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Horse, Cow, Sheep, or 'Thing as such'? The Cognitive Origins of Corporate Governance in Switzerland, Germany, and the US, 1910s-1930s

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Abstract

The US is commonly opposed to continental European countries as a distinct model of corporate governance (CG) in the sense that the US model stresses the protection of outside shareholders, whereas the continental European model is based on a broader stakeholder approach. This goes together with distinct theories of the corporation: the US system, it is based on an individualistic conception while the continental European model is associated with a super-individualistic view of the firm.

In this paper we examine the origin of this opposition by looking at the cases of Switzerland, Germany, and the US. Contrary to very popular corporate governance theories, which see in the different CG models as a quasi-natural effect of different legal traditions, we show that the emergence of two distinct approaches to CG can be localised during the first decades of the 20th century. We analyse the CG debates among legal scholars and economists and the politics of company law reform in the US, Germany and Switzerland and show that all three countries faced a similar structural development of the stock corporation during the second half of the 19th century, which led to an increasing likelihood of a separation between ownership and corporate control.

Legal scholars and economists on both shores of the Atlantic diagnosed this evolution in different ways and proposed consequently different remedies. While in the US the view prevailed which consisted in assuring the shareholders a maximal protection against expropriation by opportunistic managers, in Europe the contrary view prevailed which sees independent and powerful managers as the guardian of the interest of all stakeholders. Due to the particular political contexts in the three countries which we analyse, different ideas concerning the organisation of the firm were finally institutionalised and explain the diverging paths that continental European countries and the US went down subsequently.

Keywords: Corporate governance, company law, business systems, comparison, Switzerland, Germany, USA, small states.

0. Introduction

In 1932, Adolf A. Berle and Gardiner C. Means (1933: 66) wrote the following sentence about the relationship between the shareholder and the corporation: *"It is often said that the owner of a horse is responsible. If the horse lives he must feed it. If the horse dies, he must bury it. No such responsibility attaches to a share of stock."* Eugen Schmalenbach – one of the founding fathers of management theory in Germany – wrote a few years earlier that the joint stock corporation resembled a dairy cow, which the shareholders should treat carefully in order to be able to milk it as long as possible (Schmalenbach 1926: 91). Finally, a Swiss lawyer stated in 1920 that between the plundering of the company by its shareholders or its exploitation by managers, there could be a better world where the sheep" could safely graze on green meadows, guarded by good shepherds and vigorous sheep-dogs, to be shorn for the benefit of the community (Fick 1920: 336[1]).

The metaphors of the horse, the cow and the sheep are very revealing concerning one commonly acknowledged fundamental difference between the Anglo-Saxon and the continental European systems of corporate governance, i.e. the position of the minority shareholder within the authority structure of the firm. In the US, the creation of wealth for the owners was seen as the only legitimate goal of the corporation, whereas the European corporation was perceived as something more than just a money-making machine for its owners (Streeck and Höpner 2003); the differences between the German and the Swiss metaphor is more delicate: It seems typical that the careful treatment of the German "cow" was formulated as an obligation or an ideal, whereas the cultivation of the Swiss "sheep" worked on a more realistic basis and thanks to the self-regulation of the actors involved.

In modern terms, the opposition between US and European perspectives is usually summarised as shareholder vs. stakeholder view of the corporation. It extents not only to the theory of the firm, which underlies the corporate governance system but has concrete implications concerning the legal protection of shareholders and the prevailing ownership structure, i.e. stakeholder systems are associated with concentrated ownership structures where blockholders control large parts of a company's equity while shareholder systems are characterised by a large number of genuine public companies without dominant stakeholder (La Porta&al. 1998, Becht&Mayer 2001, Faccio&Lang 20002, Grant &Kirchmaier 2004).

The most influential theory of corporate governance in recent years – the Law and Finance school – explains this difference between corporate governance systems in continental European and in Anglo-Saxon countries by the legal origin of their corporate governance systems in common law or civil law. Common law countries, so the argument runs, protect property rights better than civil law countries and have hence better protections for minority shareholders' rights at the level of the company law. Conversely, civil law countries are less oriented towards the protection of property rights; they have hence weaker legal protections for minority shareholders' rights at the level of company law. As a result, in civil law countries, large blockholders are not ready to abandon their controlling stakes and investors are not ready to acquire minority stakes for fear of expropriation and agency costs (La Porta, Lopez-de-Silanes&al. 1997; La Porta, Lopez-de-Silanes&al. 1998; La Porta, Lopez-de-Silanes&al. 1999; La Porta, Lopez-de-Silanes&al. 1999; La Porta, Lopez-de-Silanes&al. 2000; La Porta, Lopez-de-Silanes&al. 2002). Therefore, ownership tends to be more concentrated in civil law countries – which includes all continental European countries – and equity markets are underdeveloped.

In this paper, we contest this 'legal origins' view by providing an analysis of the cognitive origins of 'legal origins'. Despite different legal origins, corporate governance structures on

[1] *„Zwischen diesen beiden äussersten Grenzen [der Ausbeuter und der Ausgebeuteten] liegt aber auch ein breiter Streifen Land, auf dem die friedlichen Hämmel wohl geleitet durch gute Hirten unter dem sicheren Schutz kräftiger Wolfshunde auf fetten Wiesen grasen und geschoren werden im Interesse der Gesamtheit."* (Fick 1920: 336).

both shores of the Atlantic Ocean were not fundamentally different up to the early 20th century. Only during the first decades of the 20th century did the two systems start to grow increasingly distinct. We argue that the emergence of the two different corporate governance models during the 20th century can be explained by different intellectual perceptions of the corporation and its goals. Concerning the regulation of corporate governance – i.e. the rights and responsibilities of the different stakeholders within the firm –the theory of the firm plays an important role: it allows actors to make sense of reality, to inform their behaviour in a context of uncertainty and imperfect information, and to legitimate a certain course of action. In that sense, theories about the firm and about corporate governance contribute to the formation of actors preferences.
With the rise of the large, quasi-public corporation with dispersed ownership, a need for regulatory action was perceived and legal scholars, economists and politicians discussed how to adapt 19th century corporate governance structures to the new situation of the early 20th century. While the fundamental problem, which was discussed as 'separation of ownership and control' in the US, and "*Strukturwandel der AG*" (structural change of the corporation) in Germany, was comparable in the US and Europe, the diagnoses and the remedies or solutions proposed went into different directions. The evolutions in economic structures were not fundamentally different in the three countries that we analyse: stock corporations grew bigger, used more and more equity markets to raise new funds, which led on the one hand to a decreasing size of the founders stakes in the company, but also to new claims on the companies due to their increasing importance for whole regions and the society at large. The 'dominant discourses' (Lehmbruch 2001) concerning diagnosis and remedies that emerged from this situation in both regions diverged fundamentally. To illustrate that fact, the view by Berle and Means that managers were to be considered as trustees of the shareholders shaped US corporate governance or at least the way US corporate governance was imagined. On the other hand, the idea of Rathenau that the firm had its own life and its own interests can explain why stakeholder and not shareholder interests became central in European corporate governance.[2]

Three points are central to our argument: firstly, corporate governance structures and rules were not fundamentally different in the US, Germany, and Switzerland up until the early 20th century. Secondly, the analysis – or diagnosis – of the problem and the remedies that were proposed by (mainly legal) scholars were essential in the creation of corporate governance institutions in the two regions. Thirdly, politics determined which of the diverging answers to a comparable situation was finally institutionalised.
Consequently, two factors have to be analysed: first, the debates among those who were responsible for the diagnosis and the remedies proposed. Second, we need to look at the political process and the context in which these debates penetrated the political arena and were transformed into law.
Our comparative analysis includes the two ideal-typical cases for the shareholder- and the stakeholder model respectively, i.e. the US and the German cases. We include, however, also the Swiss case in our comparison. Switzerland constitutes an interesting case for the comparison as the Swiss and German economic elites used to be very closely linked, but both countries new very different political evolutions during the early 20th century. Switzerland constitutes another case of a clearly insider- and stakeholder-oriented corporate governance system, but constructed its theory of the corporation explicitly in rejection of the German model. Hence, while both countries left the path of liberal economic organisation, they still went

[2] The terms firm or enterprise (in German: Unternehmen or Unternehmung), were not clearly distinguished in the period analysed here from the terms (joint-stock) company (or corporation in US English; in German: Gesellschaft, Aktiengesellschaft, AG). This lack of clear definitions is all the more surprising as the legal term corporation" means a legal body set up by the shareholders, while enterprise" rather means the economic unit to which workers and managers are more closely related than shareholders. Unless stated otherwise, we will use the terms firm and company as synonyms.

down a different path due to political factors, which allows us to better understand the German *"Sonderweg"*. The crux with the specific German development is that its economic policy is often considered by historians as a case apart – or a *"Sonderweg"*. The inclusion of the Swiss case allows us to show that another continental European country, with a very different political legacy, went down a fairly similar path which was clearly distinct from the Anglo-Saxon model. Thus, just as the case of Great Britain allows us to more close understand US (Anglo-Saxon!) corporate governance, the Swiss case merits attention for a similar cause.

The paper is structured as follows: Part 1 sets out our theoretical approach to the role of ideas in institutional change. In part 2 we show that the corporate governance systems in the three countries were not fundamentally different during the 19th century; in both regions family-owned companies prevailed, and the stock corporation was considered to serve the interests of the individual shareholder.
Part 3 discusses how these evolutions were theorised in the three countries and what remedies legal scholars and economists proposed. Part 4 briefly discusses the politics which ultimately led to the victory of the individualistic view (i.e. the shareholder approach) of the corporation in the US and to the supra-individualistic view (i.e. the stakeholder approach) in the two European cases during the 1920s-1930s. Part 5 concludes.

1. The role of cognitive aspects in the emergence of varieties of corporate governance

The diversity of corporate governance – i.e. the existence of an Anglo-Saxon and a continental European corporate governance system – cannot be explained without looking at the origins and history of today's institutions. We argue that in the field of comparative corporate governance research did not pay enough attention to the role of ideas and to the scholars who created and debated them (a notable exception is Klages 2007). Furthermore, we believe that comparison between national cases must take into account the interactions between legal scholars in different countries.

1.1. How to explain diversity of corporate governance

Scholarship in the field of comparative corporate governance usually distinguishes between two different 'varieties' of capitalisms and – in parallel – of corporate governance systems (Streeck 2001b, Berglöf 1997). On the one hand, a country cluster of Anglo-Saxon style corporate governance, which is characterised by dispersed share ownership, a consequential separation of ownership from corporate control, financing of companies through financial markets, and the organisation of economic activity mainly through market mechanisms. On the other hand, a continental European system which can be characterised by the prevailing of companies that have a large blockholder, where companies are mainly governed by insiders and financed by retained earnings and bank loans, and where market mechanisms play a less important role in the organisation of economic activity than mechanisms of extra market coordination (Albert 1993; Whitley 1999; Hall and Soskice 2001). This different focus on market- vs. insider-control and market- vs. bank-based corporate finance has as a corollary a different perception of the role of outside investors and of the goal of the firm.
Apart from the financial system, specific ownership structures are an important feature of the two corporate governance models: Anglo-Saxon companies are characterised by dispersed ownership where no shareholder holds large blocks, and firms are lead by hired managers, while ownership of continental European companies is often concentrated in the hands of one or several historical blockholders (La Porta, Lopez-de-Silanes&al. 1999), Becht&Mayer 2001, Faccio&Lang 2002, Grant&Kirchmaier 2004). The existence of large blockholders in continental Europe leads to personal relations – sometimes identity – between owners and

managers, and also to some – often paternalistic – responsibility for workers. Minority shareholder interests are considered to be negligible or even dangerous. In the US system, there is generally only one category of (small) shareholders. As a consequence, the interests of the atomised individual shareholder are central. Shareholders are the only constituency which has a legitimate claim to the residual profits of the firm (Jensen&Meckling 1976).
These differences between Anglo-Saxon and continental European countries at the level of corporate governance goes hence together with a fundamentally different conception of the joint stock company and its goals, which is commonly summarized as an opposition of a 'shareholder model' and a 'stakeholder model' of corporate governance.

Legal Origins

As mentioned above, the dichotomy between the two approaches has been explained notably by the different legal systems (or 'legal origins' in the Law and Finance terminology cf. (La Porta, Lopez-de-Silanes&al. 1999) and others cited above). Anglo-Saxon countries which are based on a common law system protect property rights and in particular minority shareholders well, which creates incentives to buy minority stakes and to divest from traditional majority stakes; whereas continental European countries – and other civil law systems – protect minority shareholders badly against expropriation by insiders (mainly directors), which explains why blockholders are reluctant to sell off their stake that allows them to monitor management (La Porta, Lopez-de-Silanes&al. 1998). This argument suggests hence that the dispersion of equity ownership and the consequential separation of ownership and control in Anglo-Saxon countries are related to fundamental features of common law countries. However, the problem with this explanation lies in the absence of serious analysis of the historical process which led to the emergence of different legal rules in different countries.
It appears that corporate governance in the US and in Germany were not fundamentally different in the decades around 1900 (Hannah 2007 even argues that Europe was more shareholder-oriented at this period than the US). The different trajectories of US and German corporate governance during the 20th century cannot be explained by legal origins. Rather, it seems to be a political story.

Political power relations and ideas

More sociological and historical studies question this view by showing that the contemporary organisation of the firm is largely the result of political struggles rather than of abstract differences in the legal system (Roe 1994, 1999, 2002, Jackson 2001, 2002, (Coffee 2000; Cheffins 2001; Windolf 2005). We adhere to this sociological and historically grounded approach, in that we consider that [h]istorically, national differences in corporate governance emerged as the legacy of political struggles over who should control the corporation." (Jackson 2003: 267). Many historical analyses exist which explain the emergence of a particular corporate governance system and ownership structures in different countries (see notably for the US Roe 1994, Coffee 2001 for the UK and the US, Cheffins 2001 for the UK, Jackson 2001 for Germany and Japan, Windolf 2005 for the US and Germany etc etc). However, these studies focus mostly on political power relations and interest group politics as explanatory variable for the emergence of a particular economic structure in the different countries. The cognitive underpinning of the different national system, on the other hand, is mostly treated as accessory or closely linked to material interests. In other words, on these accounts ideas are generally assumed to closely follow – legitimate? – a certain power configuration and the interests of the winning social group.
In this paper, we propose to have a closer look at the role of ideas in the social construction of different corporate governance systems. In fact, we consider that ideas about the place of shareholders within the firm were not just a back ground variable, but played a major role in shaping the corporate governance system. Lehmbruch considers that the institutions in which political economies like the German or the Japanese are embedded "*are supported by a dis-*

tinct cognitive framework from which they cannot be separated”. There is an *“interplay of institutions and of collectively held beliefs rooted in ‘social definitions of reality’”*, and *“these beliefs about the political economy and their evolution play an important role in explaining both the eventual persistence of such distinctive institutional patterns and phases of institutional change.”* (Lehmbruch 2001: 39). In fact, *“[i]nstitutional and policy change presupposes changes in the cognitive, normative, and instrument beliefs of elite decision makers (…).”* (Lehmbruch 2001: 41). This applies to corporate governance systems as well.

Roe’s (1994) analysis of the origin of the US financial system merits particular mentioning here because he does include an ideational – or ideological – aspect in his explanatory model. In fact he considers that populist anti-bank ideology played, besides interest group politics, a major role in the adoption of the anti-bank-power regulations of the New Deal era, which had a major influence on the ownership structure in the US. However, Roe (1994) conceives of ideas as a ‘background variable’, i.e. a cultural aversion in the US against concentration of economic power. Populist anti bank-power resentments influence the political process in the sense that interest groups’ claims have to be in line with ‘public opinion’ in order to be acceptable. Roe (1994) argues that since the interests of certain actors were indeed in line with the public opinion and with certain politicians’ constituencies, and because the polity reinforced the claims of local actors, legislation against the powerful but geographically concentrated money centre banks was possible.

In this paper we attribute more direct explanatory power to ideas in the sense that they played a major role in concrete political decision-making processes rather than just constituting a different “cultural background”. They helped actors to define their preferences in times of uncertainty and when confronted with new phenomena (Hall 2005, Culpepper 2005). This is not incompatible with Roe’s (1994) account of a certain culturally-rooted ideology which favours certain courses of actions over others, but completes this view.

