

# Great Debates in Italian and German Company Law

Edited by  
HOLGER FLEISCHER  
and MARCO SPERANZIN

*Max-Planck-Institut  
für ausländisches und internationales  
Privatrecht*

*Beiträge zum ausländischen  
und internationalen Privatrecht*

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**Mohr Siebeck**

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Holger Fleischer and Marco Speranzin

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## Preface

Great debates have spurred the development of company law in the past, and they continue to do so today. Building on an earlier publication (Fleischer/Koch/Schmolke, *Gesellschaftsrecht im Spiegel großer Debatten*, 2024), this conference volume examines classic controversies in German and Italian company law. New insights into company law and its traditions, doctrines, conceptual achievements, and discourse dynamics await from exploring these debates, their beginnings and endings, their participants, and the forums and discourse cultures in which they played out. In the introductory chapter and nine individual contributions that follow it, we invite readers to deepen their understanding of company law as an academic discipline and professional practice.

Many people have contributed to the creation of this book. First and foremost, we would like to extend our sincere thanks to all the authors for their insightful contributions. John A. Foulks, Ina Freisleben, Janina Jentz, and Anja Rosenthal at the Institute provided us with invaluable assistance during the editorial process.

Hamburg and Padova,  
March 2026

*Holger Fleischer*  
*Marco Speranzin*



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## Abbreviations

AcP	Archiv für die civilistische Praxis
ADHGB	General German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch)
AG	Public limited company (Aktiengesellschaft); Die Aktiengesellschaft
AI	Artificial intelligence
AJCL	American Journal of Comparative Law
AktG	Stock Corporation Act (Aktiengesetz)
Alb LRev	Albany Law Review
ALR	General State Laws for the Prussian States (Allgemeines Landrecht für die Preußischen Staaten)
An giur econ	Analisi Giuridica dell'Economia
ARÜG II	Act Implementing the Second Shareholder Rights Directive (Gesetz zur Umsetzung der zweiten Aktionärsrechterichtlinie)
Banca borsa tit cred	Banca, borsa e titoli di credito
BB	Betriebs-Berater
BeckOGK	Beck'scher Online-Großkommentar
Berkeley Tech LJ	Berkeley Technology Law Journal
BGB	German Civil Code (Bürgerliches Gesetzbuch)
BGBI	Federal Law Gazette (Bundesgesetzblatt)
BGH	German Federal Court of Justice (Bundesgerichtshof)
BGHZ	Decisions of the German Supreme Court in civil matters (Entscheidungen des Bundesgerichtshofes in Zivilsachen)
BKR	Zeitschrift für Bank und Kapitalmarktrecht
BMF	Bundesministerium der Finanzen
BMJ	Bundesministerium der Justiz
BRIS	Business Registers Interconnection System
BT-Drs.	Printed matter of the German Federal Parliament (Bundestagsdrucksache)
BVerfG	German Federal Constitutional Court (Bundesverfassungsgericht)
BVerfGE	Decisions of the German Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts)
Cass	Italian Supreme Court of Cassation (Corte di Cassazione)
Cath ULR	Catholic University Law Review
CBCI	Code of Business Crisis and Insolvency (Codice della crisi di impresa e dell'insolvenza)
CC	Civil Code (Codice Civile)
CDU	Christian Democratic Union of Germany (Christlich Demokratische Union)
CEO	Chief Executive Officer

cf	confer
CFSA	Consolidated Financial Service Act
Chi-Kent LRev	Chicago-Kent Law Review
CMU	Capital Markets Union
Colum Bus LRev	Columbia Business Law Review
Colum LRev	Columbia Law Review
COM	European Commission
confd.	confirmed
CONSOB	Italian National Commission for Companies and the Stock Exchange (Commissione Nazionale per le Società e la Borsa)
Contr impr	Contratto e impresa
Cornell LRev	Cornell Law Review
Corr giur	Corriere giuridico
Corte Cost	Constitutional Court of Italy (Corte Costituzionale)
CSDDD	Corporate Sustainability Due Diligence Directive
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
DAC	Digital Administration Code
DAO	Decentralized autonomous organizations
DAV	Deutscher Anwaltverein
DB	Der Betrieb
Del JCorpL	Delaware Journal of Corporate Law
Dig disc priv, sez civ	Digesto delle discipline privatistiche, sezione civile
Dir comm int	Diritto del commercio internazionale
DJT	Association of German Jurists (Deutscher Juristentag)
DLT	Distributed Ledger Technology
D&O	Directors & Officers
DStR	Deutsches Steuerrecht
EBLR	European Business Law Review
EBOR	European Business Organization Law Review
ECFR	European Company and Financial Law Review
ECGI	European Corporate Governance Institute
ECJ	European Court of Justice
ECL	European Company Law
ECLI	European Case-Law Identifier
Econ Hist Rev	The Economic History Review
ed	editor
edn	edition
EDPB	European Data Protection Board
EEA	European Economic Area
eg	exempli gratia
EPRS	European Parliamentary Research Service
ESG	Environmental, Social and Governance
et seq	and those that follow
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWG	European Economic Community

