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Adversarialism versus legalism: Juridification and litigation in corporate governance reform

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Abstract

Recent reforms of corporate governance law and related litigation rules in the US and in Germany indicate that reports of the spread of adversarial legalism are greatly exaggerated. Politics and legislation in the US since the mid-1990s have turned quite decisively against shareholder litigation even as corporate governance and securities law reforms have expanded the role and scope of the regulatory state. Germany's extraordinary expansion of financial and corporate governance regulation since the early 1990s exemplifies juridification. Although these reforms included some liberalization of shareholder litigation rules, the changes reflected skepticism towards private litigation and imposed new constraints on the most prevalent forms of shareholder suits. Marketization of economic relations and the era of finance capitalism have produced far more legalism than adversarialism, more regulation than judicialization, and more ex ante transparency rules than ex post litigation remedies.

Keywords: adversarial legalism, corporate governance reform, litigation, securities regulation.

Introduction

Over the past two decades, financial globalization and upheaval has been accompanied by fundamental reforms of the regulation, structure, and operation of domestic financial systems and national corporate governance regimes.[1] These reforms have favored the interests of shareholders even in countries that historically have favored more stakeholder-oriented forms of governance. The globalization of finance and the spread of pro-shareholder policies and legal changes reflected the burgeoning influence and appeal of the American financial and corporate governance model that began during the 1980s, peaked during the 1990s, and persisted until the collapse of the American (and then the international) financial system in 2007–2008. Daniel Kelemen and Eric Sibbitt have argued that the influence of the American political economic model has resulted in the spread of what Robert A. Kagan has defined as "adversarial legalism" to the countries of Western Europe (Kagan 2001; Kelemen & Sibbitt 2004).[2] Corporate governance and securities regulation provide ideal areas of law to test this proposition. Kelemen and Sibbitt used securities law and regulation, along with product liability law, as the bases of their comparative analysis. Kagan had earlier identified the areas of corporate governance

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law and financial regulation as most likely to develop characteristics of adversarial legalism (Kagan 1997). Further, corporate governance law has been an especially important area of reform in light of its increasing centrality to political economic organization in an era of financial globalization and increasingly serious – and now disastrous – international financial crises.

This article assesses the claim that adversarial legalism has spread cross-nationally during recent decades by examining recent reforms of corporate governance law and related litigation rules in the US and in Germany. Adversarial legalism refers to the litigation-intensive and lawyer-driven means of enforcing highly detailed and prescriptive legal rules characteristic of law and policy in the US (Kagan 1997, 2001). Kelemen and Sibbitt contend that Continental countries, which traditionally eschewed high levels of litigation as a mode of enforcing legal norms and governance relations, have embraced the expansion of formal, pro-shareholder securities regulation and judicially enforceable shareholder rights (Kelemen & Sibbitt 2004, p. 118).[3] If true, this would represent a substantial change in the characteristic mechanisms of governance that order and define economic relations in Western Europe. The Kelemen and Sibbitt thesis, if correct, would identify an extraordinary development in legal and political economic regimes outside the US. If not, it still provokes an important addition to the debate over cross-national convergence of political economic systems on the neoliberal model.

The analysis here focuses on the legal substance and structural character of corporate governance reforms adopted in Germany since the early 1990s alongside legal changes in the US over the past 15 years. The US and Germany are commonly described as representing divergent paradigmatic forms of political economic and juridical ordering. Their legal systems are highly developed yet historically divergent, not merely in terms of the often overdrawn distinction between common and civil law systems, but, more importantly, with respect to Germany's relatively undeveloped securities regulation, legal recognition of stakeholder interests, and litigation-deterring procedural rules.[4] The selection of the German case in addition to the American allows us to examine the development of areas of law and regulation that should be the *most likely* to display convergence on adversarial legalism, in the context of *most different cases*. The case study method is essential in this inquiry. The absence of comparable data on litigation rates with respect to securities and corporate governance issues make a straightforward quantitative assessment of any change in litigiousness in the two regimes impossible. The alternative offered by legal–structural analysis has the added benefit of illuminating the political dynamics of reform.

I conclude that reports of the spread of adversarial legalism are greatly exaggerated. The centrality of litigation as an enforcement mechanism has declined in the US since the mid-1990s and German law remains substantially inhospitable to lawsuits. Outside of the American political and institutional environment, there are important structural and political impediments to development of more litigation prone governance regimes, as evidenced by a review of German regulatory and corporate governance reform. Beginning in the early 1990s, Germany embarked on an extraordinary expansion of financial and corporate governance regulation, and this reform process included some liberalization of the rules governing shareholder litigation. However, these changes not only betrayed skepticism towards private litigation, but also imposed new constraints on shareholder suits where they had proven susceptible to abuse and opportunism by plaintiffs' attorneys. This does not add up to a cross-national diffusion of adversarial legalism.

Moreover, not even the US is quite as adversarial as it once was. The argument that adversarial legalism has spread cross-nationally must confront the awkward fact that politics in the US during this same period turned quite decisively against shareholder litigation and produced legislation designed to curb it.

The evidence of legal change adduced here suggests that adversarialism and legalism must be distinguished (see also Levi-Faur 2005, pp. 452, 458–459). Legalism in corporate governance has expanded in the US and has proliferated in Germany (as well as in many other countries around the world). German corporate governance reform reveals tendencies toward the marketization of finance and a striking growth of securities regulation and shareholder rights. The development of German corporate governance law since the early 1990s exemplifies *juridification* – the prevalence and encroachment of formal legal rules over socio-economic relations previously governed by informal norms, social values, and institutional practices.[5] However, these trends toward juridification have not been accompanied by a commensurate expansion of the role of litigation and the courts in enforcing these proliferating rules. In the era of finance capitalism, legalism has outpaced adversarialism by a wide margin. If an overarching trend can be derived from this comparative analysis, it is that the era of finance capitalism (which is not by any means over despite the catastrophic crisis engulfing the world's financial markets) is also the age of regulatory capitalism, with the expansion of legislation and regulatory bureaucracies rather than litigation and judicialization.

American adversarial legalism and its discontents

The structural roots of adversarial legalism

Any consideration of the "Americanization" of law or, more specifically, the spread of litigious and legalistic mechanisms of governance and enforcement must begin with a conceptual and causal consideration of adversarial legalism.[6] Drawing on Robert A. Kagan's seminal work on adversarial legalism, Kelemen and Sibbitt's "working definition of American legal style focuses on the two most fundamental distinguishing characteristics of American law (1) the emphasis on enforcing legal norms through transparency and (2) broad empowerment of private actors to assert legal rights" (Kelemen & Sibbitt 2004, pp. 105–106). They note, correctly, that the foundational legal norm and regulatory approach of transparency "manifests itself throughout American law and legal practice in the prevalence of highly detailed, transparent legal rules and regulatory procedures, extensive disclosure requirements, and the active use of formal implementation and enforcement proceedings by regulators" (Kelemen & Sibbitt 2004, pp. 105–106). The adversarial character of the American legal style is rooted in those features that "empower private actors to assert their rights through adversarial legal contestation," including statutes and case law establishing private rights of action, liberal discovery rules, lax standing requirements, class action procedures, contingency fee arrangements, and "an abundance of lawyers" to aid in exercising procedural rights and in enforcing substantive rights through threatened or actual litigation (Kelemen & Sibbitt 2004, p. 106). Following Kagan, they note that in this legal environment economic disputes become lawyer centric and litigation prone.