More precisely, we argue that in a situation where economic actors and politicians faced a new phenomenon and were confronted with considerable uncertainty about the effects of the new situation, the particular diagnosis and the remedies that were proposed by different scholars had an important influence on the solutions that were chosen at the political level in order to address this new situation. This does not mean that we adhere to an idealistic view of institutional change; we do acknowledge the importance of political struggles which ultimately lead to the institutionalisation of a certain set of ideas in formal legal rules. Also, we admit that ideas can at times be instrumentalised by opportunistic actors in order to further their interests or legitimise their power. However, the way in which a certain problem was analysed and the remedies that were proposed – i.e. its ‘framing’ – is not entirely determined by material interests and has in turn contributed to the formation of the preferences of political actors. Ideas are hence not purely the expression of underlying power relations, but influence themselves the institutionalisation of a certain type of power relations. In other words, in some instances, ideas are to be considered as independent variables in the emergence of a given institutional setting. Culpepper (2005) considers even that changing ideas of central economic actors – what he calls joint belief shifts – are a sufficient condition for institutional change (see for the role of ideas in institutional change also (North 1990; Aoki 2001).

We propose hence an analysis which takes the ideational construction of corporate governance systems more seriously by showing that ideas played a major role in the emergence of two distinct forms of corporate governance. In other words, national corporate governance systems are the result not only of struggles over power, but also of struggles over ideas and beliefs.

In the next section we discuss more in detail the theoretical role that ideas play in processes of institutional change and the related question of the role of (legal) experts in shaping a given institutional setting.

1.2. *The scientific sphere: experts, ideas and political preferences*

A large literature on the role of ideas in political processes exists notably in the field of public policy and decision-making research (Blyth 2002, Campbell 2004, Schmidt 2001, (Sabatier and Jenkins-Smith 1993)[3]. Several authors have used such theories in the field of political economy and show that ideas play a major role in the changes in economic organisation (Hall 1993, Culpepper 2005). Lehmbruch (2001: 42) considers that public policy is shaped not only in 'political for a' but also in 'scientific fora'. In fact, experts contribute in various ways to formulated policy responses to a given problem or situation. This is not to say that policy making is a process of consensual coordination; but scientific opinions compete as do interests, and it is ultimately politics and power relations which determine which diagnosis and which remedies will finally prevail. Ultimately, "[t]he degree to which scientific ideas contribute to the formation of discourse about public policies is an empirical question" (Lehmbruch 2001: 41). This implies that we look more precisely at the 'agents of change' – both in the political and scientific sphere – in order to understand the emergence of different institutional solutions in different contexts, rather than attributing cross-national differences to broad and vague cultural predispositions.

We combine hence a focus on the interplay between politics and ideas with an actor-centred approach to institutional change (Scharpf 1997). The recent literature on varieties of capitalism has increasingly questioned the traditional institutionalist view of institutional change through phases of stability (or even inertia) and 'critical junctures' following external shocks (see for the concept of critical juncture Collier&Collier 1991). The newer historical institutionalist literature stresses the importance of endogenous mechanisms of institutional changed in which agency plays a major role (Thelen 2003, Hall&Thelen 2005, Streeck&Thelen 2005, Deeg&Jackson 2006). In this view, institutions are not only seen as constraints or incentives, but also as resources which determine partly actors' behaviour, but which can also be used by actors in order to favour their own interests (Hall & Thelen 2005, Deeg & Jackson 2006). Leaving room for agency allows us hence to understand mechanisms of incremental institutional changes, which cannot be explained by classical institutionalist theories which focus on 'path dependence' and 'institutional complementarity' and over-emphasis consequently stability over change (see for instance Hall&Soskice 2001). As these newer approaches put the accent on the role of agency, changes in actors' preferences become a source for institutional change. Preferences are, in turn, among other things determined by ideas and beliefs (Hall 2005). Therefore, ideas play a role in determining a given actors' political preferences and influence consequently political decisions and economic developments. The focus on (scientific) ideas leads also to a linked focus on those who produce scientific discourse, i.e. in our cases legal experts and economists. Looking at the writings of legal experts or scholars (including some economists) allows us to show how the thinking about corporate governance both reflected and influenced in a reflexive way developments at the firm and at the political levels. Legislative measures were informed by such debates and translated a certain diagnosis of a perceived problem and related remedies into legal rules. In his study of the role that legal experts played in recent corporate governance change in Germany, Klages (2007: 8-9) states concerning the role of legal scholars in the political process that:

"Not only does their engagement as experts in committees and commissions allow them to directly contribute to the political decision-making process. At the same time they provide the legislator with legal ideas which cannot only be deployed to justify political reforms in legal terms but which can also shape policy-makers' perception of problems they try to solve and the goals which need to be pursued."

[3] In parallel to the neo-institutionalist and public policy literature on the role of ideas in public policy, in the field of the sociology of law and comparative law, legal ideas are also considered to play a major role in the development of different national institutional settings (see Nelken 1995).

More generally, like all policy fields, the domain of corporate governance regulation goes together with a particular cognitive template – or policy paradigm in Hall's (1993) terms – which allows actors to interpret the societal world, to make sense of certain events, to reduce uncertainty and complexity, and to justify and inform their choices and behaviour. More precisely, since the emergence of the legal form of the joint stock corporations as a common organisational form of economic activity in the 19th century, the company has always been accompanied by a certain set of ideas about the firm and its goals, and the rights and duties of different stakeholders (note that the term stakeholder is not a historical term; Freeman 1984) of the firm. Akin to what Hall (1993) has called 'policy paradigm', the theory of the corporation is a cognitive construct which implies a fundamental hierarchy of goals and a certain number of instruments which are considered to best serve the underlying goals. The hierarchy of goals, which is inherent in a given theory of the company, attributes different actors different roles and a different place within the company and determines – or legitimates – hence a certain type of power relations. These cognitive templates play an important role in the formulation of legal rules.

The debates over corporate governance reform during the first decades of the 20th century reveal that in each country divergent conceptions of the corporation competed and certain – sometimes explicit – political choices were made which led to the victory of one view of the firm over the other.

International aspects

The importance of debates among legal scholars touches also upon the question of 'legal transplants' from one context to another other (cf. (Watson 1974)Fleischer 2004. This is an implicit, but still fundamental, assumption of the Law and Finance school, which considers that countries can be grouped into a very limited number of 'legal families' (LLSV). Such a categorisation presupposes that countries learn from each other" or that legal characteristics are transferred rather easily from one country to the other (Siems 2006). In fact, while we do not adhere to the extreme view of comparative lawyers that 'legal transplants' happen easily as law is independent from societal context, we do consider that legal scholars play a crucial role in favouring the diffusion of ideas from one context to the other (Klages 2007; Lehmbruch 2001). In fact, it is interesting to see that even in the protectionist" interbellum, debates over corporate law reforms were highly internationalized – not in the sense that Germans directly discussed with Americans, but that they cited each other. We show, in particular, that in both Germany and in Switzerland Anglo-Saxon law was an important reference point, but that its influence on a given national legal framework depends largely on the way in which domestic actors use these references and how they are supported or not by political power relations.

To sum up, in the present paper we argue that the different choices that were made in different contexts are precisely due to a difference in the 'diagnosis' made by legal scholars and economists concerning the effects of the separation of ownership and control. The 'diagnoses' that were made, were of course not independent from the context, but bore the mark of cultural and historical legacy. However, the fact that in all countries competing interpretations existed shows also that they were not completely determined by context either. Notably, legal scholars look abroad when they try to find solutions to a problem at hand, which constitutes a way in which responses can depart from the traditional path. Depending on the context, certain legal ideas found the necessary political support and were institutionalised.

The period from the 1910s up to the 1930s constitutes a period where an important change in the institutions of the capitalist countries took place. During this period, a new situation (the increasing separation of ownership from control) sparked off a debate in which different actors propose different interpretations of the problem at hand and suggest different remedies. Such diagnoses are then picked up – or not – by certain actors in order to favour a certain course of action at the political level (Deeg and Jackson 2006). We argue that it is precisely such a process of ‘crisis – diagnosis/remedies – political choice’, which took place during the period of the 1910s up to the 1930s and constitutes the origin of the two different types of corporate governance models, one oriented towards shareholders’ the other one towards stakeholders’ interests. The period that we analyse does not constitute a ‘critical juncture’ in the sense of a complete break down of an existing institutional setting which allowed to choose a new path, but it was a period were different ‘external events’ and structural changes in the economy lead to an increasing questioning of the existing system and favoured the emergence of new ideas an new political solutions at hand. In other words, the discrepancy between the societal reality and the existing beliefs concerning the functioning of the company were increasingly mismatched, which lead actors to redefine their beliefs and favoured reforms and profound changes (cf. Hall 1993). The different diagnoses of legal experts and the remedies that they proposed in this period of economic and political uncertainty and instability were a crucial factor which explains the institutionalisation of two different systems in Europe and the US.

The next chapter shows that the US on the one hand and Germany and Switzerland on the other, were during the second half of the 19th century not as different concerning corporate governance structures and rules as the modern opposition of the two models would suggest.

2. A common ground to start with: European and American capitalisms in the 19th and early 20th centuries

The starting point of our analysis is the hypothesis that corporate governance was not that much different in the US and in Europe around 1900, and that it developed into similar directions after the turn of the century. This applies to two domains, the legal framework of corporate governance just as well as firm practices.
Several historical studies show that the continental European and the North American capitalist societies of the late 19th and early 20th century where not as different from each other as the dichotomist view, which prevails today, would suggest. This concerns both, the economic structure of the corporation and its financing and the legal framework. Systematic data are rare concerning corporate governance practices and structures for the historical period. However many studies suggest that the US were not more shareholder-oriented at the time than European countries. Thus, Windolf (2005) shows that the US and Germany shared several features concerning the role of banks, the networks of interlocking directorates and of cross-shareholdings between companies (cf. also (Davis and Mizruchi 1999), Vitols 2006. Lazonick and O’Sullivan (1996) show that both in the country cluster of so-called coordinated market economies (CME) and of liberal market economies (LME) blockholding by families prevailed during 19th century. Both in the early quasi-public corporations (railways, cf. Dunlavy 1994, Chandler 1977: 79-205, Hannah 2007) and in privately held corporations, shareholders were considered as the central interested group.
Moreover, the development of capital markets – one of the distinguishing features between the shareholder and stakeholder models in the late 20th century – Rajan and Zingales (2004) and Roe (2006) show that European countries did not have underdeveloped capital markets as compared to the US or other Anglo-Saxon countries. Hannah 2007 even argues that stock markets in the UK and in France were more vigorous in the early 20th century than their US counterparts, whereas large US corporations were, around 1900, dominated by plutocratic family owners – an ownership structure later associated with continental European corporate governance.
In the late 19th century, lawyers and legislators on both sides of the Atlantic agreed that the goal of private firms was to serve the interests of shareholders. Thus, the place of the shareholders was the core of corporate laws in all three countries. Legislators tried with different

means and not always successfully to protect shareholders. The German way of protecting shareholders is particularly interesting.

Company law in Switzerland: Relying on self-regulation

In Switzerland, the legal framework of corporate governance was based only on the Stock Corporation Law of 1881. The first banking law was adopted only in 1936 and Federal financial market regulations were inexistent up to the mid-1990s.

The Swiss Stock Corporation Law of 1881 was based on the German law of 1870 which in turn was based on the French law of 1867. After 1881, the Swiss law appeared to be very liberal. Very few things were regulated on a mandatory basis, and basically, the organisation of corporation was left to the self-regulation of economic actors. The Swiss law was more liberal than the German law of 1884 (one central difference being that Switzerland had a one-tier-board, unlike Germany with its strict separation of supervisory and management boards). According to contemporary observers, it was closer to the British model than to the German one concerning the general spirit of the law was concerned (cf. for more details David&al., forthcoming). Hence, even Switzerland, traditionally considered as the prime example of an insider-oriented corporate governance system where minority shareholders are very badly protected, the shareholder was clearly at top of the hierarchy at the end of the 19th century. This is expressed by the fact that the general meeting of shareholders was the supreme organ of the corporation, which could withdraw any competence from the other organs (Swiss company law 1881).

Corporate law in Switzerland did not change before 1936. As we will see, an important question during the reform process (which began already in 1911) was whether the shareholder-orientation of the 1881 was still appropriate in the 20th century. There was growing consensus that the liberal character of the corporate law should rather be interpreted in favour of blockholders and managers and not of minority shareholders.

Germany: A special way of shareholder protection

The importance of shareholder protection became apparent for the German legislator with the stock exchange crisis of 1873 (the *"Gründerkrise"*). As a consequence of the crash of many unsolid firms, shareholder protection became even a priority for the Germany legislator. One very influential legal expert in Germany – Rudolf von Ihering – analysed the problems of 1873 in terms of what we would call today 'agency problems', and proposed legal action in favour of shareholders Ihering 1904 [1877]. In fact, Ihering saw principal-agent conflicts between managers and shareholders as an inherent problem of the corporation.

The Gründerkrise led to the company law reform of 1884 (Schubert and Hommelhoff 1985), which was clearly oriented towards the protection of minority shareholders from abuses, such as those which have led to the crisis of 1873. Another step into this direction was the stock exchange law of 1897 which banned certain forms of trade which were considered to be dangerous (Fohlin 2007).

Another measure adopted with the reform of 1884, which was marked by an atmosphere of mistrust towards financial markets, had also important – unintended – consequences for German corporate governance. In fact, in order to protect private households from the apparently dangerous dynamic of stock markets, the law fixed the minimal par value for shares at 1000 *Mark* (Jackson 2001). This measure discouraged of course greatly the spread of shareholding among private households, which in turn had far-reaching consequences on the development of the financial system. In fact, together with the liberal attitude towards universal banks, this reform constitutes arguably a first step down the road of an insider- and bank-controlled system.

The strong shareholder protection of the 1884 law led Franz Klein, an Austrian legal scholar, to criticise the excessive protection of small shareholders". He argued that strong MSP would prevent firms from growing strong and left their managers without the necessary autonomy (Klein 2004 [1904]).

"It is a legislation born out of mistrust, soaked with suspicion, directed against abuse. Its polestar is protection of the shareholder with a slight inclination towards the small shareholder, protection against the organs of the corporation and against the exploitation of the corporation by its organs or by third persons." (Klein 1904, cited in: Egger 1925: 4-5, our translation).[4]

The German legal framework of the late 19th century was hence by no means directed against the interests of the shareholders. Even during the Weimar period, there were still some traces of the shareholder protection tradition of the 19th century. In fact, the only piece of company law legislation of the Weimar period (*"Notverordnung"* from 1931, influenced by the crashes of large firms) was characterized by a trend towards better control structures and more disclosure, and mainly followed the German legislative tradition of shareholder protection. What Jackson (2001: 129) noted for the German and the Japanese cases, applies also to the comparison between Germany, Switzerland, and the US:

"Corporate law in German and Japan were initially shareholder-oriented but had different normative conception of how to institutionalise shareholder interests".

The main measure which aimed at the institutionalisation of shareholder interests in 1884 in Germany was the introduction of a strict two-tier board structure in which the supervisory board monitored management[5]. However, rather rapidly this structure showed an unintended consequence, which the legislator of 1884 did certainly not anticipate, i.e. the supervisory board helped large blockholders to defend their prerogatives against minority shareholders. Furthermore, it was feared that shareholder protection would be a handicap for the rapidly growing German economy. Thus, while in the Swiss case the liberal character became the tombstone of shareholder protection and the basis of insider-oriented corporate governance, the non-liberal character of the German law had similar consequences.
Lehmbruch (2001: 46) considers that the period of the late 1870s, constitutes a watershed in the history of the German variety of capitalism as the formerly 'liberal developmentalist' discourse started to be replaced by the discourse of the 'socially embedded capitalism'. Concerning corporate governance, we do observe a certain change in the regulation of corporations following the *"Gründerkrise"*. However, this reorientation cannot be seen as a 'paradigm shift'. In fact, the reform of 1884 did not put into question the fundamental aim of the joint stock corporation. To be sure, the stock corporation law reform of 1884 led to the abandoning of the formerly liberal approach, where much leeway was given to the self-regulatory forces of the market and little state intervention existed. However, this change affected the means not the goal of the law. The law of 1884 was explicitly meant to enhance investor protection as a consequence of the 1873 stock exchange crash. The way in which this was to be done, was through detailed and constraining legal rules. The most important example is the strict separation of tasks between the executive boards and the supervisory board.
The legal reforms of the late 19th century reflect a loss of the belief in the self-regulating capacity of market forces, not an abandoning of the underlying idea. In more theoretical terms,

[4] *„Es ist eine aus Misstrauen geborene, von Verdacht durchtränkte, gegen Missbrauch gerichtete Gesetzgebung. Ihr Leitstern ist Aktionärschutz mit einer leisen Wendung zum Kleinaktionär hin, Schutz gegen die Gesellschaftsorgane und gegen die Ausnützung der Aktiengesellschaft zum Vorteile von Gesellschaftsorganen oder Dritten. Ob und wie die Gesellschaft, das Geschäft dabei gedeihen kann, steht nicht im Vordergrunde (…)"* (Klein 1904, cited in: Egger 1925: 4-5).
[5] The two-tier board system was introduced already in 1870 (Bähr 2003: 62), the strict separation of the two boards only in 1884.

they constitute a second order change (new instruments are introduce to achieve an old goal), and not yet a third order change (the hierarchy of goals is altered) (see Hall 1993).
We argue that the hierarchy of goals (i.e. shareholder supremacy) persisted as overreaching goal (if not at the firm level, so at least in corporate law) up until the interbellum period when a paradigm shift took place. An alternative corporate governance model was institutionalized only during the 1930s.

