while hardly ranking among their core concerns -- allowed the Greens to criticize established concentrations of economic power as obstacles to desirable types of change. Much like the Social Democrats, the Greens attacked the multiple sources of influence that the large universal banks exercised over German firms. Much like the liberals, they argued ever more pointedly through the 1990s that Germany needed a modern equity market to support entrepreneurs in the small and medium-sized sector. In effect, on issues of finance and economic policy, the Greens bridged the positions of the economic liberals and the modernizing wing of the Social Democrats.
This configuration led to legislation that was remarkable for its incremental nature. Since these changes aimed almost entirely at bolstering accountability and transparency of the supervisory boards, rather than altering the power or participation of the banks in those boards, the law became known as the Kontrolle und Transparenz Gesetz (Kontrag). It left the number of board seats that an individual could hold at ten, although chairmanships were henceforth to be double-counted. The law required the supervisory boards to meet four times per year rather than twice. And it required auditors to submit their reports to all members of the supervisory boards rather than only to the managing board as had previously been done. Regarding banking power, the permissible size of a bank’s equity share in industrial companies was not reduced, although banks with more than 5% of a company’s outstanding stock did lose their automatic right to exercise proxy rights for other shareholders. This last provision reinforced efforts already underway at the large banks to reduce their equity holdings in Germany’s principal manufacturing firms, but it nonetheless signified a potentially decisive change by allowing alternative organizations, particularly the shareholder associations, to advertise themselves as shareholder representatives and to assume some of the voting power that German banks had long enjoyed as the virtually unquestioned custodians for smaller investors.\(^\text{35}\)

The neoliberal reformers had clearly put in place the elements of a transnational coalition for more far-reaching reductions in the power of Germany’s banks. Since they largely refrained from mobilizing this coalition in the process leading to enactment, it is hard to avoid the conclusion that the neoliberals ultimately favored only mild and incremental changes in the formal regulation of Germany’s capital markets.
III.B. Promotion: Creating an “Equity Culture”

If the federal government’s effort to refine Germany formal rules of corporate governance dissipated into growing degrees of moderation, its efforts to broaden the public’s interest in purchasing equities were more successful. The main actors in this effort were not the social partners, but the state, the large industrial corporations, the banks, and foreign financial-service firms. The European Union was not directly involved, but nonetheless provided important stimuli to the German government’s efforts to create an “equity culture.”

The German government’s interest in promoting a more vibrant equities market had several sources. As European integration proceeded, the question of European financial leadership surfaced. Frankfurt was one of the only competitors to London. But if German politicians were to promote Frankfurt as the EU’s leading financial center, Germany’s small and high-cost regional stock markets would need to be combined into a much more transparent and liquid market. Beyond wanting to promote Frankfurt’s place in the EU, the macroeconomic criteria for the Maastricht Treaty gave the federal government renewed interest in privatizing major state-owned enterprises such as Lufthansa and Deutsche Telekom. In addition to revenues, both privatizations promised to generate fees that the German government wanted to direct to German banks.

One of the first issues raised by these privatizations was the size of the German
stock markets. With only about half of the country’s top 100 firms listed in Frankfurt, the dynamism and liquidity of the stock markets in Germany were limited. Counting all domestic firms listed on German exchanges, the market value of Germany’s stock market equalled approximately 39% of gross domestic product for 1997, while listed firms on the New York Stock Exchange were valued at 133.6% of U.S. GDP.

The initial privatization of Deutsche Telekom in November 1996 was the single most important event in the government’s efforts to strengthen the equity market. The privatization had to be prepared by a complex series of legal and organizational changes, which gave the operation great visibility. In addition, the federal government bankrolled a massive advertising campaign to encourage individual investors to buy shares. The Finance Ministry appointed an international consortium of investment banks, including Goldman Sachs and Merrill Lynch, to conduct a global offering. Partly owing to the government’s careful advance promotion, the offering was oversubscribed and shares in Deutsche Telekom rose nearly 20% on the first day of trading. As authoritative observer, the Financial Times pronounced the Germans ready for their plunge into the world of equities. Immediately the privatization, Deutsche Telekom had two million shareholders, which made it the most widely held German firm, far ahead of Volkswagen (0.7 million shareholders) and Siemens (0.5 million shareholders).