Compounding the problems of American policymaking and enforcement is a political culture and ideological legacy of classical liberalism, with its strong bias toward private, contractual, and market-driven modes of economic organization and intense suspicion of centralized power, be it in Washington or on Wall Street, and business elites who strenuously resisted regulatory encroachments on their autonomy (See Roe 1991; Kagan 1991; c.f. Zysman 1983). Hence, the growth of the regulatory state in the US was particularly fraught with conflict over its legitimacy. This fueled a broad political agreement over the need for high levels of legislative and judicial oversight to ensure legal accountability of regulatory bodies and business managers alike. Yet this intersection of structural and ideological features of American political life tended to impair coherent, long-term policymaking and empowered economic elites to resist governmental encroachment on power relations within the private sphere.

A highly conflictual and veto-prone political structure substantially empowered the courts. First, the separation of powers and federalism generated enormous legal complexity in a context of ongoing inter-branch, intra-branch, and inter-governmental conflict over legal interpretation and enforcement. As a consequence of this combination of institutional fragmentation and openness to interest group pressures in the political system, American law has long displayed a distinctive and paradoxical form: legal rules tend to be highly detailed and prescriptive yet are also often rife with ambiguity and conflicting provisions that require extensive judicial interpretations. Statutory law locks in otherwise ephemeral political bargains, yet legal ambiguity frequently serves to ameliorate political conflicts and facilitate legislative agreements over substantive policies. Multiple veto points further empowered the courts by making it exceedingly difficult to over-ride judicial interpretations in the absence of unusually broad political consensus. Policy conflicts within a fragmented institutional structure thus gave courts far greater latitude to impose judicial policy preferences through statutory interpretation than would be likely in a more centralized parliamentary system (Atiyah & Summers 1987).

Second, during much of the postwar period and well into the 1980s, suspicion of regulatory authority and governmental enforcement powers led to the proliferation of private litigation mechanisms to ensure greater compliance with legal standards.[7] The American adjudicatory model gave rise to a form of litigation that was at once highly formal in its reliance on legal norms and "co-ordinate" in its devolution of influence over the litigation process to opposing attorneys (Damaska 1986; Kagan 1997, pp. 167–186). The creation of private rights of action by statute or by the courts (with legislative acquiescence) indicated the broad consensus in favor of litigious enforcement mechanisms during these decades (a consensus that has since broken down). In securities law, federal courts implied private rights of action to sue for violations of disclosure rules, which gave rise to a lucrative litigation industry.

However, it is important not to overstate the favorability of American substantive law to shareholder plaintiffs, particularly under corporate law. American corporation law gives shareholders relatively few approval rights over major corporate decisions. Further, claims for breach of fiduciary duties are subject to the "business judgment rule," which creates the judicial presumption that corporate directors or officers "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[8] An important partial exception to the vitiating effect of the business judgment rule is where conflicts of interest are alleged, particularly in cases of hostile takeovers, but the fact remains that fiduciary duty claims have long been difficult to prosecute.

In addition to the proliferation of private rights of action, procedural rules favoring private litigation reinforced the propensity to sue in the US. American procedural law –

at both state and federal levels – allowed contingency fees and, in some circumstances, provided for the recovery of fees from defendants. Under federal and state law, class action procedures are available to consolidate claims sharing common nuclei of fact and law, and enabling the collective litigation of a multitude of small claims that would otherwise not be worth pursuing in court on an individual basis. State corporation laws granted shareholders comparatively expansive rights to pursue derivative actions against directors and officers on behalf of the corporation. The traditional common law judicial role of the judge as referee, rather than as the director of the litigation process as in more inquisitorial civil law systems, further empowered plaintiffs' lawyers. In contrast to the bureaucratized civil service ideal of the judiciary common overseas, the unusually politicized process of selecting generalist judges in the US, whether by election or political appointment, magnified the uncertainty in adjudicatory outcomes, the activism of court's lawmaking, and the ability of parties in complex cases and areas of law to influence the course of litigation.

Attorney control over the litigation process, particularly in complex shareholder and corporate litigation, became especially important in connection with the conduct of discovery. Permissive discovery rules not only allowed plaintiffs to prove meritorious suits by forcing disclosure of incriminating facts, but also threatened corporate defendants with vastly higher litigation costs in cases not dismissed at their inception for failure to state a legally cognizable claim. Favorable procedural rules certainly made successful litigation of meritorious claims more likely, but also massively increased the leverage of plaintiffs' attorneys to extract settlements from corporate defendants (along with directors and managerial officers) in more dubious cases, thus raising the threat of strike suits filed that enriched lawyers with few if any actual benefits accruing to shareholders (e.g. Alexander 1991; c.f. Seligman 1996). These procedural mechanisms created the structural foundations and economic incentives for the emergence of a large, aggressive, and wealthy plaintiffs' bar. This segment of the legal profession became a political power in its own right, closely affiliated with the Democratic Party and devoted to protecting and expanding the legal structures on which it depended (c.f. Cioffi 2007).

The anti-litigation backlash

Securities and corporate governance litigation provides an important example of American adversarial legalism as it developed during the postwar and subsequent conservative neoliberal eras. Even as market-driven finance and financially driven corporate management and governance practices proliferated, securities regulation and bodies of corporate law expanded to protect the increasingly important interests of investors. Shareholder rights were strengthened and expanded by legislation, regulation, and adjudication. From the 1970s through to the 1990s, shareholder litigation became an increasingly prevalent means of enforcing legal norms – and, from a more skeptical perspective, an industry unto itself – as the number of suits under both federal securities law and state corporation laws rose.

Shareholder litigation became the subject of intensifying political attacks by Republicans and, ultimately, the target of two major pieces of securities litigation reform legislation drafted to curtail shareholder lawsuits for securities fraud (Cioffi 2007). The Private Securities Litigation Reform Act of 1995 (PSLRA), passed over President Clinton's veto, substantially raised pleading requirements in securities fraud cases under federal law (making them easier to dismiss prior to the expensive discovery process) and gave large investors more control over the retention of counsel and the conduct of class action litigation.[9] The Securities Litigation Uniform Standards Act of 1998, enacted with strong bi-partisan support in Congress and the Clinton Administration, pre-empted state securities laws to prevent plaintiffs' attorneys from circumventing the new and more demanding pleading rules.[10]

The federal courts also became far less hospitable to securities litigation during the 1980s and 1990s. The Supreme Court largely abolished "aiding and abetting" liability, under which accounting and law firms could be held liable for fraudulent statements and omissions by publicly traded corporate clients.[11] Likewise, the federal courts have strictly interpreted the PSLRA to further curb litigation and narrowly construed the Sarbanes-Oxley Act to reject any private actions for violations of its provisions. There is thus an underappreciated irony in any argument that American adversarial legalism is spreading around the world, at least as it applies to corporate governance and shareholder rights: even the US, the well-spring of adversarial legalism, has retreated from this approach to legal enforcement, at least in the area of securities and corporate governance law. However, this antilitigation trend in the US should not be interpreted as evidence of convergence on less litigious political economic models. Securities and corporate governance litigation remains common and enormously important in the US as an enforcement mechanism (Cioffi 2007).