Investor protection in the US?

When New Jersey adopted the first modern corporate law on US American soil in 1896 (Roe 1999, Cary 1974). This law – like the Delaware code adopted shortly after and largely inspired by the NJ law – did not attribute more priority to minority shareholders than the European laws. At the contrary, the NJ and Delaware laws aimed clearly at attracting large trusts to incorporate in their respective states and were therefore but very liberal towards trusts, but also often criticised for their orientation towards the interests of the managers rather than the interests of shareholders (e.g. Cary 1974). Hence, no particular shareholder-orientation marked the most important corporate laws in the US at that point.
Furthermore, given the common law system, tribunals and judges played an important role in the corporate governance and concerning the attitude towards protection of shareholders.
Interestingly enough, the jurisprudence of the late 19th and early 20th centuries, there is not yet a clear orientation towards the interests of minority shareholders (cf. Bakan 2005).
Some argue that by that ruling, the corporations came to be considered as a body with interests which were not identical to shareholder interests. The individualistic and contractualist view of the firm is hence not a natural feature of the US, but was at a certain point in time in competition with a super-individualistic approach that is usually associated with the continental European model.
Another landmark law suit, which is often considered to have founded the shareholder orientation of US firms was the *Dodge v. Ford Motor* case of 1919 (cf. Bakan 2005, Baums and Scott 2003). In this ruling, the court obliged Henry Ford to give priority to the interests of (minority) shareholders instead of customers and employees.
To summarise, the common law tradition the US had inherited from Great Britain did not a priori favour minority shareholder protection. The US corporate governance system was not destined from the outset to become a shareholder-oriented model.
In short, in all three countries, corporate governance structures and rules were fairly similar: most companies were controlled by a dominant shareholder (often the founders) and the conception of the firm was based on the idea that individual shareholders occupied a central place within the company. The legal means by which this protection should be assured, however differed from one country to the other.

2.1. *The increasing separation of ownership and control*

Our main argument is that starting from a very similar situation at the end of the 19th century in Anglo-Saxon and continental European countries, the two regions developed little by little into different directions. The divergent paths of the two countries – so we argue – reached a critical point during the early 20th century when different corporate practices were institutionalised in formal legal rules and gave the divergent trends a more permanent aspect.
More precisely, towards the end of the 19th and at the beginning of the 20th centuries, an evolution took place that put into question existing beliefs about the firm and challenged the legal framework which governed economic activity: many companies which had been founded as a personal form of economic organisation with a owner-entrepreneur as only investor, changed into ever larger organisations where professional managers were in increasingly independent from the control by the owners and where a new type of investors emerged, i.e. minority shareholders. This evolution was no US specificity, but was perceived in Europe as well. In fact, the transformation of the nature stock corporation was quite widely discussed as the

'Strukturwandel der AG' (e.g. Passow 1930 in Germany). This situation led in both regions – i.e. the US and continental Europe – to an increasing concern with the impact that this increasing separation of ownership and control would have on the company and the economy as a whole. The trend towards ever larger companies, whose importance for society as a whole increased accordingly, and the new power relations between insiders and outside investors made that the rules that governed the owner-manager company of the 19th century look inappropriate in the eyes of many observers.

With the rise of large and giant firms[6] the developments in the three countries still went into similar directions at first: Firstly, there were increasingly close interrelations between banks and industrial firms in both regions as companies relied also on bank loans in order to finance their expansion. This can be illustrated by the proximity of Hilferding's (1910) analysis of the *"Finanzkapital"* and Brandeis' (1914) *"Other people's money"* which both criticised the excessive influence of banks over industrial companies (cf. the comparable role of J.P. Morgan, and of the German and Swiss universal banks).

Secondly, the basic structures of the large firms was similar, viz. a divide opened up between managers and directors (including blockholders or other people in "control", as Berle and Means 1933 termed them) on the one hand, and small, dispersed shareholders on the other.

To sum up, contrary to the assumption that there is a typical Anglo-Saxon" model of corporate governance, history shows that this model was in constant flux, and that continental European" elements like bank-control existed in the US as well at least up to the early 20th century. The puzzle is hence why did the historical paths of the two regions develop into different directions some time around the First World War?

The period of the 1910s up to the 1930s constitutes a watershed in all three countries as the differences in corporate practices started increasingly to be codified, which reduced the heterogeneity of practices within one country and led ultimately to the crystallisation of different national models. Again, this is no new insight as the Law and Finance school has been criticised on several accounts and historical analyses have made a point against legal determinism. However, as noted above, the ideational aspect and especially the interplay between ideas, politics, and law have not been closely studied so far. We do not pretend to give a definitive answer to the question of why the two models emerged and persisted – arguably at least up until the 1990s –, but we show that the first decades of the 20th century were crucial period for modern capitalism, and we show that this results from the fact that experts in Germany, Switzerland and the US developed two distinct – even contradictory – answers to a same problem and that two different solutions ultimately found the political support and were institutionalised.

3. Diagnosis and remedies: Corporate governance debates of the inter-war period

In all three countries, the exclusive orientation of corporate governance towards shareholders' interests was called into question during the first decades of the 20th century, and the legitimating of other stakeholders' interests, such as workers, managers or national interests, was discussed. This had notably to do with growing size – and hence importance – of the companies, but also with the context of repeated crises. Some scholarly works on either shore of the Atlantic can be considered to have had a particular impact on these debates and have led to distinct theories of the stock corporation which emerged during that period: For the US case, the famous book by Berle and Means "The modern corporation and private property" (1933) has had a tremendous influence and is nowadays considered to be the most influential work

[6] It should be noted that in most countries, a large sector of mainly closely-held, family controlled SME exist still in the early 21st century. Our analysis applies obviously not to this category of companies but to large stock corporations, which would eventually use the capital markets in order to raise funds.

on corporate governance in the twentieth century" (Clarke 2005: 7) and as a predecessor of agency theory and shareholder protection. For the German case, it is the theory of the firm as such" (*"Theorie vom Unternehmen an sich"*) developed in Germany at the basis of Walther Rathenau's essay *"Vom Aktienwesen"* (1917) which argued that the firm did also serve stakeholder interests. For Switzerland, a central figure in the development of the theory of the firm was the lawyers August Egger and Walther Hug who developed the theory of the firm interests or of the corporate interest", which was based on foreign models, but differed from them in key aspects.

In the next sections we expose the debates in each of the three countries in order to show, how the conception of the company and the orientation of corporate governance gradually evolved into the direction which is nowadays familiar to us.

3.1. Switzerland: A mixed corporate governance system, or a model of its own?

When the Government in 1911 kicked off a reform of the Stock Corporation Law of 1881, the above mentioned evolutions of the economic context led to a debate about how the legal framework of corporate governance should react to the new situation. Corporate governance debates in Switzerland cannot be understood without looking abroad, in particular to Germany and Anglo-Saxon countries, and to a lesser extent France, as Swiss legal scholars were familiar with foreign intellectual trends.

As stated in the introduction, Switzerland was apparently a haven of peace for companies as major problems, scandals and business failures were rare. However, the picture of Swiss companies as 'safely grazing sheep' was rather ideal than reality. The context of this animal metaphor used by the lawyer Fritz Fick is a citation by a Swiss industrialist who had stated that: *"Les actionnaires sont ou des lions ou des moutons, mais toujours des bêtes."* ("Shareholders are either lions or sheep, but always animals"[7]) (Fick 1920: 336). Fick concluded that only one of these categories of (animal) shareholders (the loyal ones, the lambs) had legitimate interests, whereas the others (the greedy lions) had not. This was to become a characteristic feature of Swiss corporate governance.

Winds of change from abroad? Foreign influence on Swiss legal experts

In recent times, the Berle/Means paradigm has become so ubiquitous that even lawyers writing about Swiss corporate governance begin their historical introduction" by stating that the basic corporate governance problem was the principal-agent conflict first analysed by Berle and Means in 1932 (cf. as example Raggenbass 2005). As a matter of fact, Berle and Means's analysis had not played any role whatsoever in shaping Swiss corporate governance as it emerged from the 1936 Stock Corporation Law reform. The classic studies about Swiss corporate governance do not even mention the famous opus of Berle and Means (1933) (cf. (Schluep 1955, Binder 1988). Only later did scholars who were critical about the insider-oriented Swiss corporate governance style draw on Berle and Means (Hofmann 1954).

This is not to say that Swiss lawyers of the interwar period were not aware of what was written in the US, but other US authors had a more important influence on Switzerland than Berle and Means's view. Interestingly, the US was mainly cited by scholars in support for a stakeholder-oriented system. This is illustrated by the unlikely origin of hard-core stakeholder theory in Switzerland: It was a professor of legal history, Hans Fehr, who introduced in Switzerland the notion that not the corporation" and its shareholders, but the enterprise" and its stakeholders should be central to modern company law. In his work, he explicitly referred to US sources, such as John D. Rockefeller, Henry Ford or Herbert Hoover, concerning the origins of this idea (Fehr 1928). Fehr (1928: 121-124) cited Rockefeller jun. and Henry Ford who both argued that in the use of property, the interests of workers should be considered referring to these ideas as a form of socialist Capitalism". Fehr considered that in the US entre-

[7] Note that there is a pun in French, which is not translatable in English, as 'bête' can mean either 'animal', or 'stupid'.

preneurs were considered as a manager of ‚organized property’ rather than as a capitalist.[8] Fehr also cited Herbert Hoover who considered that the current age was one of transition from an individualist period to a more collectivist period of collaboration and economic democracy (Fehr 1928: 124-125).

Germany on the other hand, despite the fact that both systems were later considered to be very close, served, mostly as a negative reference for Swiss lawyers during the early 20th century. Of course, Germany was, due to geographic proximity and intensive economic ties, a major source of inspiration for the ideas Swiss lawyers and economists had about corporate governance. Moreover, mobility between the two countries was large not only among legal scholars, but also among the economic elite especially before the First World War (see Schnyder, Lüpold&al. 2005). However, the Swiss relations to Germany were characterized by a mixture of closeness and distance. While the Swiss Stock Corporation law of 1881 drew heavily on the German law of 1870, Swiss lawyers viewed the company law of their country as more liberal than the one of its powerful and large northern neighbour. In Switzerland, the special German way of protecting shareholders especially after the 1884 reform was explicitly rejected as a police law”. It was in fact considered to be too restrictive for Switzerland, because there were supposedly less corporate governance problems in Switzerland. Fehr considered hence that, rather than further following the German example, some fresh wind from America” (Frischer Wind aus Amerika: Fehr 1928: 119) would do the Swiss law some good. Other lawyers advanced similar arguments by drawing on British company law. Actually, there were some differences between the Swiss and the German company laws regarding the regulatory density. The phrase Men not measures”, which characterizing British company law, was used to describe the difference between the Swiss and German laws. One argument was that liberal rules, which did not prescribe directly any behaviour for directors, but established a certain accountability, protected investors better than elaborate do’s and dont’s”. Both Swiss and German contemporary observers compared the Swiss company law to the British company law rather than to the German one. One influential Swiss lawyer formulated it as follows:

“Even the most restrictive legislation proved, time and again, as inadequate and powerless. A simple and consciously reticent legislation much more relies on the general principles of the legal order and is much better able to release those forces without which it is impossible to get by.” (Egger 1925: 6; our translation).[9]

In fact, despite the “civil law” character of Swiss company law, scholars (Egger among them), politicians and representatives of economic interests tended to rely on court judgements in case of conflicts between shareholders (e.g. minority shareholder vs. blockholders), while keeping the legal rules very general (“liberal”). There was widespread consensus that this Anglo-Saxon style (British and US models were explicitly mentioned) was a more efficient way of protecting shareholders than the German way of shareholder protection. At the same time, this view allowed to integrate other stakeholders’ interests. Faced with two extremes – protection of the shareholders or of the firm as such – Swiss legal experts chose a third model, a sort of stakeholder by self-regulation. As an example, while German firms were forced by law to separate their boards of directors and supervisory boards, the Swiss system left the decision concerning the board structure to the companies themselves. This shows that political factors (refusal of German ideas) were much more important than common legal (civil law) origins.

[8] *„Daher sieht der Amerikaner im Unternehmer weit weniger einen Kapitalisten als einen Verwalter und Leiter organisieren Eigentums.”* (Fehr 1928: 123).

[9] *„Auch die strengste Gesetzgebung erwies sich immer wieder als zu mangelhaft und als ohnmächtig. Eine einfache und bewusst zurückhaltende Gesetzgebung arbeitet stärker mit den allgemeinen Grundsätzen der Rechtsordnung und vermag damit viel eher die Kräfte auszulösen, ohne welche schlechterdings nicht durchzukommen ist.“* (Egger 1925: 6).

The emergence of the theory of the corporate interest”

The influential scholar Walther Hug (1934: 10) considered that the company law reform was influenced by two main trends. First, the above-mentioned *“Strukturwandel”* of the joint stock corporation; and second, new ideas concerning the nature and goals of the corporation that had emerged. Because of these factors, so he argued, a gap between the codified and the law in action had opened up which current reforms should fill. Debates among legal scholars as to the orientation of corporate governance were crucial for formulating the new image of the corporation.

In practice, the liberal” character of the Swiss company and the leeway it left for actors to interpret the rules, had started before the First World War to be increasingly used in favour of corporate insiders rather than to protect minority shareholders. Corporate governance discussions held in Switzerland in connection with the company law reform of 1911-36 show that whereas liberal had meant “shareholder-friendly” in the 19th century, it was more and more used as a pretext to hide the interests of insiders, i.e. blockholders, managers, and bank representatives. Even though the first draft law of 1919 tried to adapt 19th century shareholder protection to large quasi-public firms (Huber 1919; Huber 1920), there was rapidly growing consensus among lawyers and businessmen that in addition to shareholder interests, the interests of the firm” should also be protected.

The most important and influential writer in the field of company law, professor August Egger (University of Zurich) represented this idea. Egger (1925) argued notably that the strict and detailed German rules had not prevented abuses, which is why shareholder protection should be rejected as an aim of the law. For Egger, the focus on shareholder protection in the 19th century laws was outdated and was to be replaced or supplemented by the protection of the firm: If the prosperity and protection of the enterprise was guaranteed, then shareholder and creditor interests were also protected (Egger 1925: 7-8). Interestingly, this idea was already stipulated in Rathenau’s (1917) conception of the ‘convergence of interests’, i.e. all legitimate interests of shareholders converged with the interests of the company; those who did not, were not legitimate.

This shift in the goal of the reform is remarkable because when works on a company law reform had begun in 1911, no fundamental change in the orientation of the legal framework of corporate governance was intended, and investor protection had in effect been the main topic.

To explain this shift away from investor protection, Egger forwarded several reasons. For one, the complete abolition of shareholder rights was in no means intended; however, shareholders should not be the only and not the most central beneficiaries of the firm. Citing some important German writers (notably Franz Klein), he argued modern company law should enable the growth of the firms, and this implied giving managers and directors the necessary instruments needed to finance and manage the firm in full autonomy. The interests of shareholders, on the other hand, should only be protected as far as they did not interfere with the interests of the firm (Egger 1925: 8-9). Of course, Egger knew that managers and directors might be tempted to interpret firm interests” as to increase their own private benefits of control. This was all the more so as Egger was aware that more often than not, directors and managers were at the same time blockholders (Egger 1926). On the other hand, Egger also acknowledged that minority had become increasingly interested in the share as a means to make money rather than as a right to participate in the control of the company. Shareholders had become self-interested speculators with little interest in the firm.

In Switzerland – and also in Germany, as we will see later –, opportunistic behaviour by managers appeared to be the lesser evil than opportunistic behaviour by minority shareholders, as the former had a genuine interest in the survival of the company whereas the latter did not. It is hence not only a different image of managers which explains different approaches in Europe and the US, but also a different image of shareholders. This is certainly explained by the different shareholder cultures in both regions: Small shareholders were seen in the US as respectable citizens, while they were considered in continental Europe as highly suspect and self-interested individuals. As shareholding by private households was wide-spread in the US as early as in the 1920s, the picture of the proverbial 'stupid and impertinent' shareholder prevailed in Europe[10]. Due to the difference in corporate finance and the existence of an equity culture early on in the US, minority shareholders were in fact a constituency in the US. Protecting shareholders meant protecting your voters; this was not the case in Europe.