In addition to dramatically broadening share ownership in Germany, Deutsche Telekom’s privatization raised the issue of accounting standards and foreign listings. Deutsche Telekom was only the second German firm, following Daimler Benz, to apply for full listing on the New York Stock Exchange. Non-U.S. firms did not need to follow
U.S. laws for board composition or ownership structure in order to list their shares in New York, but they did have to satisfy regulatory requirements for financial accounting and disclosure enforced by the Securities and Exchange Commission (SEC). Combined with its reputation as a regulatory watchdog, the SEC’s position as guardian of the world’s largest securities markets gave it great influence in setting norms for accounting transparency around the world. German firms had to maintain almost two sets of books in order to comply with U.S. generally accepted accounting principles (GAAP) as well as German accounting conventions. Before Daimler-Benz listed its shares in New York, for example, it had to reveal hidden reserves that created a discrepancy of DM 2.5 billion in profit calculated according to German versus U.S. accounting rules. The discrepancy created bad publicity, but did not harm Daimler’s SEC-registered offering in the United States, which was managed by Deutsche Bank and targeted primarily to U.S. investors. Deutsche Telekom was expected to face fewer difficulties in adopting U.S. GAAP, because its pension liabilities were being taken over by the German government and it had no inherited pension or participation reserves. Even so, like Daimler, Deutsche Telekom was obliged to show its accounts in both German GAAP and U.S. GAAP in its 1996 annual report, with substantial differences between the two.41

A conspicuous split quickly developed among well-known German companies over the desirability of following SEC requirements to follow U.S. GAAP. German managers generally preferred to avoid disclosure that would encourage shareholder activism or suits. Some larger firms such as Siemens and VW, which had considered stock listings in New York, lost interest after observing the time and expense caused by
Daimler’s listing. Others, for which an American presence was increasingly important for business reasons, adopted the alternative international accounting standards, IAS, which allowed greater discretion on the reporting of R&D expenses and the valuation of equity investments in such entities as subsidiaries and joint ventures.\textsuperscript{42} The pharmaceuticals firm, Bayer, believed that Daimler gave up too much and had “practically capitulated” in its negotiations with the SEC. Deutsche Bank, itself Daimler’s lead banker, also chose IAS as opposed to U.S. GAAP.\textsuperscript{43}

The large-firm sector was not the only target of the federal government’s efforts to promote an equity culture. Since the early 1980s, officials in the Research Ministry had tried to promote entrepreneurship in high-tech sectors by subsidizing start-up capital for new firms. Toward the end of the decade, the Ministry initiated new programs for subsidizing equity capital through two public banks, the Kreditanstalt für Wiederaufbau and the Deutsche Ausgleichsbank.\textsuperscript{44} These programs aimed explicitly at younger technologists and dovetailed with the appearance of a new venture-capital network in Germany. Although implemented by the Christian-Liberal government in Bonn, such programs found confirmed support from social-democratic experts as well.\textsuperscript{45} The decision by the Frankfurt Stock Market authorities (Deutsche Börse) to create a new market (called the Neuer Markt) for initial public offerings, consolidated a public-private effort to bolster a new equity-driven entrepreneurial sector in Germany that was quite different from the traditional Mittelstand.

These efforts to stimulate a culture of stock purchasing were far from superficial. While household savings still went largely into savings accounts and fixed-income
securities, share ownership was increasing. According to one study, the number of Germans who held shares increased from under 13 per cent in 1996 to 19 per cent in 1999. By September of 1999, German savers were investing more in equity accounts than fixed-income accounts for the first time in the postwar era. Equally important, the shareholder associations worked with brokerage houses to provide a deeper infrastructure for individual investors who sought to bypass the large banks. An incipient movement toward investor activism also emerged as the concept of shareholder rights gained more visibility.