Adversarial legalism in comparative perspective

At the same time American politics began to shift decisively away from litigation as a primary mechanism of legal enforcement in securities and corporate governance matters, historically less litigious countries appeared to move towards American-style law and regulation in the areas of securities and company law. The substantial legal reforms of securities regulation and company law in Europe that have been adopted during the past 15–20 years strongly suggest that the American juridical model of corporate finance and governance was extremely influential (Cioffi 2002; Höpner 2003; Cioffi & Höpner 2006a,b). During the 1990s and continuing into the 2000s countries that had traditionally bank-based financial systems, and thus historically low levels of equity financing, embarked on legal reforms designed to protect shareholder interests by enhancing their rights vis-à-vis managers, controlling blockholders, and – to a lesser extent – other stakeholders.

At first glance, this development is puzzling. Adversarial legalism as a structural phenomenon and as the long-term outcome of socio-political processes is, in Kagan's account, the product of the idiosyncratic institutional and ideological conditions of American politics. Accordingly, adversarial legalism as a conceptual framework and as an empirically verifiable set of practices should not travel well (Kagan 1997). The policy domain of corporate governance thus provides a critical case in assessing the spread of adversarial legalism cross-nationally as American-style market-driven finance and "shareholder capitalism" became increasingly influential around the world during the past two decades. The cross-national development of adversarial legalism would also support the proposition that it is not simply the product of American political and institutional conditions, but is a proximate consequence of neoliberal reforms and increasingly market-driven economies.

Kelemen and Sibbitt reconceive adversarial legalism as an attribute of neoliberal governance (Kelemen & Sibbitt 2004, 2005; Kelemen 2008). Rather than deriving from a specific set of institutional structures and ideological legacies, they argue that the "Americanization of law" is the product of a broad liberalization of the global economy during the past several decades and thus not restricted to the American political economic context (see also van Waarden & Hildebrand 2009). In their view, marketization of economic relations dissolves alternative institutional mechanisms of governance long embedded in more corporatist and statist political economies. Formal law and litigation therefore should displace established modes of economic and corporate governance, statist economic management, neocorporatist peak associational bargaining and self-regulation, institutionalized representation of and negotiation among opposing interests, and informal social norms of cooperation and trust. Arm's length contractual and transactional relations that predominate in a market environment are complemented by rights-based litigious enforcement mechanisms. Just as contracts are negotiated at arm's length by individual parties with minimal constraints by law and the state, litigious enforcement is carried out by individualized claimants before a judge who does not exert extensive control over the proceedings. Permissive rules regarding attorney retainers and lawyer control over litigation are but reflections of this liberal conception of contractual relations.

Kelemen and Sibbitt argue that economic liberalization in terms of domestic markets and international trade, trends towards political fragmentation, and the internationalization of legal practice by American law firms drives the cross-national diffusion of adversarial legalism (Kelemen & Sibbitt 2004, pp. 109–113). It is no longer a facet of American exceptionalism, informed by a historical legacy of political and economic liberalism, but a political and juridical reflection of political economic liberalization and globalization during the past 25 years. If this theory is correct, litigation (and the threat thereof) should become a more prominent – if not primary – means of legal enforcement and economic ordering. Adversarial legalism emerges where social, political, and institutional alternatives – peak institutions, institutionalized bargaining channels, constraining informal social norms, and/or autonomous administrative bureaucracies with broad discretionary powers – are lacking or have lost political or economic efficacy. In an increasingly competitive and conflictual economic environment dominated by market relations, adversarial legalism may be sub-optimal but it remains an *available* form of legal ordering and enforcement. Kelemen and Sibbitt therefore argue that adversarial legalism flourishes despite the absence of the institutional and ideological preconditions for its emergence in the US. The question remains whether there is empirical support for Kelemen and Sibbitt's revision of adversarial legalism and its proliferation.

German corporate governance reforms and the problem of enforcement

Corporate governance and national models of regulation and governance

German securities regulation and corporate governance reform is an ideal test case for the Kelemen and Sibbitt thesis. Germany is among the least likely of cases to converge on the American model of law and economic organization. As an exemplar of organized, or coordinated, market capitalism, postwar Germany was characterized by its bank-centered financial system and a "stakeholder" governance regime that offered relatively weak legal protections and few practical litigation opportunities to shareholders. In this sense, Germany provides a strong test of the Americanization thesis: finding the emergence of adversarial legalism here would provide substantial support for the theory. On the other hand, financial markets and the financial services industry are the most thoroughly internationalized of all markets and sectors. Therefore, cross-national convergence on the liberal market model, and thus "Americanization," would be most likely in the areas of financial and corporate governance regulation in response to international market and competitive pressures. If adversarial legalism is spreading cross-nationally, it would likely appear in these policy domains as a manifestation of investors' new-found political and economic clout.

Most of what is regarded as the German model of the corporate form and corporate governance developed over the course of the postwar period from 1952 through to 1972, with quasi-parity supervisory board codetermination being the last addition, coming in 1976 (Vagts 1966; Shonfield 1965; Katzenstein 1987; see also Zysman 1983). It thereafter remained remarkably stable for nearly three decades. From 1994 through to 2005, Germany went through a particularly astonishing period of reform as partisan and interest group politics shifted in favor of strengthening legal protections for shareholders in order to encourage greater equity investment, financial market development, increasingly market-driven financial relations, and faster, more efficient economic adjustment through corporate restructuring (Cioffi 2006a, 2002; c.f. Lütz 1998, 2000; c.f. Tiberghien 2007). This trend towards juridification has been most pronounced in the area of securities law, which has been transformed by the creation of Germany's first federal securities regulator, the substantial and repeated strengthening of disclosure regulation, and further centralization of regulatory authority over all branches of the financial sector (encompassing banking, securities, and insurance) (Cioffi 2002, 2006a). Pro-shareholder juridification has also extended to the domain of company law, where successive reforms between 1998 and 2005 have expanded the legal powers of minority shareholders while seeking to reconcile pre-existing legal and institutional aspects of German managerialism and consensualist stakeholder governance (Cioffi 2002, 2006a).

These reform trends are not limited to Germany. They have swept across Western Europe and much of the rest of the world (e.g. Gourevitch & Shinn 2005; Tiberghien 2007). The 1990s, ostensibly a period of ascendant neoliberalism and deregulation, was the beginning of an era of pronounced regulatory expansion and deepening in corporate governance. National corporate governance regimes displayed consistent tendencies toward greater reliance on formal law in place of their traditional reliance on relational ties (i.e. relational banking, blockholding, and cross-shareholding networks) and discretionary state power as modes of regulation or economic governance. Finance capitalism has brought forth an era of legalism.