Whereas Egger had been influential in the pre-parliamentary phase of the company law reform (1911-1928), the law professor Walther Hug (University of St. Gallen, Hug 1934) was probably the most cited scholar during the debates in Parliament. The ideas presented in his work are not very different from Egger's ideas. However Hug made some important precisions in the light of economic developments and corporate governance debates since 1925 (when Egger had written). Interestingly enough, Hug had been a professor at Harvard Law School for some time, which may account for the fact that his image of the shareholder was somewhat more positive than that of Egger. Hug considered that the typical corporate governance question in Switzerland was between small shareholders and blockholders. In fact, as the (one-tier) board of Swiss firms was often composed of blockholders, they had a considerable influence on the company.

Hug also considered that among the minority shareholders, not all shareholder interests were to be protected to the same extent. While the interests of long-term investors (*"Daueraktionäre"*) and blockholders were compatible with the necessary protection of firm interests, the interests of speculators (short-term investors) were not. This idea reflects Rathenau's (1917) assumption that the interest of shareholders – rightly defined – converged with the interest of the firm. Yet, Hug explicitly distanced himself from Rathenau's (1917) work and considered that the idea of the company in itself" was, only an ideology that helped to legitimate the interests of insiders and blockholders (Hug 1934: 32).

Interestingly, the main propagator of the theory of the firm as such in Switzerland was Professor Hans Fehr (University of Bern) – the same person who had imported US stakeholder ideas into Europe during the 1920s. Another scholar who defended this view was Kurt Kohli, a student of Fehr. His doctoral dissertation of 1933, published some years later by Kohli (Kohli 1936) was the most Rathenau'ian work to be found in Switzerland. Drawing on Rathenau (Rathenau 1917) Kohli stated that the enterprise was an organism that wanted to exist, survive, and expand – even in the case that no profits were made. In the case that the enterprise was not led by a private individual (entrepreneur), there emerged a conflict of interests between the enterprise and the capital givers. In general, the interests of the enterprise" should be given priority over the interests of the shareholders, which formed the 'corporation' as one of several organs of the company. For Kohli, it was the directors and managers (he called them, using the management slang of these years, *"Unternehmensführer"*) who were the guards of the enterprise interests and who had to defend them against the outside and financial interests of shareholders. Yet, the theory of the firm as such had little impact on scholarly debates in Switzerland (Riechers 1996).

Hug (1934) regarded both this theory of the firm as such and exclusive protection of shareholder interests as extremes and proposed a third – alternative – approach. This third way can be seen as a compromise between both views and constituted a moderated stakeholder system. While he agreed with Egger that the protection of firm interests was necessary (Hug 1934: 13, 20), he refused the view that the interests of the national economy and of the state should be taken into consideration (as the socialists proposed, Hug 1934: 20), and he did not mention other stakeholder interests (workers). The new law, so he argued, had to take into account the *"Strukturwandel"* of the joint stock corporation (i.e. the trend towards ever larger companies and the formation of groups of companies, and the shift of power from the general meeting to the board; Hug 1934: 29).

[10] The one-liner Shareholders are stupid and impertinent. Stupid because they invest their money in shares, and impertinent because they demand a dividend for their stupidity" is usually attributed to the German banker Carl Fürstenberg.

Whereas Egger's main influence was to relativise or qualify shareholder interests and hence to introduce the super-individualistic view of the firm in Switzerland, the main contribution of Hug to the cognitive creation of the Swiss corporate governance model was that he refused the idea that the interest of the 'company as such', or any 'public interest' should be predominant. As the common interests of the shareholders were identical with the interests of the firm i.e. the protection of the company and its survival (Hug 1934: 35), the protection of the firm's interests automatically included the protection of shareholder interests and (secondarily) also of stakeholder interests. This was the first step to the doctrine of the 'corporate interest' that was very influential in Switzerland during the following decades.

Be that as it may, the view represented by Egger and Hug had three consequences: First, only the interests of long-term shareholders (*"Daueraktionäre"*) and blockholders were to be protected (not those of speculators), which also implied that the shareholder had a certain responsibility towards the company – i.e. at least providing 'patient capital' –, which is reflected in the above-quoted dairy cow metaphor; second, a powerful management (*"Unternehmensleitung", "Verwaltung"*) was necessary to assure the development and survival of the company (Hug 1934: 35-36); this implied, third, that it was up to managers to decide to what extent the interests of the shareholders and the different stakeholders were considered. This conception of the firm was already pretty similar to the doctrine that would become dominant with the stock corporation law of 1936 and would persist up until the 1990s (Schnyder, Lüpold&al. 2005).

With the emergence of the idea of the "corporate interest" (*"Unternehmensinteresse"*) during the 1920s and 1930s following Egger's and Hug's writings, for the first time a clear departure in legal thought from a shareholder-centred view emerged in Switzerland. This theory had the advantage of being distinct from the German theory of the 'company in itself' as it abstained from viewing the corporation or the enterprise as a living organism. In fact, Egger's and Hug's seemingly Swiss" idea of the corporate interest or firm interests, which was constructed in opposition to both German conceptions of shareholder protection and of the firm as such, was far more influential than the more internationally inspired ideas by Fehr and Kohli (US and German sources). This differentiation of Swiss legal thought from German scholarship has to be seen in the broader context of the interbellum, when the Swiss economy tried to emancipate itself from foreign influences (Schnyder, Lüpold&al. 2005).

Debates among legal scholars as to the orientation of corporate governance took place in connection to company law reform. However, despite the civil law" character of Swiss company law, scholars, politicians and businessmen tended to rely on court judgements in case of conflicts between shareholders (e.g. minority shareholder vs. blockholders), while keeping the legal rules very general ("liberal"). There was widespread consensus that this anglo-saxon style (British and US models were explicitly mentioned) was a more efficient way of protecting shareholders than the German way of shareholder protection. At the same time, this view allowed for the taking into account of other (stakeholder) interests. Faced with two extremes – protection of the shareholders or of the firm as such – Swiss legal experts chose a third model, a sort of stakeholder by self-regulation. This shows that political factors (refusal of German ideas which were viewed as dangerous for the independence of Switzerland) were much more important than common legal (civil law) origins.

However, the fact remains that both in Switzerland as in Germany, the position of shareholders was weakened. During the debates about the Stock Corporation Law reform which started in 1911, legal experts little by little abandoned the traditional individualistic view of the firm and advocated increasingly for the super-individualistic view of the firm. This change has to be seen notably in the context of the economic crises of 1921/22 and of the 1930s. This made individual shareholders' interests secondary compared to the survival and prosperity of the firm. The next chapter shows that in Germany a similar evolution took place approximately at the same time.

3.1 Germany: Rathenau'ian capitalism as a model for continental Europe?

The history of German corporate governance in the 19th century can be described as a history of shareholder protection. Also in the scholarly debates of the early 20th century, this remained an important topic. However, an alternative corporate governance model soon emerged which proposed a different hierarchy of goals of the corporation.

The declining role of the idea of shareholder protection

As we have seen, the lawyer Rudolf von Ihering criticized the company law of 1870 for not taking into account certain basic corporate governance problems. Ihering concluded from the stock exchange crash of 1873 that it was dangerous to entrust other people's money (*"fremdes Geld"*) to the managers and founders of corporations. He formulated the agency problem in pretty much the same terms as Berle and Means would do for the US case some decades later.[11] To Ihering, the managers were the problem: For him, the corporation was basically a criminal instrument used by managers to cheat on investors:

"The position of the administrator [i.e. of the manager] implies a large temptation. (…). No thief is in so good a position to steal as the administrator of other people's goods, and no cheater can so easily commit a roguery and cover it up than he." (Ihering 1904 [1877]: 172/223).[12]

During the 1920s, shareholder interests were increasingly debated for two reasons. Firstly, after the end of the First World War and during the inflation period, German firms were faced with the danger of hostile takeovers by foreign competitors; they tried to protect themselves against this danger (they used the Swiss term *"Überfremdung"* to describe this situation) with the use of super-voting shares and other legal devices. This development favoured insiders and weakened the position of outside shareholders. Also during the 1920s, Germany observed a concentration tendency; again, this was a problem for minority shareholders. When firms were taken over or integrated into large groups (Konzerne), the Konzern often bought only a fraction of the share capital (e.g. 70%), the rest (30%) remained in the hands of minority shareholders whose interests were afterwards neglected by Konzern.

These developments and the resulting shift of power from the general meeting (shareholders) to the management were called *"Strukturwandel der AG"* (structural change of the corporation). The *"Strukturwandel"* was subject of one of the numerous commissions that dealt with company law reform during the Republic of Weimar. It was the Enquete committee which ordered several studies concerning that topic the changes in the structure of the AG (Geiler 1927, Buchwald 1927, Flechtheim 1927, Hachenburg 1927 see also Passow 1930). One lawyer described the problems related to Strukturwandel as follows:

"The structural transformation of the corporation, caused by the formation of conglomerates, had in particular led to an increase of managerial power without sufficient checks and balances and, at the same time, to a weakening of the legal position of the general meeting and to a reduction of disclosure." (Rosendorff 1932: 11, our translation).[13]

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[11] *„Bei ihr [der AG] treten die Mitglieder von der Verwaltung zurück und übergeben dieselbe den Händen von Personen, welche zwar Mitglieder sein können, es aber nicht zu sein brauchen, bei ihr trennen sich die beiden Momente, welche bei der natürlichen Gestalt des Rechts in die eine Person des Berechtigten zusammenfallen: Interesse und Verfügung in der Weise, dass den Aktionären das Interesse ohne die Verfügung, dem Vorstande die Verfügung ohne das Interesse zufällt."* (Ihering 1904 (1877): 171/221).

[12] *„Die Stellung des Verwalters schliesst eine grosse Versuchung in sich. (…) kein Dieb hat es so leicht zu stehlen wie der Verwalter fremden Gutes, kein Betrüger so leicht, eine Gaunerei zu begehen und zu vertuschen, wie er."* (Ihering 1904 [1877: 172/223).

[13] *„Die durch die Konzernbildung hervorgerufene Strukturwandlung der Aktiengesellschaft hatte insbesondere zu einem Anwachsen der Verwaltungsmacht ohne genügende Kontrolle und im Zusammenhang damit zu einer*

As a consequence, lawyers and journalists demanded a company law reform in order to strengthen shareholder rights; they criticized many of the instruments of power of the insiders, most notably the super-voting shares (cf. (Laux 1998): 158-192). These critics were supported by the events of the 1930s when a number of large German companies broke down. Yet, the shareholder-oriented view of the company was soon to be overcome by a super-individualistic view.

The search for an alternative corporate governance model

The reasons for the declining scholarly support of shareholder protection and the search for an alternative concept were motivated by several reasons. Firstly, the idea emerged that the interests of outside (speculative) shareholders were not legitimate: To use the picture of the diary cow, the shareholder should behave like a farmer, but he behaved rather like a 'berry-gatherer' who took all he could and went on to another company (Schmalenbach 1926). Secondly, the shareholder protection provided by the German company law was seen as excessive.

Therefore, as in Switzerland, the key corporate governance problem as it was perceived by most German scholars was not how to hold managers accountable, but how to prevent outside shareholders from plundering the firm. This is the context of the finding of the economist Schmalenbach:

"The shareholders, if they are not closely connected to the firm, do not treat the firm like a cow, which should give milk; (…) they treat it like the wandering gatherer of berries treats a wood, they take everything away, the ripe and the unripe, because it is unknown who shall harvest the future fruits. The normal shareholder does not intend to stay forever and tends to depletion." (Schmalenbach 1926: 91, our translation).[14]

Instead of accepting that outside shareholders had only financial interests in the firms they invested their money in (and that such a behaviour might even be sustainable), the theory was developed that the shareholder had a duty of loyalty towards the firm (*"Treupflicht"*, Laux 1998: 193-228). This was the inversion of the more traditional view that the firm had to serve shareholder interests.

Second, the idea emerged that excessive shareholder protection would be an obstacle for the growth of firms. This idea was expressed by the Austrian lawyer Franz Klein in 1904 (Klein 2004 [1904]). Klein had considered the Anglo-Saxon company laws (US, GB, but also Switzerland!) as an alternative to the German way of shareholder protection: Shareholder protection could not be absolute, because every business implied risk; according to Klein, in particular the north-American corporate laws acknowledged this.[15]

Klein's conclusion was the firm and more precisely its management needed a large amount of autonomy. While the idea of increased managerial autonomy was later implemented by the

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Abschwächung der Rechtsstellung der Generalversammlung sowie zu einer Einschränkung der Publizität geführt." (Rosendorff 1932: 11).

[14] *„Die Aktionäre, wenn sie mit dem Unternehmen nicht nahe verbunden sind, behandeln ein Unternehmen nicht wie eine Kuh, die Milch geben soll; (…) sie behandeln es wie der streifende Beerensucher einen Wald, sie nehmen alles weg, das Reife und Unreife, denn wer die späteren Früchte erntet, weiss man nicht. Der Aktionär gewöhnlichen Schlages gedenkt nicht ewig zu bleiben und er ist zum Raubbau geneigt (…)."* (Schmalenbach 1926: 91).

[15] *„Wer an einem Unternehmen teilnimmt, dessen Seele Wagnis ist, wird wohl meistens auch das Wagnis mit in den Kauf nehmen, das in einer dem Unternehmenszwecke angepassten verhältnismässig einfachen, leichteren Organisation liegt; er kann nicht die Sicherheit des Sparpfennigs beanspruchen. Das ist die Weisheit vieler nordamerikanischer Aktiengesetze."* (Klein 1904: 61).

Nazi regime[16], the possible advantages of Anglo-Saxon company laws were discussed by German lawyers during the 1920s.
When, under the influence of a wave of US capital flowing into Germany, German lawyers began to think about a company law reform, they looked to the US as a model. Because the US were the largest foreign investor in Germany in those years and because the firms urgently needed capital, the import of finance instruments from the US corporate laws were discussed.[17] Finally, the alternative model that emerged was not imported from the USA, but home-grown. At the moment it was formulated – around 1930 – the ideas behind it were already a decade old.