III.C. Confrontation: Challenging the Anglo-American Model

The possibilities suggested by the growth of Germany’s equity markets became apparent through the encroachment of Anglo-American takeover tactics in Germany’s steel industry. The steel sector carried great symbolic weight because of its place in the country’s burstlike industrial growth in the nineteenth century and because it provided the clearest example of the bank-dominated capabilities that Andrew Shonfield celebrated in analyzing German industrial adjustment after World War Two. One consequence of this pattern of negotiated adjustment was that banks rarely if ever permitted hostile takeovers. Instead, in periods of growth, they discreetly planned expansions in capacity, while, in periods of recession, they work closely with labor as well as government officials to manage orderly reductions in capacity. When, in the 1990s, therefore, the banks not only countenanced but seemed to sponsor hostile takeovers, they signaled a major effort to
change the unwritten rules by which labor had participated in existing arrangements for sectoral governance.47

The stage for confrontation was set by the economic turmoil of the late 1980s. In both the coal and steel sectors, increasing competition and productivity-enhancing innovations put pressure on German firms to cut costs and rationalize capacity. One step in this direction occurred when the Krupp steel company acquired one of North Rhine Westphalia’s other major steel producers, Hoesch, in 1988. Such changes invariably ranked as high politics in North Rhine Westphalia, where IG Metall remained a major force. Krupp’s acquisition of Hoesch was particularly controversial because Krupp’s ownership structure, dominated by a family foundation, was exempt from the stronger form of codetermination (Montanmitbestimmung) that applied to Hoesch. Following this merger, steel executives and political leaders periodically raised the issue of further rationalization between Krupp and the region’s other major producer, Thyssen. Growing impatient with ongoing negotiations, the chairmen of Krupp’s supervisory and managing boards, Berthod Beitz and Gerhard Cromme, assembled the financial backing necessary to make an unsolicited tender offer to Thyssen’s shareholders in early 1997.48

The prospect of a hostile takeover deviated dramatically from the norms of coordinated management that had become deeply rooted in the steel industry. When Krupp’s plans were leaked to the press in March 1997, they provoked a storm of protest. Thyssen’s chief executive, Dieter Vogel, saw Krupp’s offer as a tactic to circumvent more deliberate negotiations. The nature of the banking consortium that financed Krupp’s takeover attempt aroused more general protest. Deutsche Bank was widely criticized for
a de facto conflict of interest, because its investment banking subsidiary, Morgan Grenfell, advised Krupp even while a Deutsche Bank officer sat silently on Thyssen’s supervisory board. Dresdner Bank was also criticized for its ties to both firms. These points mattered because Thyssen’s board structure, like Hoesch’s, fell under the 1951 legislation for Montanmitbestimmung. Since a takeover by Krupp would remove Thyssen from the full parity provided by Montanmitbestimmung, every vote on Thyssen’s supervisory board was potentially crucial. The banks with members on both boards were heavily criticized. The presence of Goldman Sachs among Krupp’s advisors provoked further charges that Krupp was importing an Anglo-American type of “casino capitalism” into Germany.49

Krupp’s plans also triggered an intricate set of negative reactions in the political sphere. Although the regional government in North Rhine Westphalia had often tried to facilitate rationalization in this industry, it opposed Krupp’s use of hostile takeover tactics to accomplish this goal. For one thing, Krupp was more deeply indebted than Thyssen, causing concern in the government about the economic wisdom as well as the political costs of the takeover.50 The Social Democratic leader of the regional government in North Rhine Westphalia, Johannes Rau, summoned leaders of both firms to a dinner meeting on March 18, one day after the initial press reports, and persuaded them to begin talks toward a quick and mutual resolution. As talks began on March 20, the regional economics minister, Wolfgang Clement, set out the government’s goals in a speech to the regional legislature (Landtag) in Düsseldorf. Clement claimed a major voice for the regional government in persuading the two companies to reach a mutually acceptable plan (Konzept) within eight days. He said that this goal required close communication among
the company leadership, the steelworkers represented by IG Metall, and the works
councils. Emphasizing the importance of such communication, Clement invoked the term,
certed action (Konzertierte Aktion), reminiscent of tripartite wage-bargaining in the
1970s. Even as the CDU leaders in Bonn denied that the Krupp-Thyssen talks required
any federal involvement, minister Clement in Düsseldorf. emphasized the need for a full-
employment solution.51