The European Union (EU) has played an increasingly prominent role in framing the new pan-European regime of financial and corporate governance regulation through positive legislation on transparency rules, free mobility of capital, and liberalization of financial services (Cioffi 2002, 2006b). It has influenced negative integration (or downward harmonization) by barring state aid to firms and through the European Court of Justice's invalidation of national company laws that created de facto or de jure barriers to cross-national corporate chartering. However, corporate governance reform has been largely driven by domestic politics, and this is particularly true of litigation rules. The EU has been highly successful in harmonizing and strengthening securities regulation, but there was substantial consensus over the need for greater transparency and more robust national regulatory institutions. The EU's cumbersome and veto-prone political machinery tends to grind to a halt when it encounters issues over which there are deep divisions among the member states. This has long hobbled attempts to harmonize company law with respect to board structure, shareholder voting rights, takeovers, and codetermination (Cioffi 2002, 2006b). Enforcement mechanisms and procedures, public and private, are matters left to the discretion of the member states. Hence, a focus on domestic politics tells us more about the forces impelling reform.

Legal reforms inevitably raise the issue of litigious enforcement and its prevalence. If legal rules and principles are to be more than symbolic acts, legal reforms must provide for credible public (governmental) or private enforcement mechanisms. Each may be litigious in form, but vastly different in their practical implications. Governmental regulatory and prosecutorial enforcement is limited by the (i) adequacy of regulatory resources; (ii) professional (i.e. technical) competence of regulatory officials; and (iii) integrity of regulators against the threat of capture by private interests or ideological resistance to enforcement activities. The chronic problems of governmental enforcement, highlighted by regulatory failures leading up to the current financial crisis, thus point to the alternative of private enforcement through private litigation.

Private litigation theoretically enhances enforcement and compliance by delegating monitoring corporate and financial actors and enforcement capacities to parties who have an economic incentive to protect their legal interests. Private litigation also reallocates the burden of funding enforcement proceedings to those threatened or injured by legal violations. Litigants and courts partially displace regulators and politicians as the principal actors involved in compliance and enforcement. This, however, entails both a diminution of state control over policy and a potentially substantial conveyance of power to shareholders and, more problematically, to plaintiffs' attorneys. Litigation as an enforcement mechanism raises all the familiar criticisms of litigiousness – inefficiency, ineffectiveness, rent-seeking through strike suits and collusive settlements, distortions of managerial and market behavior – voiced in the large literatures on adversarial legalism, securities litigation, and tort reform. We are left with practical tradeoffs and political choices as to the appropriate mix of and structure of enforcement mechanisms with no ideal solution.

German stakeholder governance and the structural approach to regulation

Juridical and institutional differences between the American and German financial systems and corporate governance regimes derive from their roots in divergent conceptions of law and governance. The legal liberalism underlying the American market model relies on an enforceable framework of legal rights and obligations that facilitate and inform market transactions. German governance, in contrast, traditionally rested on more corporatist legal and institutional foundations that utilize politically created and legally constituted representational structures to order bargaining relationships among privileged interests. The governance *structure* of the German corporation, as constituted by law, performs a crucial regulatory function by influencing individual and organizational behavior to achieve desired social and economic ends. In contrast with the American reliance on the allocation of legal rights and duties to *individual* actors, along with procedural rules conducive to their litigious enforcement, the German corporate governance relies primarily on the legal and consequent institutional architecture of representation and decisionmaking power with respect to *institutional* groups (e.g.

Teubner 1985, pp. 155–156; c.f. Roe 1993, pp. 1969–1970). Firm governance becomes a largely self-executing intra-corporate process. Formal rights always provided a backdrop to ensure good faith participation in bargaining and consultation among legally recognized stakeholders.[12] However, with significant exceptions described below, lawsuits brought on behalf of individual shareholders played, at most, a secondary role alongside the institutionalized structures of corporate governance.

The juridical structure of German corporate governance institutionalizes representation and negotiation among managers, shareholders and lenders, and employees. Labor is granted a legally defined role in the governance structure through supervisory board and works council codetermination. German corporate and financial market law made use of the banks' traditional dominance of external corporate finance by granting them significant control over proxy voting and allowing them to maintain extensive webs of supervisory board mandates (Roe 1994, 1993). German managers are hardly powerless, but their power was simultaneously maintained and constrained by intra-firm institutional arrangements that allowed shifting alliances among management, shareholders, lenders, and labor.

Substantive and procedural law subordinated litigation to the imperatives of iterative bargaining relationships. Shareholder rights were generally minimal and exceedingly difficult to enforce.[13] Weak Länder securities regulation provided for little financial disclosure by listed firms. Claims for materially false or misleading statements were therefore impracticable in all but the most egregious cases. Plaintiffs had to prove willful deception – an extremely demanding standard of proof and difficult to satisfy (Baums & Scott 2003, p. 20). Insider trading was not legally prohibited and thus not a basis for shareholder litigation.[14] Under the law of corporate groups (the *Konzernrecht*), minority shareholders in controlled subsidiaries had comparatively strong rights to challenge related-firm transactions ex post, but they had limited access to material information. The external auditor's annual report and reports on intra-group transactions was disclosed to the firms' supervisory boards, not to the shareholders, and practically speaking only through the management board's summary (Baums & Scott 2003, p. 13).[15]

Fiduciary duty claims were likewise legally discouraged. This in part reflected both the stakeholder character of corporate governance and the practical problems of enforcing governance norms and protecting shareholder interests through the imposition of personal liability on corporate directors and officers. Where shareholders, managers, employees, and lenders are all legally recognized stakeholders, litigation of right-based claims would have mired the courts in an endless series of exceedingly difficult, perhaps intractable, conflicts over which stakeholder's rights trumped and would have undermined negotiation as the favored means to resolve conflicts among stakeholder groups. Tellingly, in one early and important appropriation of American corporate governance law, German courts adopted the pro-management business judgment rule, which virtually eliminated liability in mismanagement (duty of care) cases and sharply circumscribed it in cases addressing conflicts of interest over self-dealing transactions (duty of loyalty).[16]

Procedural constraints on private lawsuits further inhibited shareholder litigation. Would-be plaintiffs faced procedural obstacles such as limits on discovery, a "loser pays" rule for attorney's fees and court costs, the prohibition of contingency fee retainers, and, in many cases, the right of the supervisory or management board to bring lawsuits rather than shareholders themselves. German law exacerbated the classic collective action problem of dispersed shareholders: each has a small amount to gain from successful litigation, but much to lose from an unsuccessful lawsuit. They will not litigate in the absence of procedural mechanisms that pool the costs of litigation and/or shift the risk of failure onto plaintiffs' attorneys. Germany developed no equivalent of the American class action or the derivative shareholder suit. Suits against the management board (or an individual member) were brought by the supervisory board; suits against the supervisory board were brought by the management board. Given the close relationship between the two bodies, this procedure cultivated conflicts of interest. Further, until 1998, shareholders seeking to compel a suit against the management or supervisory board had to represent at least 10 percent of outstanding share capital – an exceedingly high threshold (Stock Corporation Act § 112).