Rathenau and the theory of the firm as such

This alternative was the theory (or ideology) of the firm as such (*"Theorie vom Unternehmen an sich"*) which was developed around 1930 by a number of lawyers (Haussmann, Netter, Geiler) on the basis of Walther Rathenau's ideas (cf. Laux 1998, Riechers 1996). Rathenau is the central person in the German corporate governance debates, just as Hilferding with his *"Finanzkapital"* in debates over bank power. His findings go into a similar direction; however, he focuses more on large firms themselves instead on their relations to banks. Influenced by the experiences with war economy, which he had helped establish in Germany (just as Keynes had in Britain), he wrote a series of texts in the years 1917-19 (Vom Aktienwesen, Von kommenden Dingen, Die Wirtschaft der Zukunft).
Interestingly enough, the text that most closely deals with corporate governance ("Vom Aktienwesen" (Rathenau 1917) does not in particular take the special war situation into account. Rathenau's argument was shaped by his own experiences as manager and director of many large firms, among AEG, the firm his father had founded. The emergence of large, quasi-public firms which were lead by professional managers was described by Rathenau as substitution of the ground", which is more or less a synonym for the structural change of the corporation which is not closely held any more.[18]
AEG was famous for its policy of retaining and reinvesting earnings (creation of (hidden) reserves) and distributing only modest dividends (in Schmalenbach's words, this would be the policy of the farmer who cares for his cows and sheep). This policy was defended by the managers and directors of the firms, which Rathenau described as professionals (rather than blockholders; 16). Most shareholders – the loyal long-term investors: *"Anlageaktionäre"* – accepted these practices: they trusted the directors and managers and left the execution of their voting rights to the banks as proxies (26-27).
However, there was another group of shareholders which wanted to plunder and exploit the firm in order to get high dividends and increasing share prices. If their monetary demands were not satisfied, this group of shareholders constituted a fierce opposition in the general

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[16] The company law of 1937 saw the CEO as "Führer", and Klein was considered to be a predecessor of the (economic) „Führerprinzip" (Kalss, Burger&al. 2003: 316).
[17] This was the perspective of the 33. German Juristentag in Heidelberg in 1924 (List 1998: 121f., Schubert&Hommelhoff 1999). No resolution was taken in that question, and two years later (at the 34. Juristentag in Köln (List 1998: 124f., Kalss, Burger&al. 2003: 306). This time, other topics apart from financing were discussed as well, for instance the introduction of a one-tier-board instead of the traditional two-tier-board. However, the relevant lawyers were against such legal transplants, some of them arguing that they were incompatible with the German context and with German mentality. Again, to resolution was taken, with the result that the question lost its importance (Verhandlungen des Juristentags, zit. in: List 1998: 125).
[18] *„Durch den Weg von der Familien- und Sozienunternehmung zur Grossunternehmung ist die Substitution des Grundes für unsere Wirtschaftsgesellschaften eingetreten (…)."* (11-12). Definition of Substitution des Grundes (8): *Die Einrichtung behält ihren Namen und einzelne Züge ihrer ursprünglichen Wirksamkeit, obgleich unmerklich ihre Voraussetzungen, häufig ihre Ziele und ihr inneres Wesen sich verändert haben."* (8).

meeting. Rathenau even described these speculative shareholders as potential spies sent by rival firms.[19]
For Rathenau, the loyal shareholders clearly belonged to the upper class; he believed that "small people" who needed their savings should not buy shares because the risk was to big (32-34). Citing his own experience and information obtained by bankers, he held that small shareholders (*"Splitterbeteiligungen"*) held only a small fraction of the capital of the large firms. For these reasons, Rathenau argued that the protection of small shareholder was not necessary.
Rathenau compared the corporation to a human being which had a proper life (which could grow and die, cf. 42-49) and proper interests. The life of a corporation was a struggle for expansion (47). It was exactly expansion plans that were often opposed by minority shareholders. And this, according to Rathenau, was dangerous because this was necessary in the interest of the national economy, which depended on its firms (50-56; only strong firms could build bombs and submarines, 61). This was particularly true for the large firms which were to large do die; in the eyes of Rathenau, it was impossible that the shareholders of the Deutsche Bank liquidated the firm to invest the capital elsewhere – in such a case, the government would have to intervene to stop them (39).
This example of the Deutsche Bank is interesting for two reasons; first, an Englishmen, J. M. Keynes, had made a similar example (the Bank of England, which was privately owned but lead by an independent management); interestingly enough, Keynes had had a similar job for an agency of war economy in the UK as Rathenau had had in Germany. Second, to cite again the horse metaphor by Berle and Means, German shareholders not only had to bury the horse if it died, but even more, the horse should not die in the first place.
The conclusion drawn by Rathenau was the following: The managers of the firms should have the discretion to create as many reserves as possible, and managers had to defend this policy of retaining and reinvesting against speculators. Managers were representatives of the interests of the nation, the national economy and of national defence and should not regard themselves as trustees of the shareholders (60). As long as the corporation existed in its current form, so Rathenau argued, it had to be protected against fragmentation by private interests of speculators (41).[20]
In an earlier text ("Von kommenden Dingen", written in 1915, Rathenau 1917a) Rathenau had described the modern shareholder as a nexus of different property rights – i.e., the modern shareholder held shares of different firms of which he only knew the name and the composition of his portfolio changed frequently (141f.). The consequence was a depersonalisation of property" the consequence of which, in turn, was twofold: The firm got a proper life which was independent of shareholder interests, and the managers (supported by "trustees" of the shareholders like banks) became the center of the firm.

"The depersonalization of property means at the same time an objectification of the thing. The property rights are fragmented and flexible to such an extent that the enterprise obtains a proper life – just as it did not belong to anybody – an objective existence, like it was embodied by state and church (…) in earlier times. This situation appears in the process of the life of the enterprise as a shift of focus; the top levels of a hierarchy of officials become the center (…)." (Rathenau 1917a: 142, our translation).[21]

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[19] *„Selbst der Fall ist nicht selten, dass feindlich konkurrierende Unternehmungen einen Abgesandten als Aktionär ausstatten und, gestützt auf gesetzliche Rechte, Auskünfte zu erzwingen suchen, die dem gegnerischen Interesse dienen."* (Rathenau 1917: 28).
[20] *„[J]edoch solange das Gebilde in seiner jetzigen Form besteht, haben wir es gegen Zerstückelung durch privatinteressierten Partikularismus zu schützen, gleichviel ob hierdurch gelegentlich spekulative Absichten durchkreuzt werden; wir haben dafür zu sorgen, dass diese ohne gewaltsame Verletzung der Rechte Einzelner zum Wohle der Gemeinschaft erhalten bleiben."* (Rathenau 1917: 41).
[21] *„Die Entpersönlichung des Besitzes bedeutet jedoch gleichzeitig eine Objektivierung der Sache. Die Besitzansprüche sind derart unterteilt und beweglich, dass das Unternehmen ein eigenes Leben gewinnt, gleich als gehö-*

Even though Rathenau rejected Marxism, this came close to what the Swedish socialist Ernst Wigforss later called “social companies without owners” (Högfeldt 2005). Concerning the role of managers, Rathenau described their attitude by the famous term public servant idealism” (Beamtenidealismus). Thus, the diagnosis of Rathenau was an idealistic view of managers (and loyal shareholders), and a negative view of outside (speculative) shareholders. This idealistic view of managers and their comparison to the public administration seems to translate Rathenau’s admiration fro the Prussian state tradition (Lehmbruch 2001: 69). The fact that the concepts of ‘administration’ and ‘bureaucracy’ were at the time primarily positively connoted signifying the rational and unemotional – technocratic – organisation (see also Weber 1976: 575), has certainly contributed to increase support for the increasing ‘bureaucratisation’ of large companies.

The picture of the professional manager that prevailed in Germany, but even more so in Switzerland was hence that of a technocratic administrator who was driven by a uninterested ‘universalistic ethos’ (according to Hegel; Lehmbruch 2001: 54) to favour the interests of his organisation and the society at large. This positive picture of the manager explains why control mechanisms were considered to be secondary and why the autonomy of the firm from market forces was put in the centre of German and Swiss company law in the 1930s.

Thus, while Rathenau’s diagnosis focussed on the conflict between “Beamtenidealismus” and speculation, the remedies were a coordinated economy in which firms should unite in self-regulation bodies supervised by the state in order to rationalize production and to ensure the well-being (“*Leistungshöhe”*) of the German economy.

The Rathenau line of thinking became important among the lawyers which dealt with the Stock Corporation Law reform of the Republic of Weimar from 1924/26 until its end. However, the Rathenau’ian view of the firm and of corporate governance were molded into a theory only after 1928. The ideas of Rathenau were developed into the theory of the enterprise in itself” (or “firm as such”, *“Theorie vom Unternehmen an sich”*). Around 1930, the lawyer Haussmann (Haussmann 1928) created the term which Rathenau had not mentioned, only to be criticized by another lawyer, Netter (Netter 1932) who argued that Haussmann’s interpretation of Rathenau did not correspond to what the former German foreign minister (who was murdered in 1922) might have meant. Thus, there was a Rathenau’ian theory which Rathenau had not formulated and about the content of which its creators did not agree. The theory of the firm as such was a sort of perverted stakeholder theory stating that the particular interests of stakeholder groups were subordinated and at the same time encompassed in the “interest of the enterprise” (*“Unternehmensinteresse”*; Laux 1998, Riechers 1996).

However, the theory of the firm as such fitted into the categories which were used by lawyers to describe the nature AG as juridical person. In his *“Rechtsphilosophie”*, the lawyer and politician Gustav Radbruch had developed three interpretations of legal bodies like the firm (cf. for the following Goldschmidt 1937: 11-12): While the individualist theory saw company only as a vehicle of shareholder interests (*“Zwecksubjekt”*; oriented to individual interests: freedom) and therefore as a legal fiction (*“Fiktionstheorie”*), the super-individualistic theory (inspired by Otto von Gierke’s idea of the AG as a sort of old-Germanic *“Genossenschaft”*: association/cooperative) was based on the idea that there were common goals (*“Verbandszwecke”*) which were more than the totality of shareholder interests (but still determined by them: collective or national interests). In this view, the company was seen as a real person. Furthermore, Radbruch had described a third, the transpersonal view, where the juridical person (e.g. the enterprise as such”) had its own interests who were separated from the individual

re es niemandem, ein objektives Dasein, wie es vormals nur in Staat und Kirche, in städtischer, zünftischer oder Ordensverwaltung verkörpert war. Dieses Verhältnis drückt sich im Lebensprozess des Unternehmens aus als eine Schwerpunktverschiebung; zum Mittelpunkt werden die leitenden Organe einer Beamtenhierarchie (…).“ (Rathenau 1917a: 142).

and also the collective interests of the shareholders (instead, the enterprise had cultural function, according to Radbruch).
The transpersonal view, as we have seen, was rejected by Swiss lawyers; in Germany however, it was taken more seriously. The impact of such thinking was twofold: Shareholder interests lost their legitimation or at least primacy, whereas stakeholder interests – most notably national interests became primordial. It was up to the managers to guarantee the national service of the firm. While the theory of the firm as such is surely not a direct predecessor of Nazi style corporate governance, it was however a short way from this theory to the *"Aktiengesetz"* of 1937 which obliged the firm to serve common and national interests and which called the managers *"Führer"*.
We have seen that some legal experts in Germany struggled to adapt the traditional (civil-law) rules of the company law to new circumstances. In fact, certain measures favouring outside shareholders were introduced by the legislator in 1931 which were borrowed from abroad (audit committee). On the other hand, while there was consensus in Switzerland that firm interest had to be taken into account and shareholders could appeal to courts, the gap between pro-shareholder and pro-stakeholder advocates was much wider in Germany. The result was that at the cognitive level, no compromise was possible. The result was a corporate governance system in which shareholders did not have anything to say anymore but in which stakeholder (national) interests became paramount.
In short, Germany, the firm was increasingly seen as an institution serving multiple goals. The idea that the shareholders should serve the interests of the firm, and that the corporation should also consider stakeholder interests was the German solution to the problem of the increasing distance between firms and shareholders. Compared with Switzerland,
In the following section, we show that in the US such stakeholder ideas existed also. However, they did not become predominant in the US as they had in Germany.

3.2 The emergence of the shareholder approach: Berle/Means and how they shaped the image of US corporate governance

Our picture of corporate governance ideas in the US is strongly influenced by the very popular agency theory. However, the well-known finding of the separation of ownership and control" is only one aspect of the governance problems of large US firms. This diagnosis goes back to Berle and Means analysis of the modern corporation". However, the Berle/Means book (Berle&Means 1933[22]) does also contain some pieces of remedy", which is often said to be in favour of better shareholder protection. However, as mentioned above, the intellectual climate in the US was rather stakeholder-friendly during the 1920s and 1930s, and the book of Berle and Means must be viewed in this context.
In the Anglo-Saxon world, the debate about the separation of ownership and control has a long intellectual tradition. It is no wonder that Jensen&Meckling (1976) began their article about agency costs with the famous citation by Adam Smith:

"The directors of such [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company." (Adam Smith, 1776)

[22] We do not go into details here regarding the many journal articles by the two authors.

Much could be said about the sort of corporation Smith was writing about.[23] However, Jensen&Meckling note that Berle and Means later popularized" Smith's idea of a manager-shareholder divide. Thus, from hindsight, Berle and Means appear as precursors of agency theory. In this perspective, their work seems to defend shareholder rights in the sense that managers would have to act as trustees of the shareholders.
However, trusteeship towards shareholders (fiduciary duty) was only one of the possible reactions/consequences to the separation of ownership and control. The others were either to give full powers to managers, or to give priority to stakeholder interests, which left (neutral, technocratic) management with the task to balance the different interests.
It would be to overstate the influence of Berle and Means if we were to believe that US corporate governance focused on shareholder interests immediately after 1932. Also after that date, stakeholder ideas existed in the US. For instance, the William O. Douglas (chairman of the SEC) underlined in the 1930s (cf. the collection of his works, 1940):

"Today it is generally recognized that all corporations possess and element of public interest. A corporation director must think not only of the stockholder but also of the labourer, the supplier, the purchaser, and the ultimate consumer." (Democracy and finance, 1940, cited in: Riechers 1996: 183).

It seems that even Berle came to accept the predominance of this situation later. However, he was opposed to such views at in the early 1930s as his famous dispute in the Harvard Law Review in 1932 with E. Merrick Dodd, a professor of law shows. Whereas Dodd favoured stakeholder-oriented corporate governance, Berle defended shareholder interests (Hopt 1985, Weiner 1964, Macintosh 1999).

Dodd vs. Berle: Stakeholder interests vs. shareholder interests?

Dodd (Dodd 2005 (1932)) asked the question For whom are corporate managers trustees?" The answer he gave was consistent with a stakeholder view of the firm.[24] Dodd saw the corporation as a social service as well as a profit-making function" (62). For him, the dispersed shareholders were too far away from the firm to understand the necessity of social service; managers were not:

"That stockholders who have no contact with business other than to derive dividends from it should become imbued with a professional spirit of public service is hardly thinkable. If incorporated business is to become professionalized, it is to the managers, not to the owners, what we must look for the accomplishment of that result." (66).

Dodd brought forward several arguments in favour of his view: For instance, managers and employees were closer to the enterprise" than shareholders, and furthermore, courts increasingly came to accept stakeholder interests within certain limits.[25] Another argument was derived from legal theory: Dodd contested the traditional view that the distinct legal entity" of the corporation was a fiction resulting from the mysterious act of incorporation and held instead that the legal personality of the corporation was real. This resembles very much Rathe-

[23] Corporations had been forbidden after the South Sea Bubble in 1710 (Bakan 2005: 12-15).
[24] Actually, Dodd rejected Berle's (earlier published) view that *"managerial powers are held in trust for stockholders as sole beneficiaries of the corporate enterprise."* (62). Dodd agreed with Berle that managers should not be able to divert profits into their own pockets. However, shareholder interests should not be primordial, as the corporation had a social service as well as a profit-making function" (62).
[25] He interpreted to Dodge vs. Ford Motor case not as absolutely pro-shareholder: That decision allowed for a certain consideration of other than shareholder interests! (Dodd 2005 (1932): 69, Fn. 31). Social responsibility (e.g. contribution to charities) was allowed (according to another case) insofar as it served the interests of the firms (69).

nau's argument who also sees the company as a 'thing in itself', which is much more than a legal fiction or a contract binding only the entrepreneurs.
Dodd was not alone with his view. In fact, he cited GE manager Owen D. Young and GE president Swope who were ardent partisans of a stakeholder orientation of large firms. Owen for instance had declared in early 1929 that he felt as a "trustee of an institution" and its stakeholders rather than as an "attorney for the investor" (Owen, cited in Dodd 2005 (1932): 66-67), and Swope had developed a plan according to which organized industry" should recognize stakeholder interests on the basis of self-regulation rather than wait until being forced by the state to do so (67).
Berle (Berle 2005 (1932)) defended shareholder orientation against Dodd's stakeholder view. Berle defended the legitimacy of shareholder interests, as millions of Americans had invested their savings in the securities of the large firms (76). However, Berle did not reject the idea of considering stakeholder interests. Actually, Berle made it clear that Dodd's argument was familiar to him (77, and Fn. 3-4). Interestingly enough, he then makes some propositions which no one familiar with European or advanced American thought seriously disputes": that large corporations (a few large organisms, the task of whose administrators is fundamentally, that of industrial government") had become the basis of modern life (77). As the people controlling these firms were ministers or princes rather than promoters or merchants, exclusive profit-making" was not the primary goal of large firms any more. The reason why Berle doubted that the shareholders should be the sole beneficiaries of the firms was the following: He saw share ownership and bonds as passive property, which could only be sold at the stock exchange and thus, the shareholder was not directly linked to the firm whose shares he owned. *"This no doubt weakens his ethical right to demand compensation for mere ownership."* (79). Again, this distance between the shareholder and the firm reminds us of certain ideas of Rathenau. Actually, as it is well known, Berle had read Rathenau.
However, while Berle could accept Dodd's diagnosis was perfectly aware of this situation, he held that Dodd's argument was *"theory, not practice"*: In reality, the people controlling the large corporations (neither *"control"*, nor bankers or lawyers) did not recognize social responsibility and there was no mechanism which would enforce it (77). Despite the increased power of managers, responsibility to the community has not yet appeared". Even though many managers had sympathies for such ideas and were benevolent and idealist (79), examples like Swope and Young at GE were still the exception (81).
Thus, it was not the stakeholder system as such that Berle rejected, but rather Dodd's preference for a stakeholder system based on the self-regulation of the managers. Berle understood that this would lead to an insider-orientation rather than to a stakeholder system. Berle was ready to abandon the primacy of shareholder rights, but not *"until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."* It was not sufficient to hand over all powers to managers and *"control"* with *"a pious wish that something nice will come out of it all"* (78).
In Europe, law-makers adhered to this pious wish, not because they were more religious than Americans, but because for one minority shareholders were – or were seen as – something very different than in the US, and second, it allowed certain constituencies to obtain enormous influence over the companies' assets.
To Berle, the origin of the growing importance of passive property was the corporation laws of the last two decades which had fostered the rise of the quasi-public corporation. To conclude, Berle found it likely that stakeholder interests would become equally acknowledged as shareholder interests; however, clear legal rules were necessary before giving up shareholder interests and completing management autonomy.