Pressure on the two companies increased dramatically toward the end of the week-
long negotiating period. On March 25, roughly thirty thousand steelworkers
demonstrated in front of Deutsche Bank’s headquarters in Frankfurt while another six
thousand demonstrated in Dortmund. According to some reports, Thyssen helped
transport the steelworkers to Frankfurt to give them a forum for attacking the “wild west”
tactics of Krupp and its financial backers.52 Even as he negotiated with Krupp’s chief
executive, Gerhard Cromme in Düsseldorf, Thyssen’s chief executive, Dieter Vogel,
helped mobilize the steelworkers to forestall the solution that Krupp had initially wanted.
The day after the demonstrations, Krupp and Thyssen issued a joint memorandum,
announcing that the two companies would merge their steel operations. Rather than the
original model, in which Krupp would control the merged entity, the talks in Duesseldorf
generated a solution in which Thyssen would hold 60% of the merged company’s shares.
Both companies renounced the use of involuntary layoffs and announced their intention to
meet soon with representatives of the employees and IG Metall. In addition, both chief
executives thanked the regional economics minister Clement for helping moderate the
talks.53
This sequence of events marked a clear setback for the proponents of a more open market for corporate control in Germany. Gerhard Cromme, Krupp’s chairman, claimed that the solution achieved all of his company’s aims for greater efficiency, but he also complained that Germany’s financial markets had not been “ready” (reif) for an unsolicited takeover bid and argued for the dismantling of Germany’s encrusted structures (verkrusteten Strukturen) of financial management. For Thyssen as well as IG Metall, the mediation of the regional government led to a far more satisfactory outcome. The government’s role lessened Krupp’s relative power in the merged entity and obliged both companies to negotiate continually with employee representatives over organizational structures and practices for the new firm.

This case clearly contradicts the argument that Germany’s economic institutions are inexorably converging on those of Anglo-American style capitalism. At the same time, however, the story is not a simple revival of neocorporatist social partnership at the regional level. First, the interests of the firms were by no means congruent. Inasmuch as Thyssen invited cooperation from IG Metall in opposing Krupp’s unsolicited tender, it was as much management as labor that tried to prevent the unrestrained sway of financial power. Second, after the companies agreed to merge, they set up a detailed system of consultation with the works councils and the representatives of IG Metall to help plan and implement specific restructuring measures. These consultative mechanisms at the firm level exemplified a willingness to experiment with strategic partnership that went well beyond standard accounts of neocorporatist economic bargaining. In the Krupp-Thyssen case, the union negotiated a series of such “coordinating” bodies for each of the
company’s functional divisions. These new structures went part of the way toward replacing through contractual means the protections earlier guaranteed to Thyssen employees through Montanmitbestimmung. As one union representative interpreted it, the Krupp-Thyssen merger represented a victory for the Rhineland variant of negotiated German capitalism, but it also signalled that labor would have to elaborate a range of new consultative policies (Begleitpolitik) to maintain a day-to-day voice in the industry’s restructuring. ⁵⁶

IV Conclusion

By documenting the different types of politics that are shaping the future of corporate governance in Germany, these three instances of contestation illustrate the depth of the tension between the Anglo-American conception of property rights and the German conception of the firm as a constitutional construction for balancing the interests of contending social groups. The questions at stake are how widely German firms will adopt the shareholder-value approach and how they will adapt it to their legally required commitments to provide a regular voice for employees as well as owners in the running of industrial companies.

The formal legal changes to date show a pattern that appears deceptively similar to previous examples of incrementalism and negotiated change in the Federal Republic. ⁵⁷ The initial debate over a new law on stock ownership quickly settled into a smaller-scale discussion of the transparency and independence of the supervisory boards. The Free
Democrats sometimes claimed to want far-reaching reforms, but ended up by tinkering with existing structures rather than proposing the whole-sale reductions in bank power sought by the Social Democrats. In the confrontation over Krupp’s takeover effort, the SPD government in North Rhine Westphalia intervened to moderate any move away from accepted neocorporatist processes of industrial policymaking. And the steelworkers were called out as much by Thyssen’s management as by IG Metall, with the purpose of thwarting Krupp’s effort to push Germany toward the Anglo-American example of a more freewheeling market for corporate mergers and acquisitions. Of three three cases examined here, the government’s efforts to create an “equity culture” through the privatization of Deutsche Telekom had the most far-reaching consequences by deepening the infrastructure for new equity issues and thereby encouraging a significantly broader segment of the German public to purchase shares.