Finally, the German inquisitorial civil law tradition confers control over the discovery process to judges, not to attorneys as in common law systems. The courts' limitations on discovery further weakened the plaintiffs' litigation position and perpetuated the opacity of corporate finances. Even if publicly available information alerted shareholders to a *potential* violation of their rights, constraints on discovery rendered *proving* the case difficult, if not impossible. Strict limits placed on discovery by German courts further reduced the plaintiffs' chances of prevailing in a lawsuit, the corporation's likely transaction costs in litigating a case, and thus the shareholders' leverage in settlement negotiations.[17] Overall, German procedural law therefore strongly and consistently discouraged litigation by shifting the risk–benefit calculation in the corporate defendant's favor. Given weak disclosure rights, managers and controlling shareholders could block informational channels, raising the risks of opportunism. Weak procedural rights left shareholders with little leverage or formal legal recourse to protect their interests. Not surprisingly, postwar Germany had high levels of stock ownership concentration and notably low levels of equity financing and stock market capitalization relative to GDP (see comparative statistics in Roe 1994; Gourevitch & Shinn 2005).

Shareholder litigation did flourish, however, in one area of German corporate governance law: legal challenges to the conduct of shareholders' meetings. Under German company law, shareholders must approve a much wider array of business decisions than is the case under American law. To protect these governance rights, shareholders' meetings are subject to complex disclosure and procedural rules, and an alleged violation of these rules can provide the basis for an action to block or rescind a corporate decision taken or ratified at the meeting. In situations requiring rapid execution of important business decisions, such as capital increases, major investments and divestments, or mergers, plaintiffs' attorneys were in a strategically superior position to managers. They frequently brought lawsuits to enjoin managers from acting where time was of the essence and extracted lucrative settlements. Germany thus developed its own problems with abusive corporate litigation that gave rise to criticisms similar to those heard in the US after the 1970s. Litigation was commonly referred to in German legal circles as the "American disease," but German managers, their attorneys, and policymakers were well aware that they had an outbreak of their own. The experience of lawsuits as borderline extortionate, ineffective in the achievement of policy goals, and potentially disruptive to stakeholder cooperation and negotiation jaded many of those later involved in corporate governance reform regarding the use of shareholder litigation as an enforcement mechanism.

Legal reform and the ambivalent liberalization of litigation

These legal foundations of German finance and corporate governance have undergone a striking and extraordinary transformation since the mid-1990s. The speed and significance of these legal reforms has led some commentators to speak of an "Anglo-Saxonization process of the German system of corporate finance" (Deeg 1999, p. 74).[18] More precisely, political and economic actors in Germany sought to appropriate some of the legal strengths (and what were then regarded as the economic benefits) of American-style market finance while preserving the traditional strengths of German bank-centered finance and the political economic stability and comparative advantages, particularly in export-oriented manufacturing sectors, of a more highly institutionalized and organized form of capitalism. The regulatory politics of securities law reform reflects these sometimes conflicting and often complementary agendas. One of the most controversial areas of legal reform, and one of the last to be adopted, was the liberalization of the rules governing shareholder litigation. The need for effective enforcement mechanisms forced litigation remedies on to the public policy agenda, but serious reservations and political conflicts over the merits of litigiousness produced a set of reforms that were strikingly ambivalent and rather modest.

The politics of the German financial system and corporate governance reforms was driven by domestic political and economic forces (Lütz 1998, 2000, 2005; Ziegler, 2000; Cioffi 2002, 2006b; Lütz & Eberle 2007). The internationalization of capital markets, the desire to attract international capital flows and (more importantly) retain domestic financial services business, and the Europeanization of both markets and economic regulation were to varying degrees necessary but not sufficient conditions for substantial legal change. Foreign and transnational investors, financial institutions, and regulatory authorities played a role in fomenting the legal changes that swept over Germany since the early 1990s, but they were subordinate to the powerful interest groups and peak associations that drove the pace and substance of reform (Cioffi 2002; Lütz & Eberle 2007). The interest group coalition that formed in support of reform favored the "modernization" of Germany's traditional bank-centered, opaque, and insider-dominated financial system with a more securitized, transparent, and diffusely owned one (Cioffi 2002).[19] To accomplish this transition, the country's political and economic elites embarked on a process of securities and company law reform that (i) constructed a more legalistic and centralized securities regulatory regime and (ii) repeatedly strengthened the legal protections and relative power of minority shareholders (Cioffi 2006b).

This was an extraordinary undertaking and it reflected a transformation of interest group preferences and partisan political strategies that broke with the relational finance model that constituted one of the foundational features of the postwar German political economy (Cioffi & Höpner 2006a,b; Cioffi 2006a,b). Large financial institutions, particularly the large universal banks, insurance companies, and investment funds wanted to encourage the domestic development of market-driven finance that would generate more profitable lines of business than their traditional lending and advisory roles. Large, internationally oriented public corporations wanted better access to equity capital and other market-based financial products without having to leave the domestic market (Cioffi 2002, 2006a,b). Large banks, shareholders' associations, and activist investors sought greater legal protection for shareholders to enhance shareholder value and market liquidity (Lütz 1998, 2000; Cioffi 2002). Germany's powerful labor movement acquiesced, and sometimes actively supported, the reform agenda because any strengthening of the supervisory board would also strengthen employee representation through codetermination, and enhanced transparency would aid unions in collective bargaining (Cioffi 2002; Höpner 2003).

Politically, the center-left Social Democratic Party (SPD) during the Schröder era embraced the reform agenda to position itself as the party of economic modernization and the foe of entrenched managerial and banking interests – and in hopes that its repositioning would allow the Party to tap support in the financial sector that had long been aligned with the center-right Christian Democratic Party (CDU-CSU), and the neoliberal Free Democratic Party (FDP) (Cioffi 2002). The SPD therefore pursued a strategy that would strengthen the legal rights and institutional position of shareholders within the firm and the securities markets, but left labor codetermination laws intact (Cioffi 2006a,b). The CDU was politically outflanked on these issues during the late 1990s and early 2000s. Not only was it out of government during the Red–Green coalition of 1998–2005, its leadership was placed in the difficult position of trying to negotiate the tensions between pro-shareholder corporate governance reform and its established alliances with corporate managers, many of whom sought to protect their autonomy from financial market and shareholder pressures for short-term earnings growth. Notably, once the Schröder government and the Red–Green coalition collapsed in 2005, largely as a result of labor market and social welfare policies rather than its financial market and corporate governance agenda, the rapid and far-reaching reforms stalled. International market and political pressures did not make up for the erosion of the domestic political conditions that drove pro-shareholder legal change.

The character of the legal changes adopted as part of this great wave of reform help to answer the question of whether Germany experienced an "Americanization" of its securities and corporate governance law. The answer, in part, turns on the definition of Americanization. Germany did create the country's first federal securities regulator, the *Bundesaufsichtsamt fur den Wertpapierhandel* (BAWe), in 1994 and the momentum of reform consistently expanded and increased the stringency of disclosure rules (Lütz 1998, 2000, 2005; Cioffi 2002, 2006b; Lütz & Eberle 2007). German reformers, moreover, were well aware of the American model of a strong federal securities regulator and the substantive framework of American securities law. This suggests a degree of convergence on the American Securities and Exchange Commission (SEC) regulatory regime. However, this interpretation may rely on an overly expansive definition of Americanization. Germany, along with many other countries, did develop and strengthen domestic securities regulation, both substantively and institutionally. Yet had there been no SEC model it is likely that Germany would have pursued the same course of reform and regulatory structure as appropriate to the emerging market-driven financial system. From this perspective, reform was not a process of mimesis that appropriated American regulatory structures and mechanisms, but the product of largely domestic politics and law.