The divide between managers and owners

One main finding of Berle (a lawyer) and Means (an economist; Berle&Means 1933) was that in many American firms, a situation had emerged where many owners did have an interest, but no power in the firm, where some managers had the power but no capital interest: Management control (84-90). The result was the "divergence of interest between ownership and control" (119). This conflict of interest was one between managers and shareholders arose because managers could reinvest the profits of a firm "to enlarge their own power, their interests might run directly counter to those of the 'owners'". For instance, managers had "powers over the routing of earnings", for instance to frame the accounting figures or to create "hidden reserves" (203-203).

In parallel, the situation of the shareholders had also changed. Ownership had become "passive" in the course of the American corporate revolution", as they described the rise of giant corporations around in recent years. The passive shareholder was not responsible any more for the firm:

"It is often said that the owner of a horse is responsible. If the horse lives he must feed it. If the horse dies, he must bury it. No such responsibility attaches to a share of stock." (66).

The shareholder could sell his share (his passive property) immediately on the stock exchange, if he wants, this is the only way he can make use of his wealth (66-67), but this also distances him from the corporation:

"The shift of powers from the individual to the controlling management combined with the shift from the interests of the individual to those of the group have so changed the position of the stockholder that the current conception with regard to him must be radically revised." (278).

In other words, the shareholder was not a quasi-partner any more but only some sort of bondholder, a supplier of capital. In parallel with the position of managers and shareholders within the corporation, the nature of the corporation had also changed, as Berle&Means observe at the beginning of the book:

"It was apparent to any thoughtful observer that the American corporation had ceased to be a private business device and had become an institution." (V, for a similar argument: 1).

Interestingly enough, Berle and Means cited Rathenau (in a chapter called *"The new concept of the corporation"*). The text quoted was about the *"depersonalization of ownership"* in large German firms, with the consequence "that the enterprise assumes an independent life" and becomes an institution which resembles state character" (Rathenau, "Von kommenden Dingen", pp. 120f. in the English translation from 1921, cit. in Berle&Means 1933: 352). The main characteristics of the Rathenau'ian corporation were the concentration of power that was similar to the power of the medieval church or that of the national state, and the interrelation of a wide diversity of economic interests", those of shareholders, workers, consumers and managers (352-353). Berle&Means concluded that the *"modern corporation"* was potentially *"the dominant institution of the modern world"*, as powerful as the church or states had been in earlier times (356-357).

Berle and Means observed that all over the world, in Soviet Russia just as well as in the America of the depression, there was a call for powers to be used in favour of the common interests (communist idea) or of stakeholders. There were three possible reactions to these calls for stakeholder rights (354-356): First, the managers could also in future be seen as trustees of the shareholders, which had to manage the firm in the sole interests of the owners (354). The second possibility was to give unlimited powers to managers (a view *"held by the great corporation lawyers and by certain students of the field"*, 354) and to accept that managers were the central persons. This was of course directed against people like Dodd and not a view favoured by Berle&Means. *"If these were the only alternatives, the former would ap-*

pear to be the lesser of two evils. A third possibility exists, however." (355). This third system was a stakeholder system, in which community interests were central. We are now going to have a look at Berle's and Means' discussion of stakeholder rights and will then show why they nonetheless preferred to give priority to shareholders.

An alternative corporate governance model: the community in the centre

The third alternative was a stakeholder system, in which shareholders had agreed that their interests were not the only ones to be considered. Actually, the stakeholder system imagined by Berle and Means differed from the one defended by Dodd. Berle and Means argued that clear rules were necessary as to which (alternative) group of stakeholders should receive the benefits of the corporation. Concepts like that of "corporation as a whole" – which was sometimes used by US courts – were too vague to be applicable:

"Sometimes the courts, shielding themselves behind a consideration of the advantages to the 'corporation as a whole', have overlooked the fact that apparent advantage to the mythical corporate entity may mean staggering loss to its separate owners; and that it is often necessary to trace what group within the corporation receives the ultimate advantage." (335-336).

The problem was that this concept gave managers the discretion to define the *"interest of the enterprise as a whole"*, and that the result was often contrary to shareholder interests (277).

"The legal doctrine that the judgment of the directors must prevail as to the best interests of the enterprise, is in fact tantamount to saying that in any given instance the interests of the individual may be sacrificed to the economic exigencies of the enterprise as whole, the interpretation of the board of directors as to what constitutes an economic exigency being practically final." (277-278).

Instead, the future stakeholder system should be based on clearly defined community interests:

"It remains only for the claims of the community to be put forward with clarity and force. (…). When a convincing system of community obligations is worked out and is generally accepted, in that moment the passive property right of today must yield before the larger interests of society." (356).

Berle and Means would have preferred if the managers of the large firms had set up a reasonable and generally accepted plan to serve stakeholder interests in which, finally, managers would become *"a purely neutral technocracy, balancing a variety of claims by various groups in the community (…)"* (356). These citations are taken from the very last pages of the Berle&Means book.
However, as long as such rules did not exist, managers should act as trustees of shareholders (247), and shareholder interests in the stock market should be protected (289ff.).
The reaction of Berle and Means to this situation was to consider managers as trustees of shareholders. Shareholder interests were important for Berle and Means. For instance they emphasized the need for disclosure of quoted corporations (*"Property in the stock market"*). Instead trying to bridge the distance between firm and shareholders like it was tried in Germany (by introducing of duty of loyality: *"Treupflicht"*) or by denying the rights of distant shareholders, the innovation by Berle and Means was to concentrate on stock exchange regulation in order to protect (distant) shareholders. Even though another check[26] on managerial power might have been preferable, trusteeship to shareholder interests was the only possibility

[26] Berle and Means concluded (drawing on a comparison with trust law) that the use of corporate power should be subject to some sort of checks (Berle&Means 1933: 274-275).

that worked in practice. In modern terms, whereas shareholder protection in Europe had traditionally concentrated on 'voice' (a not very efficient way as minority shareholders were concerned), Berle and Means preferred 'exit'.[27]

Shareholders as stakeholders?

The diagnosis of Berle and Means was not so far away from the one of Rathenau – they saw the modern corporation as an institution, and it was not clear any more why the distant and dispersed shareholders should be the sole or main beneficiaries of this large corporate organism. Just as for Rathenau, this was not seen as a problem for many American lawyers of the 1920s – they argued that not only had the nature of the corporation and position of the shareholder changed, but also the attitude of the managers which were now trustees of multiple stakeholder interests.

Berle and Means did not agree with prominent American lawyers and industrialists about this new role of the managers. They argued that legal rules were necessary to efficiently protect stakeholder rights. As such rules did not exist – and obviously Berle and Means could not figure out how stakeholder protection should or could be implemented – they preferred to stick to the traditional view of protecting shareholders. In doing so, they relied mostly on security market regulation and not on corporate law reforms as continental European promoters of shareholder interests did. A similar disagreement existed with Rathenau, who had seen managers as idealist civil servants. While in the US, the idea that managers were trustees for the shareholder became the basis of corporate governance, the stakeholder idea prevailed in Europe.

A difference existed also with regard to shareholders. The US had, by the 1920s, already a fairly well-developed equity culture, which did not exist in Germany and Switzerland. This made that minority shareholders had a 'face' for politicians. They were hard-working American citizens which voted also in elections. In Germany and Switzerland, small shareholders were at best 'stupid and impertinent', but more probably, they were rascals who either wished to drain the company from all its money, or the obtain information for some competitor. Obviously, there was little incentive to engage into a struggle to obtain legal protection for the latter category of investors. On the other hand, blockholders were more common in Europe than in the US, but they did not have to rely on shareholder protection.

Riechers observes rightly that the position of shareholders was treated differently in the two countries (Riechers 1996: 185). While in Europe, the idea emerged that the shareholder had certain obligations towards the firm (that the cow should be handled with care), no one reproached shareholders in the US if they did not care about the fate of the horse.

In any case, even if we would assume that there was rather a stakeholder than shareholder system of corporate governance in the US in the period analysed here, then in any case shareholders constituted an important stakeholder group. In Europe, they did not.

The different reactions of the US and of the two continental European countries to a fairly similar challenge can be explained by several factors. For one, 'path dependence' has certainly played a role: in the US, several laws had already been enacted which bore the sign of a certain respect of outside investors. Also, in Germany at least since 1873, small shareholders were suspicious and laws had been passed which went already in the direction of increasing insiders control over the firm (notably in 1884). Then, broader cultural explanations could also be advanced: Roe (1994) showed that US 'public opinion' is generally hostile to too powerful organisations, which has certainly influenced the analysis of the problem. In Germany and Switzerland, on the other hand, more authoritarian and paternalistic, subordinating

[27] They knew about the limits of voice". It seemed also clear in theory that the interests of shareholders were not to be neglected; the problem was with practice and with application of this idea. It was up to courts to enforce shareholder rights. However, apart from the fact that a courageous court was needed, there was another problem: *"The indefiniteness of its [i.e. the theory that powers needed to be checked] application, and the extreme expense and difficulty of litigation, still leave the stockholder virtually helpless."* (Berle&Means 1933: 276).

individuals to a strong personality, views may independently from fascism have been easier to defend.
However, political developments were important – without the Nazi rise to power, the German economic and corporate governance crisis might have had different results. Without the New Deal laws, the US corporate governance system might equally have taken another path.

4. Legal ideas and politics: The institutionalisation of two different views of the firm

In the previous section we showed that in all three countries, corporate governance debates opposed legal scholars defending different positions, i.e. pro-shareholder or pro-stakeholder systems. In the following sections we show how politics finally led to different views being institutionalised during the 1930s in all three countries paving thus the way to the familiar distinction that many scholars make today.
It is no coincidence that the years of 1910s to the 1930s were the period were the corporate governance regimes in all three countries started to take their shape. The structural transformation of the joint stock corporation must be seen in the context of a period of great political and economic instability and crisis. This situation shook existing economic beliefs and was favourable to reform programs and policies that broke with existing norms and values, which increased the possibility for radical change. Lehmbruch (2001: 43) states that: "*At times discourse coalitions may be so stable and powerful that no heterodox ideas get transported into politics. But under critical circumstances a dominant discourse may be challenged by a dissenting discourse coalition, and a hegemonic discourse coalition can eventually be displaced form this position by another, formerly minority, coalition, thus opening the way for policy change*". This is precisely what happened in all three countries progressively during the period under analysis where discourse coalitions based on the above-discussed legal theories took shape and oriented the corporate governance regime into particular directions which were, to different degrees, a departure from the traditional system or, at least, which reinforced certain aspects that may not have been central before.

Switzerland: Centre-right dominance and a particular stakeholder-system

The political context of the reform of the 1881 stock corporation law, which was kicked off in 1911 and led to the adoption of the new Stock Corporation Law of 1936 was characterised by very clear centre-right dominance over both chambers of federal parliament. The social democrats as main oppositional force were in fact too weak in order to impose their relatively mild proposals concerning the protection of workers' interests (codetermination arrangements as they had been introduced in Germany Weimar period were not demanded. The reform was hence very clearly dominated by the preferences of the centre-right parties and favoured hence the interests of their constituents, i.e. the managerial elite (Lüpold forthcoming).
As we have seen, legal theory in Switzerland converged relatively quickly on a moderate stakeholder system. The law professor August Egger had a particular influence. His ideas were picked up by legal scholars throughout the 20th century (Hug 1934, Siegwart 1945, Schluep 1955, Binder 1988). His influence was reinforced by the fact that he was personally involved in an experts' commission preparing company law reform. Also, the theory of the 'corporate interest' formulated by Egger and further propagated by Hug (1934) was readily accepted by a majority the Parliament. The corporate interest" can be found in some of the most important paragraphs of the new law. Above all, art. 663 al. 2 allows the management to create hidden reserves refers to the long-term prosperity of the company as main reasons for this practice (for more details David, Mach&al. forthcoming).
Egger's theory had the advantage that it was considered to be a specifically Swiss theory, which was clearly distinct from the German legal doctrine. Also, it justified instruments that

were increasingly used as a protection from foreign investors. During the 1920s, a debate about the *"Überfremdung"* of the Swiss economy, which would endanger Switzerland's independence and neutrality held place. The new legal doctrine which offered a rationale for the isolation of Swiss companies from market pressures and from outside influences reflects hence also a more general trend towards an increasing 'protectionism' of Switzerland, which started during the First World War, but continued during the years of economic crises of the 1920s and early 1930s. In times of political and economic turmoil, the sense of vulnerability of the Swiss economic and political elites due to the smallness of Switzerland impacted hence also the corporate governance system (Lüpold 2004).

It should be noted, however, that the Swiss law maintained its liberal tradition in the sense that the new law still left a large leeway to self-regulation and to economic actors, i.e. insiders. Despite different legal means, the omnipotence of managers and blockholders was comparable to the German case, but it was legitimated by self-regulation and not by an ideological turn (introduction of the *"Führerprinzip"* in the new German company law of 1937).

In short, in some ways Switzerland constitutes an example for what happens when managers and blockholders get what they want: an extremely opaque insider-oriented system largely based on self-regulation. In fact, since the Stock Corporation Law of 1936, which perverted the liberal legislative technique inspired by the UK model, the rules of the game were largely favourable to insiders. This can be explained by two principle factors, which distinguish Switzerland from Germany and the US: firstly, the Swiss Federal Government was very weak and left the regulation of the economy largely to the economic actors themselves (David&al. 2007). In fact, contrary to what Roe (2003) shows for instance where the Federal Government has the possibility to intervene whenever economic actors, or local governments do not sufficiently take into account the interests of outside investors, in Switzerland one can speak of a liberal model of transfers of tasks to the state", i.e. economic actors and local governments decide which tasks are attributed to the Central state, not the other way round (Hotz 1979; Mach, Schnyder&al. 2007). Secondly, the absence of a strong labour movement in Switzerland prevented a true stakeholder-model, implying industrial citizenship, from emerging in Switzerland. The labour movement in Switzerland is fragmented along sectoral, religious and linguistic lines and is hence very weak. Employers, on the other hand, organized early on in the 19th century and business associations became hence very powerful with considerable influence over the policy-making process (Katzenstein 1985; Mach 2006). This led to a situation, were company law largely reflects the interests of the business elite themselves, which is clearly expressed by the insider-oriented rules of the 1936 law, which do not imply any comparable counter-powers as the German law for instance contains (Jackson 2001).

Germany: Stock Corporation Law Reform in Hard Times

In Germany the elaboration of a new regulatory framework during the first decades of the 20th century was characterised by a much less stable political context than in Switzerland. The preparatory works for the Stock Corporation Law reform started in the Republic of Weimar, but were brought to an end only in 1937 under the Nazi dictatorship. The influence of both periods has marked the reform.