The incremental scope of formal legal change accurately reflects the balance of power among Germany’s political parties. Just as they prefer a politics of negotiation among large organized groups in the political arena, both the CDU and the SPD support the representation of contending social interests in large industrial enterprises. From their different ideological traditions, both of the large parties therefore uphold some kind of regularized voice for employees at the company level -- thereby putting a brake on any radical efforts to dismantle the laws on codetermination. The Greens, while espousing a Jeffersonian attachment to small-scale enterprise, have not played a prominent role in legislation for corporate organization. As the main party that champions individual choice over large group negotiation in economic policy-making, the FDP is therefore limited to
proposing moderate changes in the role of the banks while avoiding any direct assault on the labor’s codetermination rights.

A more important reason for the limited extent of formal-legal change comes from the genuine ambivalence and uncertainty among Germany’s business leaders about where their interests lie. Individual business leaders have periodically complained about the unwieldy procedures required by codetermination, but the peak employer associations have consistently recognized the importance of works councils in insulating plant-level consultation from collective bargaining and providing important shop-floor information.58 Labor’s role at the supervisory-board level provoked more criticism from business representatives in the debates over corporate governance, but here, too, prominent German employers decided against tinkering with arrangements that conferred many advantages. The case of Daimler-Benz is especially illustrative. When Daimler established a U.S. production plant in Alabama, its Mercedes auto division happily managed the new facility as one of its only non-union sites.59 Daimler subsequently emphasized the language of shareholder value in negotiating with U.S. investors and regulators over listing its shares in New York. In Stuttgart, however, the company took great pains to maintain workforce loyalty. When Daimler’s merger with Chrysler occurred in 1998, the company chose to maintain its legal status as a German enterprise and made German institutions of social partnership its model for cross-border holdings by accepting a representative of the United Auto Workers on the supervisory board of the merged entity.60 Similarly, while Deutsche Bank actively champions the openness and transparency that are needed in maintaining Frankfurt’s credentials as a European financial
center, it also seeks to perpetuate its privileged ties with Germany’s largest enterprises. These examples follow a familiar pattern by which German firms tend to emphasize the language of economic liberalism in international negotiations while continuing to invest in the long-term relationships that anchor their positions in the domestic economy.

Such mixed messages are more than an exercise in cross-border public relations. They also reflect a deeper analytic issue. Institutional analyses often distinguish between actors behaving strategically within a known set of rules and actors seeking to alter the rules that govern their interactions. In the debate about corporate governance, actors are not seeking to alter the rules by which they compete but rather the rules by which they and their competitors are themselves constituted. In such a situation, firms are effectively faced with the problem of figuring out which rules might work to their benefit while simultaneously deciding what it should mean to be a firm in the first place. It is hardly surprising that business preferences in such a situation are subject to change. Until the menu of likely institutional alternatives is clarified, firms cannot calculate their payoffs reliably and preferences are not likely to coalesce. This process of institutional clarification necessarily involves more than jockeying for strategic advantage; it is also a process of deliberation about the underlying goals of economic production and exchange.

The uncertainty of business preferences is one important reason that the politics of corporate governance take on a transnational dimension. All parties to this debate seek to preserve the inherited features of German institutions that best fit their needs while espousing those elements of newer institutional models that enable them to join the
modern and forward-looking camp. Alliances with non-German actors provide one way of achieving this goal. In the steel merger, for example, Krupp’s executives failed to impose their plan for a simple merger, but managed to bring Thyssen to the bargaining table by recruiting non-German banks, Morgan Grenfell and Goldman Sachs. In its discussions about listing its shares on the New York Stock Exchange, Daimler-Benz saw advantage in breaking ranks with other German firms by accepting the accounting standards of the U.S. Securities and Exchange Commission. In debating the formal rules of corporate governance, economic liberals in the Ministries of Justice and Economics allowed access to non-German capital holders and helped them align their interests with the domestic German shareholder associations. The transnational dimension suggests that the advocates of neoliberal reform, while weak in the arena of domestic party politics, are potent in the arena of organizational recipes and ideas. By linking their positions to those of activist pension funds and fiduciary organizations abroad, the German shareholder associations can shape the terms of debate by positioning themselves as the most stalwart proponents of a more open and flexible economy.