The continued centralization of German financial regulation supports this interpretation. Notwithstanding opposition from the Bundesbank, Germany's central bank, and from the Länder, securities, banking, and insurance regulators were consolidated in a single overarching regulatory body, the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BAFin), in 2001 (Schüler 2004, pp. 12–13). By successfully integrating the regulation of all principal forms of financial business within one body, Germany adopted a far more centralized regulatory structure than the US (where continued regulatory fragmentation has been held partially responsible for catastrophic regulatory failures and vast economic damage in recent years). In addition, political control over financial regulation is more hierarchical and centralized than in the US. Unlike the independent SEC, the BAFin is under the direct oversight of the Ministry of Finance, as was the BAWe before it. Further, this centralization ultimately secured the support of Länder officials who wanted authority located in a more politically accountable body. In this case, political fragmentation and in-fighting did not thwart increasing institutional centralization.

Throughout its reform period Germany eschewed extensive enforcement of securities regulation and shareholder rights under company law through private litigation. Securities regulators in Germany therefore have taken on a much more important enforcement role in comparison with the US, not because of a preference for statist regulatory structures but because of deliberate policy choices to avoid wasteful and potentially abusive litigation. In the US, the entrenchment of institutions, legal structures, and interests preserved both regulatory fragmentation and an exceptional reliance on litigious enforcement. Powerful economic interests in Germany, shaped by the country's legal structure and stakeholder governance traditions, discouraged the adoption of litigation-driven enforcement mechanisms, but the absence of an established and bureaucratically entrenched securities regulation regime allowed the development of a *more* centralized regulatory structure without provoking the kind of turf battles seen in the US.

The limited nature of litigation reform and its belated adoption reflected the ambivalence of policymakers toward litigiousness and their reluctance to stoke conflict and controversy over the issue. The timing of the reforms is noteworthy. Shareholder litigation reform had been on the policy agenda since the 1990s, but only became the focus of policymaking in 2005 at the end of the reform period (Baums Commission 2001, pp. 88–90; Deutscher Juristentag 2002, Recommendation 1.15). Perhaps not coincidently, this occurred only after it had become apparent that Schröder's Red–Green government and "*Neue Mitte*" program were collapsing politically, and that the financial sector had not become a reliable SPD constituency.

Liberalization of litigations rules began with the passage of the Control and Transparency Act (the KonTraG), the first major revision of German company law since 1965, in 1998.[20] The KonTraG lowered the threshold required for minority shareholders to demand the filing of a claim against supervisory and management board members on behalf of the corporation. This threshold was reduced from a vote of 10% of shares to 5% of shares or 1 million DM of nominal capital. However, the KonTraG did not strengthen the *substance* of Germany's historically weak fiduciary duties, nor did it alter the procedures for enforcing shareholder rights. The KonTraG litigation reform only extended to claims for *gross* breaches of the fiduciary duty of loyalty, not for breach of the fiduciary duty of care (i.e. negligence in carrying out directorial responsibilities) for fear of creating excessive litigation.

The collapse of the high-tech Neue Markt in 2002 amid many accounting irregularities, the crash of Deutsche Telekom stock following an enormous government-sponsored public offering, and a number of other corporate scandals during the early 2000s raised the political salience of shareholder litigation rules (Freshfields Bruckhaus Deringer 2005). In response to these problems and scandals the Schröder government pushed through two far more sweeping legislative reforms of shareholder litigation in late 2005. These reforms had already been part of the government's 10 point corporate governance agenda and the recommendations made by two government corporate governance commissions (Baums Commission 2001; Cromme Commission 2003). Many of the Cromme

Commission's recommendations regarding intra-firm governance structures and practices contributed to further juridification of corporate governance through the adoption of many of its proposed legislative changes and a "comply or explain" rule for firms' adherence to the Code's "best practices." (Cromme Commission 2003, p. 3.10; AktG § 161). But the proposed changes to litigation rules were not amenable to this quasi-disclosure approach to regulation; they required legislative changes to procedural law.

Shareholder litigation reform embodied both the appreciation that litigation plays a necessary and inevitable role in protecting shareholder interests and the countervailing recognition that it is also prone to inefficiency, rent-seeking, and abuse. The UMAG amendments to the Stock Corporation Act, the core of Germany's company law, created an analog to the derivative action under American corporate law that gave minority shareholders the ability to sue directors on behalf of the corporation.[21] The UMAG cut the thresholds for filing suit against supervisory or management board members from 5% (established by the KonTraG) to just 1% of shares or 100,000 Euros. The law also allowed shareholders to bring and control the suit directly (rather than by a court-appointed independent representative).[22] The UMAG also relaxed the "loser pays" rule for court costs and attorneys' fees by allowing plaintiffs to seek reimbursement of costs regardless of the suit's outcome so long as the court upholds the action in a preliminary proceeding.

However, political conflict over the desirability and potential dangers of litigation also resulted in provisions designed to curb litigation and contain its costs. The UMAG codified a version of the business judgment rule, recognized by the Federal Court of Justice in 1997, and thus sanctioned a potent defense against all but manifestly egregious cases of director misconduct. In a compromise between the SPD–Green-controlled Bundestag and the CDU-controlled Bundesrat, the law created a new preliminary procedure to test the substance of derivative suits and screen out "professional plaintiffs" to prevent abusive strike suits (Noack & Zetzsche 2005, pp. 1041–1042; Lederer 2006, pp. 1603–1604). The reform thus imposes an important gatekeeper function on the courts to control the potential for abusive litigation. The legislation re-balanced the power of shareholders and managers by careful procedural design. The UMAG went further in curbing litigation by accelerating the dismissal of meritless lawsuits challenging decisions approved by the shareholders' general meeting – the most prevalent type of shareholder litigation and the single greatest source of abusive litigation. As noted above, actions to challenge important business decisions on highly technical legal grounds had led to Germany's own problems with professional plaintiffs and strike suits. The UMAG required a preliminary court proceeding to screen out baseless suits within four months and limited the plaintiff's ability to strike quick lucrative settlements by blocking urgent business decisions through litigation. The reform thus expanded shareholder litigation modestly in a new way while curtailing its most prevalent form.

The KapMuG securities law reforms passed in 2005 created a new form of collective litigation that, for the first time, created a procedure designed to overcome the imposing collective action problems confronting a diffuse class of shareholders.[23] Though it fell short of the American class action, the KapMuG broke sharply with the historically individualistic character of German shareholder litigation. In part, this reform not only derived from the government's pro-shareholder reform agenda, but was also the product of a serious and politically damaging setback in the government's attempt to create a German shareholder culture (*Aktienkultur*). The CDU-led government under Helmut Kohl promoted Deutsche Telekom's 1996 privatization and initial public offering by guaranteeing the stock's value for a period of time. The market value of these shares collapsed in 2001 after the expiration of the guarantee and shareholders claimed that a large portion of their losses stemmed from fraudulent misrepresentations of the company's assets (Baetge 2007, pp. 7–9). Approximately 15,000 individual suits filed by more than 750 attorneys inundated a *single judge* with no procedure to consolidate the proceedings and litigate the common issues efficiently (Baetge 2007, pp. 7–9). After years of grinding litigation without a single final judgment, some plaintiffs filed an action with the Constitutional Court claiming denial of fundamental justice under law. The Court dismissed the claim, but it openly called for experimentation with collective litigation and shamed the government into reforming procedural law (Baetge 2007, pp. 7–9).