The interbellum was a critical period in Germany for several reasons: Most importantly, the establishment of a parliamentary democratic system allowed for the first time to integrate formerly marginal 'sub-cultures', namely Catholics and labour (Lehmbruch 2001: 71). Both introduced new ideas and new claims into economic policy which would eventually have a considerable impact on different features of the German economy, and notably on the organisation of the firm. Thus, the social Catholic ideas of subsidiarity and corporatism favoured some degree of cooperation among social-partners even though it never took a comparable proportion to other (small) European states. Also, the establishment of social insurances, which were co-managed by workers and employees through parity organs, led Social Democ-

rats to claim the extension of this idea of collaboration to the firm level, which explains the emergence of claims for co-determination (Lehmbruch 2001: 59; Teuteberg 1981).
The First World War has contributed in another way to the increasing receptivity of Germany for stakeholder approaches by submitting industrial interests to the national interest. In fact, while at the beginning of the war, there was still opposition to the subordination of the private economy to the war effort, this opposition waned during the war and led ultimately to the acceptance of the superior national interest by German entrepreneurs (Lehmbruch 2001). The war economy thus contributed to foster the belief in the subordination of individualistic interests to a 'higher interest', but also in the need for cooperation among 'social partners'. Although the 'social partnership' was soon to break down after the war, it had left its legacy in the form of co-determination arrangements.
At the cognitive level, the super-individualistic stakeholder view of the firm matched this evolution very well as it provided a rationale for the inclusion of new legitimate claims and of the qualification of individual shareholders' interests. The war had in fact disqualified the priority of individual interests. This is also expressed in the constitution of the Republic of Weimar, which obliged wealth to serve the common good.
When the company law reform was initiated in 1924-26, no precise goal was defined. Several directions for reform were proposed (adoption of elements of Anglo-Saxon laws, reactions to *"Strukturwandel"* etc.). During the debates about the reform of the 1920s and early 1930s, the idea emerged that the shareholder was a trustee of the firm and had hence a fiduciary duty (*"Treupflicht"*) towards the company. A "general provision" (*"Generalklausel"*) prescribed that shareholders must not harm the interests of the company. This is obviously the opposite of the horse metaphor by Berle and Means (1933) – where no duty whatsoever went together with the ownership of shares – and constituted an important step away from the shareholder approach.
This does not mean, however, that shareholder rights were completely abandoned during the reform works of the Republic of Weimar. In fact, while legal experts tended towards the theory of firm interests (or the firm a such") in order to tackle the problems that had emerged as a result of the *"Strukturwandel"*, the legislation did not follow this path. In fact, the two draft laws of 1930 and 1931 elaborated by the officials of the Ministry of Justice 1930 as well as the amendment to company law passed by Chancellor Brüning in 1931 (*"Notverordnung"*) were mainly in the tradition of shareholder protection. More precisely, the *"Notverordnung"* introduced a compulsory external auditing body and increased levels of disclosure and transparency (Bähr 2003).
Under the NS Regime, the legal framework of corporate governance took a different direction, but not all the elements that had been introduced during the Weimar period were dismantled. Generally speaking, the stakeholder view of the firm was compatible with the NS ideology as it detached the firm from its owners and legitimised the pursuit of other goals than the interests of the shareholders. This allowed the legislator to reconcile the interests of the anti-capitalist wing of the NSDAP, who pleaded for the transformation of capital companies into business partnerships, with the interests of the business elite who opposed the abolishing of the joint stock corporation as a legal form (Bähr 2003). The influence of the business elite and notably the managers of the largest joint stock corporations on the Stock Corporation Law reform was important as these people were integrated in the preparatory committee of the new law, thus preventing Nazi ideology full access to company law (Bähr 2003). For instance, the two-tier board structure was not put into question despite the NS ideology of the *"Führerprinzip"* which would rather have mandated for a one-man-show. Nonetheless, the *"Führerprinzip"* was the guideline for the governance of the large German corporations. The paragraph of the new Stock Corporation Law of 1937 obliging the management (*"Vorstand"*) to consider the interests of the nation and of the workers laid the foundation for a stakeholder system, in which the managers were the central actors and the Nazi state the main stakeholder.

To sum up, during the Republic of Weimar, due to the particular historical circumstances – i.e. the establishment of the first German republic – a stakeholder model emerged which was legitimated by super-individualistic conceptions of the firm such as the theory of the firm as such”. Key elements of such conceptions were compatible with NS ideology. After 1945, the architects of a stakeholder system concentrating on worker interests also drew on the Weimar ideas about corporate governance.

USA: Shareholder Protection through Federal Financial Market Regulation

While in both Switzerland and Germany corporate governance for large firms is mainly codified in the stock corporation laws, the US legal framework of corporate governance has multiple sources, including federal law, state laws, listing requirements of the main stock exchanges, and jurisprudence. Therefore it is difficult to find any one 'smoking gun' similar to the German and Swiss corporate laws of the 1930s which allow us to clearly identify the nature of the governance systems of the large corporations of these countries.

Indeed, corporate law in the US is mainly regulated at state level. The most important corporate laws during the period analysed here (New Jersey, Delaware), were largely enabling laws”, which had as main objectives – so their critics argue – to attract the largest number of company headquarters possible. The leeway for the companies’ management was hence large. Both these laws were hence not very shareholder-oriented. Quite at the contrary, Delaware has often been criticised to be at the origin of a ‘race to the bottom’ attempting to attract new companies that would incorporate in their state, by increasing the leeway for managers und curtailing shareholders rights (Justice Louis Brandeis evoked the idea of of a race to the bottom in the ruling Liggett v. Lee of 1933; see also the article by William L. Cary (1974), former chairman of the SEC). As an example, Delaware introduced in the late 1920s, just before the stock market crash of 1929, an act which allowed companies to restrict some important shareholder protections and introduced so-called ‘blank stock’ whose terms could be defined by the board without the general meeting’s assent. This act was clearly oriented towards insiders’ interests and slashed by Berle as giving insiders the power of confiscation (Roe 2003: 611).

During the Depression, however, a counterweight to the liberal state laws of New Jersey and Delaware – which became during the 1920s the most important location for corporate headquarters (Cary 1974) – emerged in the form of Federal State intervention. In fact, the crisis of the 1930s has led politicians in the US to become aware of certain dysfunctions of the regulatory framework governing corporations. The political context – the election of the Democrat FDR and his New Deal Program (1934-1941) – provided the necessary tools in order to transform this perception in to federal law. In relation with the New Deal, the Federal Government intervened in domains where the states had neglected MSP for opportunistic (i.e. fiscal) reasons. The instrument which served the Government to this end was mainly securities regulations – which were called at the time Federal corporation law (Cary 1974, Fleischer 1965). Thus, the Securities Exchange Act of 1934 took the proxy voting procedure out of states’ hands and regulated the issue at the federal level in favour of shareholders. The SEA also outlawed insider-trading, which was not the case of the Delaware law and established the Securities and Exchange Commission (SEC). According to Roe (2003: 609) the Federal Government regulated thus little by little all ‘big issues’ of corporate governance – mainly through securities and antitrust regulations – and left only ‘minor issues’ to the states. US federal law was hence clearly shareholder-oriented as early as the 1930s. In short, even though state-level corporate law continued to favour managers, the position of small shareholders did not fall beyond a certain level because correctives at the federal level existed. In Europe, with insider-oriented company laws and no stock exchange law (Switzerland) or one that was not in favour of small shareholders, there was no such safeguard for shareholders.

One effect of the New Deal legislation was that it prevented the emergence of blockholdings by banks and other institutional investors (Roe 1994). In the light of the impacts of blockholder dominance on minority shareholder protection in Europe, this was indeed an important aspect.

It should be noted that the New Deal answer to the economic crisis of the 1930s was clearly inspired by Berle and Means' work and did not only address the immediate effects of the crisis but was also meant to remedy the consequences of the 'separation of ownership and control'. This can be illustrated by a quote taken from a speech by FDR who stated in his Commonwealth Club Address of September 23, 1932 that:

"Recently a careful study was made of the concentration of business in the United States. It showed that our economic life was dominated by some six hundred odd corporations who controlled two-thirds of American industry. […] More striking still, it appeared that if the process of concentration goes on at the same rate, at the end of another century we shall have all American industry controlled by a dozen corporations, and run by perhaps a hundred men. Put plainly, we are steering a steady course toward economic oligarchy, if we are not there already."[28]

The influence that Berle and Means' ideas had on the New Deal program is explained by the fact that both of them worked as advisors for the New Deal administration for some time. Their attitude have fit into that critical thinking about large firms in the aftermath of the 1929 stock market crash, and their book could, thus, become the Bible" of the New Deal (cf. Nodoushani&Nodoushani 2005 (1999)). The change of political power (New Deal Democrats) was thus an important element for the impact of the Berle and Means' book. In fact, one could speculate over the impact of the book had Herbert Hoover – whose position in the shareholder/stakeholder debated we mentioned above – been re-elected in 1932.

Moreover, the US common law system implied an important role for court rulings and precedence. In the US tradition, such rulings were indeed often – but not always – favourable to shareholders. At this level, La Porta&al.'s (1998) intuition about the better protection of shareholder rights due to judges who apply general principles like 'fairness' in order to protect individual property rights may indeed explain part of the story.

In short, federal-level New Deal legislation can be considered as an important step towards the institutionalisation of a shareholder-oriented corporate governance system in the US. Yet, following the Second World War a period of 'managerialism' was to follow before shareholders would become the undisputed kings of the stock corporation in the 1980s.

5. Discussion and Conclusions

In this paper we have shown that economic and corporate governance structures were not very different in the US, Germany, and Switzerland during the 19th century as in all three countries, companies were mainly dominated by owner-managers and the legal framework governing corporations aimed at protecting owners' interests. The 'structural change', which set in all three countries some time during the late 19th century and led to ever larger companies with an increasing distance between owners and managers and an increasing professionalisation of management was comparable as well. Already at this point, however, certain political decisions in both regions led to an increasing diversity. This can be shown notably in the attitude towards trusts/cartels and towards the large banks, which were considered to dominate industrial firms in all three countries. The discussion of the works by legal scholars and economists clearly shows that this evolution of the joint stock corporation was perceived and analysis in surprisingly similar terms in all three countries. In particular, while the emergence of genuine public companies and the separation of ownership and control have been mainly discussed for

[28] www.americanrhetoric.com/speeches/fdrcommonwealth.htm (20.7.07).

the US case, our analysis shows that contemporary observers perceived the same trend in Europe too. In this context, lawyers and economists considered that 19th century investor protection rules, which were based on the owner-entrepreneur and not on passive shareholders who invest in order to increase their personal wealth, were not adequate anymore in the new situation. Confronted with this situation, scholars in the three countries made very different diagnoses of the situation and proposed different remedies. It is striking to see that in the US a very positive image of the minority shareholder prevailed and that the public and politicians appear to have been suspicious towards managers' power. In Germany and Switzerland, on the other hand, the contrary view prevailed: managers were seen as uninterested stewards who were able to protect the company against the selfish interests of 'dubious speculators'. The 'remedies' that were proposed by legal scholars in order to address the mismatch between the 19th century corporate governance structures and the economic reality of the early 20th century diverged according to this diverging diagnosis: US scholars demanded the introduction of protections for minority shareholders in order to counterbalance the increasing power of corporate insiders (along with measures to stop the concentration of economic power). German and Swiss scholars on the other hand proposed to walk down the path towards the separation of ownership and control so as to make sure that corporate insiders could manage the company in the best interest of all legitimate stakeholder groups.

This different perception of minority shareholders was certainly also the result of different choices during the late 19th century which led in the US to a 'equity culture' and wide-spread shareholdings by private households, whereas in Germany and Switzerland shareholding by 'small savers' was discouraged. In this situation minority shareholders were a considerable part of politicians' voters, while they were insignificant, faceless investors for European politicians.

However, we also showed that in none of the three countries, the future dominant theory of the firm was not undisputed from the outset. While a dominance of individualistic theories can be observed in the US and a similar dominance of super-individualistic approaches in the two European countries, in both regions, the contrary theory was also advocated by some scholars. As an example, like in Europe, the stakeholder- or the shareholder-view and stewardship vs. agency theory conception of managers, to use anachronistical terms, were debated in the US as well. In this situation of competing ideas, it was only with the institutionalisation of these ideas that they ultimately became the dominant doctrine in the long run. As we have shown, the political context is hence crucial in order to understand the origins of diversity in national corporate governance systems.

The political choices of the New Deal period in the US led to an increasing protection of minority shareholders and helped the individualistic view of the company to become the dominant paradigm. This is not to say, however, that a shareholder system emerged in reality however, as a long period of 'managerialism' was to follow the New Deal era and 'investor capitalism' emerged in actual fact only during the 1980s (Jackson 2001). Yet, it appears clearly that the Federal Government and the mainstream legal theory favoured shareholder over stakeholder interests.

In Germany, the experience of the First World War led to a qualification of individual interests and constituted hence the moment when the super-individualistic view of the company was born. It is no coincidence that the most influential German scholar was one of the leading figures in the German war economy. The super-individualistic approach was reinforced during the period of the Republic of Weimar which favoured – through the inclusion of new social groups in the political process – the legitimacy of additional stakeholders' claims on the firm. This stakeholder approach was translated into company law. Despite the NS regime's policy of submitting all stakeholder groups to a powerful *"Betriebsführer"*, the super-individualistic approach was not put into question and important features of the 'Weimar model' re-emerged soon after the War (most importantly the codetermination arrangements in 1951, but not shareholder protection).

In Switzerland, finally, the super-individualistic view of the firm and the suspicion towards (especially foreign) outside investors that was developed in legal theory, was readily picked up by the business elite, which dominated both the Federal Parliament and the Government. Neither labour, nor the 'state' were strong enough in order to oppose the institutionalisation of important instruments of insider-dominance over the firm – in the name of the corporate interest – which would lead over the following decades to the emergence of the notorious *"fortress of the Alps"* (Monks and Minow 1995).

Despite the emergence of a stakeholder approach in both Switzerland and Germany, the two national models are distinct as the political context of the institutionalization of the two systems was different. One major difference in that respect is the very strong dominance of the business elite over the political process in Switzerland and the much stronger role of the state in Germany. Fundamentally, however, both countries have comparable conceptions of the stock corporation and especially of the role of minority shareholders within it. Carl Fürstenberg's – who was a board member not only in German companies but also in Switzerland before World War One – one-liner about the stupid and impertinent shareholder summarizes this view perfectly well.

The different role of the state is an interesting finding: in fact, it appears that in both Germany and the US managers were not strong enough to impose their view on law-makers. Even though managers did become powerful in the US, they did not have any comparable leeway to that of Swiss managers after 1936, and the question of the real autonomy of the managers of large German firms vis-à-vis the Nazi state – the main stakeholder – is still a topic for historians.

Besides structural evolutions of the economic system, contextual factors such as the economic crises of the interbellum had also a major influence on the institutionalisation of corporate governance systems in the three countries. Yet again, the answers that were given in both areas to similar challenges were very different due to domestic particularities. The US answer to the Great Depression was to reinforce state control over the functioning of (financial) markets – in order to save the markets – and clipping the power of banks but also of managers. In Germany and Switzerland on the other hand, the reaction was mainly to place the survival of the company on top of the hierarchy of goals and to subordinate hence individual, private interests of different stakeholders to the interest of the company. This was achieved mainly through far-reaching powers for managers over the company-level decision-making process.

Table: Overview

	USA	DE	CH
Goal and measures	Limitations of managerial and institutional investors' power	Obligation for firms and managers to serve national interest	Self-regulation; insider-system in the name of 'corporate interest'
Legal concept	Minority shareholder protection	Firm as such"	Corporate interest
Political context	New Deal	Weimar/NS	Political stability, strong bourgeois dominance
Role of politics	Federal securities regulation important	Company law as instrument of the state	Important for institutionalising insider system
Most influential scholars	Berle/Means	Rathenau	Egger and Hug
International aspects	Influence of German stakeholder ideas	US system as positive and negative	German system as negative reference

	(Rathenau)	reference point (Germans cite US pro-stakeholder authors)	point (refusal of German legal techniques)

Despite the importance of domestic factors, we have also underlined the importance of the interaction between legal scholars in different countries, which also raises the question of 'legal transplants', 'learning' and other forms of transfers. Certainly, this aspect would deserve more attention and would require a thorough analysis. We have seen that corporate governance debates during the protectionist interwar period heavily drew on foreign expertise as well as on domestic sources. However, few legal transplants took place. Rather, foreign corporate governance and business law systems were used as a mirror to more fully understand the problems of the own country and to find a solution in line with national traditions and attitudes. Thus, auditing was imported to Germany from Britain in 1931, but became rapidly an instrument of state intervention.

To conclude, our analysis suggests – ironically from a modern point of view – that the US-style shareholder approach, which is nowadays clearly associated with neo-classical theories and hence considered to stem from the right side of the political spectrum, was ultimately triumphed in the US due to its integration in the rather left-leaning New Deal program and its institutionalisation during the Roosevelt administration; whereas the stakeholder approaches of the two European countries – which are nowadays rather associated with centre-left ideas – were institutionalised under right-wing dominated – or for the case of Germany totally controlled – political regimes. This clearly contradicts accounts of VoC studies which associate LME characteristics with right-wing dominated politics, and coordinated market economies with left wing dominance (see Deeg&Jackson 2006 for a discussion). The explanation for this apparent paradox lies in the fact that today's observers associate each approach to values which it did not necessarily stand for at the time: left-wing support for minorities (including shareholders) is perfectly coherent with their aversion towards capitalists (i.e. large block-holding families) and other insiders; conversely, right-wing support for a stakeholder approach becomes intelligible when one considers that this implied the overcoming of individualistic theories – which were arguably not very popular in a period were authoritarian-collectivist ideas flourished – and served – more importantly – the interests of the traditional right-wing constituencies. The fact that the perception has changed concerning the two models of corporate governance shows once more the important of agency in institutional change: as actors use institutions as resources, the institutions of corporate governance in both contexts were used by actors contrary to their original intention.