For all of these reasons, it would be an analytic mistake to underestimate the importance of the shifts that underlie the modest formal-legal changes enacted to date. The highly intentional creation of an “equity culture” in Germany has precipitated more than a shift in attitudes. By extending and literally advertising the rights of individuals to purchase shares, the German state prompted individuals to invest a significantly larger proportion of household financial assets in equities. By reinforcing the language of shareholder value, the new “equity culture” also created opening for aggressive foreign
entrants, as shown in Vodafone’s bid for Mannesmann in late 1999. The creation of a new market for small entrepreneurial start-up firms was also significant, because it gave younger Germans a sense that equity financing on the U.S. model can provide career possibilities that were previously dominated if not monopolized by larger and more established firms. All of these changes favor the continuing growth of the shareholder protection associations, the disaggregation of voting rights, and a limited but significant shift away from the prevailing pattern of block ownership for large enterprises.

What are the possible outcomes? One possibility is the imposition of reform from above. Although it seems like a logical place for the European Commission to assert itself, the likelihood of a pan-European reform enforced by Brussels is “distant.” The proponents of neoliberal reform within Germany often look to the Competition Directorate in Brussels for support, but the Commission’s weakness in this debate so far testifies to the great difficulty of finding guidelines acceptable to all member states. Partly owing to this intractability, other international organizations such as the OECD and the World Bank have launched important initiatives on corporate governance. While the OECD initiative is important for Germany, the generic nature of the OECD guidelines suggest that they are meant to prompt further discussion more than to impose new practices. A second possible outcome is continued resilience of German laws and practices in the face of all outside influences. This outcome is also unlikely because almost all groups within Germany agree that some degree of change in the structure of equity markets is desirable.

The third and most likely outcome is a process of ongoing improvisation that
occurs as new patterns of interest become clear. These new patterns of interest will rest on several factors: the perceptions of large firms about the relative value of stability versus flexibility in industrial relations; the perceptions of large bank managers about the pros and cons of arms-length versus more integrated ties to the industrial customers; the emerging markets for new financial-services firms; and the opportunities for small entrepreneurs in search of capital. At the level of individual investors, as more German hold shares -- and vote those shares independently rather than through the banks – there is more chance that they will adopt Anglo-American criteria of shareholder value in evaluating their holdings. Significant as such a shift would be, it would not necessarily imply a wholesale adoption of Anglo-American practices. The spread of American-style compensation schemes is, for example, very likely to be limited by German expectations that prevent the huge disparities in income acceptable in the United States. While continuing change in the rules of corporate governance is highly likely, it will therefore be change of a hybrid sort in which the German view of the firm as a constitutional embodiment of social partnership remains a clear reference point in evaluating the shareholder rights supported by the proponents of more Anglo-American definitions.

This hybrid process of institutional imitation and adaptation shows why very different mechanisms of change will continue to complement each other in linking globalization to the processes of domestic politics. The examples of financial distress, merger, and acquisition in Germany all point to the operation of competitive selection. For corporate governance, however, such instances served more as signals of something amiss than as unambiguous evidence for the superiority of one approach over another. To
see how German firms and organizations interpreted these competitive pressures, the mechanisms of coercive and mimetic isomorphism proved most revealing. Some firms – including both Daimler Benz and Telekom – adjusted to the requirements of powerful regulatory agencies abroad such as the American Securities and Exchange Commission. Other organizations – such as the shareholder associations – articulated their goals in terms that made them likely allies for Calpers and other fiduciary actors in the United States. Yet when Krupp retained Goldman Sachs to help plan its hostile takeover of Thyssen, the resort to Anglo-American practice backfired and the merger was accomplished only by improvising on the more familiar formula of high-level negotiations facilitated by the regional government.