FCA	Federal Court of Australia
Flex-KapG	Flexible Corporation (Flexible Kapitalgesellschaft)
Foro it	Il Foro italiano
GDPR	General Data Protection Regulation
GesRÄG	Corporate Law Amendment Act (Gesellschaftsrechts-Änderungsgesetz)
Giur comm	Giurisprudenza commerciale
Giur It	Giurisprudenza Italiana
Giust civ	Giustizia civile
GmbH	Private limited company (Gesellschaft mit beschränkter Haftung)
GmbH & Co. KG	Limited partnership with a limited liability company as general partner (Gesellschaft mit beschränkter Haftung & Compagnie Kommanditgesellschaft)
GmbHG	Limited Liability Company Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung)
GmbHR	Zeitschrift für Gesellschaftsrecht, Unternehmensrecht und Steuerrecht
HansRGZ	Hanseatische Rechts- und Gerichtszeitschrift
Harv JOLT	Harvard Journal of Law & Technology
Harv LRev	Harvard Law Review
Harv UP	Harvard University Press
HGB	Commercial Code (Handelsgesetzbuch)
Hist Pol Econ	History of Political Economy
ICT	Information and communications technologies
IDC	International Data Corporation
IDPL	International Data Privacy Law
ie	id est
IJLIT	International Journal of Law and Information Technology
InsO	Insolvency Code (Insolvenzordnung)
IPO	Initial Public Offering
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
JAIR	Journal of Artificial Intelligence Research
JCMS	Journal of Common Market Studies
J Corp L	Journal of Corporation Law
J Fin Econ	Journal of Financial Economics
J Inst Econ	Journal of Institutional Economics
JZ	JuristenZeitung
KG	Limited partnership (Kommanditgesellschaft)
KGaA	Partnership limited by shares (Kommanditgesellschaft auf Aktien)
KonTraG	Act on Monitoring and Transparency of Enterprises (Gesetz zur Kontrolle und Transparenz im Unternehmensbereich)
KritZgR	Kritische Zeitschrift für die gesamte Rechtswissenschaft
L&E	Law & Economics
LG	German Regional Court (Landgericht)

LLC	Limited Liability Company
Lodo arb	Lodo arbitrale
M&A	Mergers & Acquisitions
MBCA	Model Business Corporation Act
MiFID II	Markets in Financial Instruments Directive II
MLR	Modern Law Review
MoMiG	Act to modernize the law of private limited companies (Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen)
MoPeG	Act to modernize the law of partnerships (Gesetz zur Modernisierung des Personengesellschaftsrechts)
MP	Member of Parliament
NJOZ	Neue Juristische Online-Zeitschrift
NJW	Neue Juristische Wochenschrift
Nuove leggi civ	Le nuove leggi civili commentate
NUS	National University of Singapore
NYU JL&Bus	New York University Journal of Law & Business
NZG	Neue Zeitschrift für Gesellschaftsrecht
ÖBA	Österreichisches Bankarchiv
OECD	Organisation for Economic Co-operation and Development
OJLS	Oxford Journal of Legal Studies
Okla LRev	Oklahoma Law Review
OLG	German Higher Regional Court (Oberlandesgericht)
OS	Organization Studies
OUP	Oxford University Press
Oxf Econ Pap	Oxford Economic Papers
Pac Econ Rev	Pacific Economic Review
para	Paragraph
Princ UP	Princeton University Press
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R&D	Research & Development
Rev soc	Revue des sociétés
RGBI	Official Law Gazette of the German Reich (Reichsgesetzblatt)
RGZ	Decisions of the Supreme Court of the German Reich in civil matters (Entscheidungen des Reichsgerichts in Zivilsachen)
Riv corp gov	Rivista Corporate Governance
Riv dir civ	Rivista di Diritto Civile
Riv crit dir lav	Rivista critica di diritto del lavoro
Riv dir comm	Rivista del Diritto Commerciale
Riv dir comp	Rivista di diritto comparato
Riv dir soc	Rivista di Diritto Societario
Riv dott comm	Rivista dei dottori commercialisti
Riv giur lav	Rivista giuridica del lavoro e della previdenza sociale
Riv it scienze giur	Rivista Italiana per le Scienze Giuridiche