The resulting KapMuG created a new procedure in which the first filed claim is certified as the "lead case" (*Musterverfahren*) once 10 cases based on the same set of facts are filed. The regional court defines the common issues of law and fact, and then, with the support of other claimants, the lead case is adjudicated by the provincial court. All claimants contribute to the costs of the lead case if the action is dismissed. The court's rulings on common factual and legal issues in the sample claim are binding on all other cases based on the same set of facts. Plaintiffs do not have to opt-in to the collective procedure, nor is there any possibility of opting-out of it. However, the procedure was so controversial that the statutory provision creating it was drafted to expire on 1 November 2010, five years after its effective date, unless renewed by the legislature (Baetge 2007, pp. 7–8).

The litigation reforms laws were the product of political compromise amid serious interest group conflict. Business interests, including the Association of German Industry (BDI) and the Association of German Banks (BDB), were opposed in particular to derivative actions but were assuaged sufficiently by the provisions curtailing litigation over decisions approved by the shareholders' general meeting and continued procedural obstacles and attendant practical difficulties in bringing successful private suits.[24] The peak business associations were adamantly opposed to an even more fundamental reform of securities law that would have made material misrepresentations actions if made *negligently*, rather than the established standard of intent. The intensity of opposition forced the government to withdraw the proposed legislation. The managers and banks split over collective proceedings in securities litigation, with the BDB favoring a pro-shareholder litigation position as a way to encourage further capital market development, yet opposing the importation of class action procedures.[25] Shareholder groups and the plaintiffs' bar demanded the adoption of a true class action, but did not have sufficient influence to sway the policy debate. The legislative outcomes suggest the waxing influence of the financial sector and the BDB, particularly in policy areas where managers (and thus the BDI) is split over reforms.[26] Where the BDB opposed liberalization, as with derivative actions, the reforms were more modest and contained significant concessions to business.

Some commentators consider these litigation reforms to be a transformative moment in German corporate governance. Such extravagant claims are at best premature. Insurers issuing directors and officers policies covering board members' liabilities have not discerned an increase in litigation (though they warn of increasing risks) (Daucourt 2009). In fact, premiums have remained far below those in the US and have reportedly decreased in recent years before spiking recently with the onset of the global financial crisis (Fromme & Kruger 2008; Daucourt 2009; Newsblaze.com 2009). Business interests may have brokered political deals over litigation rules that arguably gave them as much or more than they gave up. Lack of data precludes a more definitive assessment, but it appears that only a small number of derivative and collective actions have been brought.[27] Collective actions can serve either as a shareholder sword if a lead case is successful or as a liability shield if it is dismissed, leading to the dismissal of all other related cases, as in a recent case against DaimlerChrysler.[28]

Further, German procedural law is still largely antagonistic to litigation. Contingency fees are still not allowed in securities and corporate fiduciary cases and there are no juries or punitive damages. Most importantly, there is still no American-style discovery in German litigation procedure. This poses a fundamental problem for proving cases, and may make the lead case mechanism an even greater boon for companies by effectively shutting down litigation of alleged disclosure violations by maintaining an informational vacuum. Lack of discovery also substantially tilts bargaining power towards management. Where expenses of litigation are lower for the corporation, plaintiffs have less leverage in settlement negotiations. There may be fewer strike suits under these rules, but there will also be fewer successful meritorious ones. Litigation reform may reframe the politics of litigation by inducing shareholder advocates to press for more pro-litigation reforms going forward (Freshfields Bruckhaus Deringer 2007, p. 29). Given the strenuous opposition by managerial interests and skepticism in the policy community towards litigation, this remains a matter of sheer speculation.

Conclusion

Corporate governance reform in Germany confirms the increasing juridification of corporate governance relations even in a country with long-established traditions of "consensus capitalism," stakeholder negotiation, and prominent neocorporatist institutional features. Germany is hardly alone in this. Numerous other countries in Europe and Asia have undertaken similar legal and regulatory transformations.[29] In Germany, the change is particularly striking because the deliberate strengthening of shareholder rights and pro-shareholder market regulation may disrupt a well-established and intricate interweaving of legal and institutional relationships within the firm and between firms and the bank-based financial system. Federal securities regulation emerged only during the past 15 years. During that time it has rapidly expanded, grown more stringent, and become integrated as part of an increasingly all-embracing institutionalization of financial regulatory authority that is now far more centralized than that of the US. Shareholder rights under company law were strengthened substantially and consistently in ways that deviated from the established legal and institutional balance of stakeholder interests within the corporation.

Given its break with past legal and institutional forms of regulation and governance, Germany provides a particularly revealing example of the growing legalism of economic relations in an era of marketization and globalization. However, "Americanization" is an inapposite term for this phenomenon. In the first place, legalism is hardly alien to German political and economic traditions. Juridification has been a persistent feature of the German political economy and at times a significant concern of German legal theorists.[30] Further, as the German case illustrates, there remain very significant differences between post-reform Germany and the American model of law and governance. German codetermination remains intact, while relational banking practices and a cross-shareholding network continue to endure in modified forms (though each has eroded somewhat in recent years), perpetuating the institutionalization of stakeholder governance. Germany, along with many other countries around the world, has pursued legal reforms to buttress and encourage the development of financial markets and a more financially driven form of corporate management and restructuring. This is a process of policy formation and legal change distinct from the inter-state diffusion of a particular legal style. International economic developments and the explosive growth of the international financial system in particular do drive juridification and the rising status of transparency within the universe of regulatory norms.

A more pointed objection to the notion of Americanization of law and regulation arises from consideration of legal enforcement mechanisms and the role of litigation. If economic developments of recent decades fostered greater legal formalization and transparency regulation, this does not logically or empirically entail a corresponding increase in adversarialism. Germany consistently declined to embrace adversarial legalism as set of legal and institutional features. Substantive and procedural rules, even after recent liberalizing reforms, are still less conducive to litigation than their American analogues. Political and economic elites retained a skeptical attitude towards litigation derived from their own knowledge and experiences with litigiousness in the corporate governance area. They expanded shareholder access to the courts and sought to ameliorate the collective action problems in enforcing new shareholder rights, but they did so cautiously in order to prevent excessive and abusive litigation. If the example of the US played a role in this policy process, it was as cautionary tale of what might happen if litigation rules were liberalized too far and too fast. The severability of juridification and adversarialism, as functionally and temporally distinct political bargains and policy calculations, was critical to the success of corporate governance reform (c.f. Levi-Faur 2005, pp. 453–455). Policymakers were not dissuaded from pursuing desirable regulatory innovations by the necessity of tying them to increasingly litigious enforcement mechanisms.