In all three cases, direct transnational ties between particular pairs of organizations conveyed norms as well as financial pressures from abroad to the arena of domestic German politics. Such cases show that proponents of neoliberal reform can readily import new ideas from abroad. At the same time, nothing precludes alternatives for firm-level governance from emerging and taking root within Germany. While such home-grown innovations cannot be forecast with certainty, the current diversity in Germany’s industrial landscape suggests that they are likely to occur among large firms as well as the smaller and more insulated firms of Germany’s Mittelstand. This view suggests that pressures from the international economy will provoke changes in the German economy, but that the changes will build upon Germany’s inherited institutions for regularized consultation with labor even as the methods and techniques of equity-based financing encroach on sectors previously dominated by German institutions for bank-led financing.
Since the interests of different segments of the business community are likely to shift as new institutional possibilities come into view, new ideas may be as valuable as new resources in this debate. Accordingly, the conventional politics of pushing and hauling captures neither the full weight nor the potential for longer-term change implicit in the issues at stake. The question of corporate governance hinges on more than the changes wrought by competitive selection or the adjustments negotiated by domestic actors pursuing clear goals. Ultimately, it hinges on a contest at the level of ideas about the purposes of industrial enterprise and about whether there is a difference between having a stake and having a share in that enterprise.
Acknowledgement: For comments and suggestions, I thank Fred Block, Neil Fligstein, Peter Hall, Rainer Hank, John Leslie, Peter Katzenstein, Jutta Kneissel, Suzanne Lütz, William Ocasio, David Plotke, Kathleen Thelen, Sigurt Vitols, Margaret Weir, and Steven Weber. Financial support for this research was provided by the German Marshall Fund of the United States, the Center for European Studies at Harvard University, and the Center for German and European Studies, Berkeley. Earlier versions were presented at the Workshop on Globalization and European Governance, University of California, Berkeley, April 14, 1998; the Annual Meetings of the American Political Science Association, Boston, Massachusetts, September 3-6, 1998; and the Workshop on Liberalism and Change, University of California, Berkeley, January 22-23, 1999.

NOTES


3. For the historical emergence of Germany’s constitutional treatment of the firm versus the approaches taken in other countries, see especially Gregory Jackson, “Corporate Governance in Germany and Japan: Developments within National and International Contexts (Typescript: Max-Planck-Institut für Gesellschaftsforschung, 1997); Sigurt Vitols, Steven Casper, David Soskice and Stephen Woolcock, “Corporate Governance in Large British and German Companies: Comparative Institutional Advantage or Competing for Best Practice” (Anglo-German Foundation for the Study of Industrial Society, London, 1997); and Mary O’Sullivan, “Corporate Governance in Germany: Productive and Financial Challenges” (Annandale-on-Hudson, N.Y.: Jerome Levy Economics Institute, 1998). For selected perspectives from the wide literature on comparative corporate governance, see Richard Buxbaum, “Comparative Aspects of Institutional Investment and Corporate Governance” and other essays in Theodor Baums, Richard M. Buxbaum, Klaus J. Hopt, eds., Institutional Investors and Corporate Governance (Berlin: de Gruyter, 1994); and Andrei Shleifer and Robert W. Vishny, “A Survey of Corporate Governance,” Journal of Finance (June 1997): 737-783.


7. A more comprehensive description would have to include a country’s provisions under at least four categories: (1) the formal rules that establish the terms of liability and authority within a firm; (2) the distribution of ownership among different interest groups in a society; (3) the rights of lenders (debt-holders) as opposed to owners (shareholders); (4) the informal patterns of decision-making that characterize top management’s links to external constituencies as well as internal stakeholders. For these issues, see Jonathan R. Macey and Geoffrey P. Miller, “Corporate Governance and Commercial Banking: a Comparative Examination of Germany, Japan, and the United States,” *Stanford Law Review* 48: 1 (Nov, 1995):73-112; and Mark J. Roe, “Some Differences in Corporate Structure in Germany, Japan, and the United States” (Symposium: Economic Competitiveness and the Law), *Yale Law Journal* 102: 8 (June, 1993): 1927-1003; Roberta Romano, “A Cautionary Note on Drawing Lessons from Comparative Corporate Law (response to article by Mark J. Roe),” *Yale Law Journal* 102: 8 (June, 1993):


11. See Hans Willy Hohn, *Von der Einheitsgewerkschaft zum Betriebssyndikalismus: Soziale Schließung im dualen System der Interessenvertretung* (Berlin: Sigma, 1988); Peter J.