Bibliography

Albert, M. (1993). Capitalism vs. capitalism : how America's obsession with individual achievement and short-term profit has led it to the brink of collapse. New York, Four Walls Eight Windows.

Aoki, M. (2001). Toward a Comparative Institutional Analysis. Cambridge MA, MIT Press.

Bakan, Joel (2005). Das Ende der Konzerne die selbstzerstörerische Kraft der Unternehmen. Hamburg, Europa Verlag.

Baums, T. and K. E. Scott (2003). Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany. ECGI - Law Working Paper 2003(17): 57.

Berglöf, E. (1997). Reforming corporate governance: redirecting the European agenda. Economic Policy 12(24): 91-123.

Berle, Adolf A. (2005 (1932)). For whom corporate managers are trustees. A note. Corporate Governance. Critical perspectives on business and management. Thomas Clarke. London: 76-82.

Berle, Adolf A.&Gardiner C. Means (1933). The Modern Corporation and Private Property. New York, Macmillan.

Binder, A. (1988). Die Verfassung der Aktiengesellschaft. Grüsch, Verlag Rüegger.

Blyth, Mark, 2002: Great Transformations. Economic Ideas and Institutional Change in the Twentieth Century. Cambridge: Cambridge University Press.

Boemle, M. (1998). Unternehmensfinanzierung. Zurich, Verlag SKV.

Buchwald (1927). Die wirtschaftlichen Strukturwandlungen und die Reform des Aktienrechts. Bericht, erstattet der 3. Arbeitsgruppe des Ersten Unterausschusses für allgemeine Wirtschaftsstruktur des Ausschusses zur Untersuchung der Erzeugungs- und Absatzbedingungen der deutschen Wirtschaft (Enquête-Ausschuss). Berlin.

Campbell, John L. 2004: Institutional Change and Globalization. Princeton: Princeton University Press.

Chandler, Alfred D. (1977). The visible hand the managerial revolution in American business. Cambridge - Mass.& London, Belknap Press.

Cheffins, B. R. (2001). Does Law Matter? The Separation of Ownership and Control in the United Kingdom. Journal of Legal Studies 30.

Clarke, Thomas (2005). General introduction. Corporate Governance. Critical perspectives on business and management. Vol. 1. Thomas Clarke. London, Routledge: 1-41.

Coffee, J. C. (2000). The Rise of Dispersed Ownership: The Role of Law in the Separation of Ownership and Control. Columbia Law and Economics Working Paper 182: 1-95.

David, T., A. Mach,&al. (forthcoming). De la «forteresse des alpes» à la valeur actionnariale: histoire de la gouvernance d'entreprise suisse au 20e siècle.

Davis, G. F. and M. S. Mizruchi (1999). The Money Center Cannot Hold: Commercial Banks in the U.S. System of Corporate Governance. Administrative Science Quarterly 44(2): 215-239.

Deeg, R. and G. Jackson (2006). Towards a More Dynamic Theory of Capitalist Variety. King's College London, Department of Management, Research Paper 40.

Dodd, E. Merrick, Jr. (2005 (1932)). For whom are corporate managers trustees? Corporate Governance. Critical perspectives on business and management. Thomas Clarke. London: 61-75.

Dunlavy, Coleen (1994). Politics and Industrialization. Early Railroads in the United States and Prussia. Princeton.

Egger, A. (1925). Zur Revision des schweizerischen Aktienrechts. Zürich.

Egger, Aug. (1926). Schranken der Majoritätsherrschaft im Aktienrecht. Zeitschrift für schweizerisches Rechts (ZSR) Neue Folge Band 45/XLV: 1-43.

Fehr, Hans (1928). Recht und Wirklichkeit. Einblick in Werden und Vergehen der Rechtsformen. Potsdam/Zürich, Müller Kiepenheuer/Orell Füssli.

Fick, Fritz (1920). Kritische Bemerkungen zum Aktienrecht. SJZ 16/1920: 329-336.

Flechtheim (1927). Die wirtschaftlichen Strukturwandlungen und die Reform des Aktienrechts. Bericht, erstattet der 3. Arbeitsgruppe des Ersten Unterausschusses für allgemeine Wirtschaftsstruktur des Ausschusses zur Untersuchung der Erzeugungs- und Absatzbedingungen der deutschen Wirtschaft (Enquête-Ausschuss). Berlin.

Fleischer 1965, Federal Corporation Law. An Assessment" Harvard Law Review 78, p.1146ff.

Fleischer, Holger (2004). Legal Transplants im deutschen Aktienrecht. Franz Klein - Vorreiter des modernen Aktien- und GmbH-Rechts. Peter Doralt&Susanne Kalss. Wien, Manz: 116-138.

Fohlin, Caroline (2007). Finance Capitalism and Germany's Rise to Industrial Power. Cambridge.
Freeman, R. Edward (1984). Strategic management : a stakeholder approach. Boston, Pitman.
Geiler, K. (1927). Die wirtschaftlichen Strukturwandlungen und die Reform des Aktienrechts. Berlin, Carl Heymanns Verlag.
Goldschmidt, Robert (1937). Grundfragen des neuen schweizer. Aktienrechts. St. Gallen.
Hachenburg, Max (1927). Die wirtschaftlichen Strukturwandlungen und die Reform des Aktienrechts. Bericht, erstattet der 3. Arbeitsgruppe des Ersten Unterausschusses für allgemeine Wirtschaftsstruktur des Ausschusses zur Untersuchung der Erzeugungs- und Absatzbedingungen der deutschen Wirtschaft (Enquête-Ausschuss).
Hall, P. A. and D. W. Soskice (2001). Varieties of capitalism : the institutional foundations of comparative advantage. Oxford [England] ; New York, Oxford University Press.
Hannah, Leslie (2007). The Divorce of Ownership from Control from 1900: Re-calibrating Imagined Global Historical Trends. CIRJE Discussion Paper CIRJE-F-460.
Haussmann, F. (1928). Vom Aktienwesen und vom Aktienrecht. Mannheim, Berlin, Leipzig.
Hofmann, Ernst Martin (1954). Wandlungen und Tendenzen in der Machtstellung und Zusammensetzung der Verwaltung privater Aktiengesellschaften. Zürich/St. Gallen.
Högfeldt, P. (2005). The History and Politics of Corporate Ownership in Sweden. A History of Corporate Governance around the World. R. Morck. Chicago, London, University of Chicago Press: 517-579.
Hopt, Klaus J. (1985). Corporate governance and directors' liabilities legal, economic and sociological analyses on corporate social responsibility. Berlin [etc.], de Gruyter.
Horwitz, Morton J., 1992: The Transformation of American Law. 1870-1960. Oxford: Oxford University Press.
Hotz, B. (1979). Politik zwischen Staat und Wirtschaft. Verbandsmässige Bearbeitung wirtschaftspolitischer Probleme und die daraus resultierenden Konsequenzen für die Aktivitäten des Staates im Falle der Schweiz. Diessenhofen.
Huber, Eugen (1919). Entwurf eines Bundesgesetzes betreffend Revision der Titel 24 bis 33 des Obligationenrechts. (Bern).
Huber, Eugen (1920). Bericht über die Revision der Titel 23 bis 33 des schweizerischen Obligationenrechts. Beilage zum Entwurf vom Dezember 1919. (Bern).
Hug, W. (1934). Zur Revision des schweizerischen Aktienrechts. St. Gallen, Verlag der Fehr'schen Buchhandlung.
Ihering, Rudolf von (1904 [1877]). Der Zweck im Recht. Erster Band. Leipzig.
Jensen, M. C. and W. H. Meckling (1976). Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. Journal of Financial Economics 3: 305-360.
Kalss, Susanne, Christina Burger,&al. (2003). Die Entwicklung des österreichischen Aktienrechts. Geschichte und Materialien. Wien.
Katzenstein, P. J. (1985). Small states in world markets : industrial policy in Europe. Ithaca, N.Y., Cornell University Press.
Klages, P. (2007). The Contractual Turn in Corporate Law Scholarship: Its Causes and Consequences for Corporate Law Reforms in Germany. MPIfG Summer Conference Why History? The Contribution of Historical Explanation to the Analysis of the Economy. Ringberg Castle, Munich.
Klein, Franz (2004 [1904]). Die neueren Entwicklungen in Verfassung und Recht der Aktiengesellschaft. Franz Klein - Vorreiter des modernen Aktien- und GmbH-Rechts. Peter Doralt&Susanne Kalss. Wien, Manz: 175-238 [1-64].
Kohli, Kurt (1936). Aktiengesellschaft und Unternehmen. Bern, Diss. Uni Bern.
La Porta, R., F. Lopez-de-Silanes,&al. (1998). Law and Finance. Journal of Politcal Economy 106(6): 1113-1155.
La Porta, R., F. Lopez-de-Silanes,&al. (1999). Corporate Ownership Around the World. The Journal of Finance LIV(2): 471-517.
La Porta, R., F. Lopez-de-Silanes,&al. (2000). Investor protection and corporate governance. Journal of Financial Economics 58: 3-27.
La Porta, R., F. Lopez-de-Silanes,&al. (2002). Investor Protection and Corporate Valuation. Journal of Finance 57: 1147-70.
La Porta, R., Lopez-de-Silanes,&al. (1997). Legal Determinants of External Finance. Journal of Finance(3).

La Porta, R., Lopez-de-Silanes,&al. (1999). Investor Protection: Origins, Consequences, Reform. NBER Working paper series. Cambridge, MA: 42.
Laux, F. (1998). Die Lehre vom Unternehmen an sich. Walther Rathenau und die aktienrechtliche Diskussion in der Weimarer Republik. Berlin, Duncker&Humblot.
Lehmbruch, G. (2001). The Institutional Embedding of Market Economies: The German Model and Its Impact on Japan. The Origins of Nonliberal Capitalism. W. Streeck and K. Yamamura. Ithaca, London, Cornell University Press: 39-93.
List, Helge-Alexander (1998). Die geschichtliche Entwicklung der Rechnungsprüfung im deutschen Aktienrecht bis zum Aktiengesetz von 1937. Jur. Fakultät. Göttingen, Göttingen.
Lüpold, M. (2004). Schutz vor wirtschaftlicher Ueberfremdung oder Abwehr unfreundlicher Übernahmen? Die Vinkulierung von Namenaktien in der Praxis der Unternehmen und die Veränderungen des rechtlichen Rahmens (1929-1961). Historisches Seminar der Universität Zürich. Zürich, Universität Zürich. BA Thesis.
Lüpold, M. (forthcoming). Der Ausbau der Festung Schweiz: Aktienrecht und Corporate Governance in der Schweiz, 1881 - 1961. Historisches Seminar der Universität Zürich. Zürich, Universität Zürich. PhD.
Mach, A. (2006). La Suisse entre internationalisation&changements politiques internes. La législation sur les cartels&relations industrielles dans les années 1990. Basel, Verlag Ruegger.
Mach, A., G. Schnyder,&al. (2007). Transformations of self-regulation and new public regulations in the field of Swiss corporate governance (1985-2002). World Political Science Review 3(2): 1-29.
Macintosh, John C.C. (1999). The issues, effects and consequences of the Berle–Dodd debate, 1931–1932. Accounting, Organizations and Society Volume 24, Issue 2, February 1999: 139-153.
Netter, Oskar (1932). Zur aktienrechtlichen Theorie des Unternehmens an sich. Festschrift für Albert Pinner zu seinem 75. Geburtstag. Berlin/Leipzig: 105-210.
Nodoushani, Omid&Patricia A. Nodoushani (2005 (1999)). The Debate on Corporate Governance. An historical analysis of Berle and Means contributions. Corporate Governance. Critical perspectives on business and management. Thomas Clarke. London: 209-220.
North, D. C. (1990). Institutions, institutional change, and economic performance. Cambridge ; New York, Cambridge University Press.
Passow, R. (1930). Der Strukturwandel der Aktiengesellschaft im Lichte der Wirtschaftsenquete. Jena, G. Fischer.
Raggenbass, Marc E. (2005). Neue Dimensionen schweizerischer Corporate-Governance-Standards. Der Schweizer Treuhänder. 10/05: 751-758.
Rathenau, Walther (1917). Vom Aktienwesen - eine geschäftliche Betrachtung. Berlin, Fischer.
Rathenau, Walther (1917a). Von kommenden Dingen. Berlin, S. Fischer.
Riechers, A. (1996). Das Unternehmen an sich die Entwicklung eines Begriffes in der Aktienrechtsdiskussion des 20. Jahrhunderts. Tübingen, Mohr.
Rosendorff, Richard (1932). Konzerndämmerung? Die Konzerne im Zeichen der Wirtschaftskrise und die Stellung des Gesetzgebers zu ihnen (Italien, Grossbritannien, Deutschland, Vereinigte Staaten von Amerika). Abdruck eines Vortrags vom 26.10.1932 im Basler Juristenverein. Zürich und Leipzig, Orell Füssli.
Sabatier, P. A. and H. C. Jenkins-Smith (1993). Policy change and learning : an advocacy coalition approach. Boulder, Colo., Westview Press.
Scharpf, F. (1997). Games Real Actors Play. Actor-Centered Institutionalism in Policy Research. Colorado, Oxford, Westview Press.
Schluep, W. R. (1955). Die wohlerworbenen Rechte des Aktionärs und ihr Schutz nach schweizerischem Recht. Zürich, St. Gallen, Polygraphiswer Verlag.
Schmalenbach, Eugen (1926). Dynamische Bilanz. Vierte Auflage. Leipzig, Gloeckner.
Schmidt, Vivien A., 2001: The Politics of Economic Adjustment in France and Britain: When does Discourse Matter? In: Journal of European Public Policy 8, 247-264.
Schnyder, G., M. Lüpold,&al. (2005). The Clash of Paradigms: Switzerland's Long March Towards a Shareholder-Oriented Conception of the Firm. Le gouvernement d'entreprise en Suisse. Dynamiques externes&stratégies internes. J.-J. Friboulet, D. Isakov, D. Barbuscia and F. Giorgetti. Genève, Zurich, Bâle, Schulthess Médias Juridiques SA: 41-67.
Schnyder, G., M. Lüpold,&al. (2005). The Rise and Decline of the Swiss Company Network During the 20th Century. Lausanne, IEPI.

Schubert, W. and P. Hommelhoff (1985). Hundert Jahre Modernes Aktienrecht eine Sammlung von Texten und Quellen zur Aktienrechtsreform 1884 mit zwei Einführungen. a Berlin ; New York, W. de Gruyter.

Schubert, Werner&Peter Hommelhoff (1999). Quellen zur Aktienrechtsreform der Weimarer Republik (1926-1931). Frankfurt a.M. ; Berlin ; Bern, P. Lang.

Siegwart, A. (1945). Das Obligationenrecht. 5. Teil: Die Akteingesellscahft. a:a. Allgemeine Bestimmungen (Art. 620-659). Zuerich, Schulthess.

Streeck W. 2001b. The Transformation of Corporate Organization in Europe: An Overview. In MPIfG Working Paper, pp. 1-59. Cologne.

Streeck, W. and M. Höpner (2003). Einleitung: Alle Macht dem Markt? Alle Macht dem Markt? Fallstudien zur Abwicklung der Deutschland AG. W. Streeck and M. Höpner. Frankfurt/New York, Campus Verlag: 11-59.

Teuteberg, Hans-Jürgen (1981). Ursprünge und Entwicklung der Mitbestimmung in Deutschland. Mitbestimmung Ursprünge und Entwicklung Referate und Diskussionsbeiträge der 5.Oeffentlichen Vortragsveranstaltung der Gesellschaft für Unternehmensgeschichte Düsseldorf, 7.Mai 1980. Hans Pohl. Wiesbaden: 7-73.

Vitols, Sigurt (2006). Das deutsche Modell in der politischen Ökonomie. Gibt es einen deutschen Kapitalismus? Tradition und globale Perspektiven der sozialen Marktwirtschaft. Volker Rolf Berghahn&Sigurt Vitols. Frankfurt am Main, Campus: 44-59.

Watson, A. (1974). Legal Transplants: An Aproach to Comparative Law. Edinburgh, Scottish Academic Press.

Weber, Max (1976). Wirtschaft und Gesellschaft. Tübingen.

Weiner, Joseph L. (1964). The Berle-Dodd Dialogue on the Concept of the Corporation. Columbia Law Review. Vol. 64, No. 8. (Dec., 1964): 1458-1467.

Whitley, R. (1999). Divergent Capitalisms. The Social Structuring and Change of Business Systems. Oxford, Oxford University Press.

Windolf, P. (2005). The Emergence of Corporate Networks in Germany and the United States 1896 - 1938.