Transplantation of foreign legal concepts and regulatory mechanisms – even where it occurs deliberately with fully conscious intent – requires substantial adaptation to domestic political, legal, and economic conditions (c.f. Pistor & Berkowitz 2003). Because rights-based litigation poses a potential threat to, and might displace traditional processes of stakeholder negotiation and consensual decisionmaking, it is not surprising that German reforms, channeled through a policy process heavily influenced by highly organized stakeholder groups, limited the extent to which reform would rely on private lawsuits as an enforcement mechanism. If there is evidence of convergence from the cross-national comparison of American and German securities law and corporate governance, it is on increasing legalism. In light of antilitigation reforms of American securities law, there is at most a potential bilateral convergence on a more modest version of adversarialism in which litigation is intentionally dampened and legally limited. Corporate governance reforms are situated within well-established legal environments and the political process must inevitably reconcile legal and regulatory innovations with existing interest group alignments and institutional arrangements. Accordingly, a common exogenous shock to national political economic systems will induce policy and juridical changes along distinctive trajectories. At a time when financial and corporate governance structures are being tested as never before, cross-national differences in legal structures and their capacity to constrain market actors may take on unheralded significance.

Finally, German corporate governance reforms suggest a variant on the theoretical proposition that adversarial legalism is likely to emerge and reproduce itself under conditions of political fragmentation. The fragmentation of socio-economic groups and actors once bound by solidaristic norms and ties of consensualism may likewise produce pressures for increasingly legalistic, and perhaps adversarial, relations. Conflicts among labor, industrial management, and finance capital have sharpened in Germany in recent years. These cleavages have opened in part because of economic strains on the German political economic model that have been building for decades. But in part, they are the product of political and policy choices that created market-facilitating legal and regulatory structures in order to create a more dynamic market-driven economy. The domestic politics of this process was paramount. When the center-left Red–Green government of Gerhard Schröder fell in 2005, the succeeding CDU-SPD Grand Coalition, in the midst of a breakdown and fragmentation of the German party system unprecedented in the postwar era, found itself incapable of pursuing major reforms on any front.

At this point in history, speaking of the cross-national Americanization of law, whether or not adversarialism is considered a necessary component may be anachronistic. In the corporate governance area, the appeal of the American legal and market model had already suffered a severe blow as a result of the Enron-era financial scandals and the regulatory and governance deficiencies they revealed. The onset of the global financial crisis that emanated from the American mortgage and derivatives markets beginning in 2007 has largely destroyed what ideological and intellectual influence the American neoliberal model had left and has left it at its lowest ebb since the Great Depression. These conditions are propitious for renewed cross-national political economic and legal divergence. Regulatory cooperation through multi-lateral institutions and/or inter-state agreements may well become increasingly vital (though not necessarily successful), but American hegemony in such activities is now, at a minimum, open to question (Zumbansen 2006). With the collapse of much of the American financial system, including its globally pre-eminent investment banks, the US faces a wrenching legal and institutional transformation. Perhaps a decade from now we will be debating "the Europeanization of American law."

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Notes

1 The term corporate governance refers here to the legal and institutional arrangement of formal power relations and decisionmaking processes within the corporate firm.

2 For an incisive critique of the Kelemen and Sibbitt thesis, see Levi-Faur (2005).

3 Although the authors are ambiguous on the relationship between the cross-national spread of transparency regulation and the far more debatable spread of adversarial litigation, they appear to conceive of transparency and "broad empowerment of private actors to assert legal rights" as jointly defining characteristics of American law (Kelemen and Sibbitt 2004, p. 106).

4 The common law–civil law distinction is often exaggerated (Rehder 2009). However, the form and substance of law and regulation varies considerably and systematically across liberal and non-liberal national political economies (c.f. van Waarden 2009).
5 For the purposes of this article, the terms *juridification* and *legalism* are interchangeable.
6 For the most comprehensive summation and articulation of adversarial legalism, see Kagan (2001); for an elegant analytical summary of Kagan's conception, see van Waarden (2009).
7 c.f. Kagan (2001, p. 36 f.f.); van Waarden (2009).
8 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). See Bainbridge (2004); see generally Block *et al.* (1998).
9 Private Securities Litigation Reform Act of 1995, Public Law: 104–67 (December 22, 1995), amending Title I of the Securities Act of 1933, 15 U.S.C. 77a, *et seq*., and Securities and Exchange Act of 1934, §§ 15 U.S.C. 78a–78 mm, Pub. L. no. 104–67, 109 Stat. 737 (1995).
10 Securities Litigation Uniform Standards Act of 1998, Pub. L. no. 105–353, 112 Stat. 3227 (codified as interspersed subsections of 15 U.S.C. §§ 77–78). The statute did not pre-empt fiduciary duties under state corporate laws or the rules governing derivative suits brought to enforce them.
11 *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).
12 This includes substantial litigation involving works council rights and powers (Rehder 2009).
13 The exception of disclosure rights in the context of the shareholders' annual general meeting is discussed below.
14 Voluntary self-regulation, under the insider trading "Kodex," nominally barring insider trading proved ineffective.
15 German company law relied primarily on supervisory board approval of related party transactions even where conflicts of interest would cast doubt on the board's judgment (Baums & Scott 2003, p. 14).
16 See the decision of the German Federal Civil Court (*Bundesgerichtshof*) belatedly endorsing a long-established judge-made German equivalent of the American business judgment rule in *ARAG/Garmenbeck*, 135 BGHZ 244 (April 21, 1997); see also Baums (1996); Baums and Scott (2003, p. 14).
17 Discovery often accounts for up to 90% of litigation costs in American securities cases. These expenses are born almost entirely by defendant companies, but driven by plaintiffs' attorneys under permissive civil procedure rules. Therefore, once a lawsuit survives a motion to dismiss for failure to state a claim, the plaintiffs' bargaining leverage rises substantially.
18 However, it should be noted that the law has changed far more than actual corporate and financial practices. Banks withdrew from many board mandates, cross-shareholdings eroded to varying degrees during the last decade, and a larger proportion of managers became more attentive to "shareholder value." However, these changes have not swept away established business practices and organizational forms, long-term managerial orientation, and relational ties among firms and stakeholders (Börsch 2007).
19 Relying on extensive interviews with policymakers.
20 For a more comprehensive account of the politics of the KonTraG, see Cioffi (2002); Ziegler (2000).
21 Law on the Improvement of Corporate Integrity and Modernization of Decision-directed Suits (*Gesetz zur Untemehmungsintegritat und Modernisierung des Anfechtungsrechts*) (UMAG) of 22 September 2005, BGBI 12802.
22 Stock Corporation Act § 148. Dissident shareholders can also use an online shareholders' forum to solicit support to initiate action against directors. Stock Corporation Act § 127a.
23 Law on Model Proceedings in Capital Market Disputes (*Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten*) (KapMuG) of August 16, 2005, BGBl. I, p. 2437.
24 Interview with Oliver Wagner, BDB, 26 July 2007.

25 Interview with Oliver Wagner, BDB, 26 July 2007.
26 Interview with Thomas Lorenz, BDB, 26 July 2007.
27 Interview with Olaf Müller-Michaels, partner, Hölster & Elsing, Düsseldorf, 18 July 2007; Borrego (2007); Baetge (2009, p. 129).
28 c.f. Freshfields Bruckhaus Deringer 2007 (citing OLG Stuttgart, 15 February 2007, case no. 901 Kap 1/06).
29 For broader comparative accounts of reform, see Cioffi and Höpner (2006a,b); Tiberghien (2007); Gourevitch and Shinn (2005).
30 See, for example, the chapters on juridification collected in Teubner (1987).

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