15. Mark Roe, Strong Managers, Weak Owners (note 2).


17. For an example of this logic, see William Emmons and Frank A. Schmid, “Universal

18. In 1970, corporations or joint-stock companies (Aktiengesellschaften) employed roughly 33.5% of German workers, but comprised less than 2% of the 1.9 million enterprises in Germany. The others were single proprietorships (91%), partnerships of different types (5.8%), cooperatives (0.7%), non-stock private companies (0.2%), and public companies (0.2%). Figures from Alfred Thimm, “How Far Should German Codetermination Go?” Challenge 11 (July/August 1981). For these different organizational forms and their legal status, see Germany’s Commercial Law Code, the Handelsgesetzbuch (HGB), articles 17-37a.


28. Rainer Funke, parliamentary state secretary of the Justice Ministry, quoted in the Financial

Financial Times (11 April 1996) and (24 June 1996).

Interview, Ministry of Justice, Bonn, June 1998. The evolving views of Calpers on corporate governance in Japan, France, and Germany are available on its website: www.calpers.ca.gov/invest/corpgov/cggermany.htm In 1996, Calpers was primarily concerned with U.S.-based efforts to bring more “outsiders” or non-management directors to American boards – a priority which at best addressed awkwardly the tensions within Germany’s two-board system.


Ibid.

Interviews, Office of Margareta Wolf, Green Party spokeswoman for economics, finance, research, and technology, Bonn, June 1999; Office of Hans-Martin Bury, SPD spokesman for economic, finance, and technology, Bonn, June 1999. For the Greens’ position on corporate governance, see the published version of a roundtable, held 5 March 1997, in

35. Handelsblatt (6-7 March 1997): 6. My thanks to John Cioffi for reminding me of this provision’s significance.


38. Figures from Lanoo (see above, note 23), page 274. The corresponding figure for the market valuation of all British firms as a proportion of British GDP was 193.7%.


40. Figures from the dpa (deutsche Presseagentur), November 1996, and available (as of May 1999) at the website for Deutsche Telekom

41. In keeping with the more closed nature of financial governance in Germany, the German financial press reported on these cross-listings in notably less detail than English language publications. The best accounts on these particular cross-listings are from Euromoney (April 1995), Euromoney (May 1995) and Economist (17 September 1994). For the reconciliation of Deutsche Telekom’s 1996 accounts, see the company’s Geschäftsbericht (Annual Report), 1996.


44. Marianne Kulicke, u.a., Chancen und Risiken junger Technologieunternehmen: Ergebnisse des Modellversuchs “Förderung technologieorientierter Unternehmensgründungen” (Heidelberg: Physica-Verlag, 1993).

45. Peter Glotz and Uwe Thomas, Das dritte Wirtschaftswunder: Aufbruch in eine neue Gründerzeit (Düsseldorf: Econ, 1994).

46. Results of the study, by the Institut für praxisorientierte Sozialforschung (ipos), appeared in the website of the Federal Association of German Banks (Bundesverband Deutshcer Banken) – < http://www.bdb.de/presse/interes/aktuell.htm > – under the heading


48. This account is based on interviews with representatives of the regional government of North Rhine Westphalia and IG Metall in Düsseldorf, June 1998, and June, 1999, as well as the documentary sources cited below.

49. Süddeutsche Zeitung (26 March 1997).


52. Süddeutsche Zeitung (26 March 1997) and Sunday Times (London) (30 March 1997).


55. For additional information on new arrangements for labor-management cooperation in firm-level strategy and change, see the important Report of the Commission on Codetermination, Mitbestimmung und neue Unternehmenskulteren (Bertelsmann Stiftung und Hans-Böckler Stiftung, 1998).


62. Choice-theoretic accounts grapple with this problem as an extreme example of the unintended consequences of institutional change, which can disappoint actors who opt for particular institutional alternatives only to find that the chosen arrangements do not

63. For the general difficulty involved in imputing “pre-political” preferences and focusing analysis on the way actors with fixed preferences proceed, see Cass R. Sunstein, Free Markets and Social Justice (New York: Oxford University Press, 1997), 21-23.

64. Lanoo (above note 23), page 280.

65. The “OECD Principles of Corporate Governance” were developed at the request of the OECD Council meeting of 27-28 April 1998 and published on the OECD website <http://oecd.org/dag/governance/principles.htm> on May 18, 1999.