Riv ODC	Rivista Orizzonti del Diritto Commerciale
Riv soc	Rivista delle società
Riv trim proc civ	Rivista trimestrale di diritto e procedura civile
RIW	Recht der internationalen Wirtschaft
R not	Rivista notarile
ROHG	Reichsoberhandelsgericht
ROHGE	Entscheidungen des Reichsoberhandelsgerichts
RuW	Verlagsgesellschaft Recht und Wirtschaft
S.a.R.L.	Société à responsabilité limitée
SchiedsVZ	Zeitschrift für Schiedsverfahren
SE	Societas Europaea
SEBI	Securities and Exchange Board of India
SJZ	Schweizerische Juristen-Zeitung
SLIM	Simpler Legislation for the Internal Market
SME	small and medium-sized enterprises
SPA	Sale and Purchase Agreement
S.p.A.	Public limited company (Società per azioni)
SPAC	Special Purpose Acquisition Company
SPE	Societas Privata Europea
SPV	Special Purpose Vehicle
SRD	Shareholder Rights Directive
S.r.l.	Limited liability company (Società a responsabilità limitata)
Stan LRev	Stanford Law Review
TFEU	Treaty on the Functioning of the European Union
Trib	Tribunale
U Cal P	University of California Press
U Chi LRev	University of Chicago Law Review
UCITS	Undertakings for collective investment in transferable securities
UCLA LRev	UCLA Law Review
UCP	University of Chicago Press
UG	Unternehmersgesellschaft
UK	United Kingdom
U Pa LRev	University of Pennsylvania Law Review
U Pitt LRev	University of Pittsburgh Law Review
US	United States
USC	United States Code
UTLJ	University of Toronto Law Journal
Va LRev	Virginia Law Review
VC	Venture Capitalist
Vita not	Vita notarile
VS	Verlag für Sozialwissenschaften
Wash LRev	Washington Law Review
WM	Zeitschrift für Wirtschafts- und Bankrecht
WPg	Die Wirtschaftsprüfung

WpHG	Wertpapierhandelsgesetz
WpÜG	Wertpapiererwerbs- und Übernahmegesetz
Yale LJ	Yale Law Journal
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfgG	Zeitschrift für das gesamte Genossenschaftswesen
ZfPW	Zeitschrift für die gesamte Privatrechtswissenschaft
ZGH	Zeitschrift für das gesamte Handelsrecht
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZInsO	Zeitschrift für das gesamte Insolvenz- und Sanierungsrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZRG	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung
ZSR	Zeitschrift für Schweizerisches Recht
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

# Great Debates in Company Law

## A Research Outline

*Holger Fleischer\**

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## I. Introduction

Anyone who wishes to delve deeper into company law and its professional culture has various points of entry. One can take a closer look at the preferred re-

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\* This article first appeared in German in [2023] JZ 365. It was written at the beginning of the research program and has been slightly revised for this introductory chapter.

search topics and methods,<sup>1</sup> examine the key protagonists and their interactions,<sup>2</sup> or trace the development of company law scholarship in specific eras.<sup>3</sup> It is also conceivable to devote oneself to the *grands arrêts* of the field<sup>4</sup> or to inspect the great masterpieces of draughtsmanship.<sup>5</sup>

Another key to better understanding company law lies in familiarizing oneself with the major historical as well as with today's major debates in the field. This essay sets forth the program for a new project that takes up this line of research. The first case study has already been published.<sup>6</sup> Inspired by two slim edited volumes on English law<sup>7</sup> and expected to fill about twenty chapters, it will examine the flashpoints of German company law in context. Novices and experts alike can look forward to valuable insights from his 'cartography of controversies,'<sup>8</sup> such as about the essence of company law, its traditions and dogmas, its intellectual achievements, and its discourse culture.

Part II of the following research outline first amplifies the potential of systematically studying any discipline's crucial controversies. Part III provides orientation in the form of a brief chronology of major debates in company law. Part IV follows with observations on how these debates began and how they were resolved or ended. Part V makes observations on the formation of theories as the debates matured. Subsequently, Part VI maps important debates in company law accord-

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<sup>1</sup> For more details on the topics and methodological approaches of all habilitation theses on company law, see Holger Fleischer, 'Gesellschaftsrecht im Spiegel seiner Habilitationsschriften' (2022) 51 ZGR 191; specifically on methodological theory in company law, see Peter O Mülbert, 'Einheit der Methodenlehre? Allgemeines Zivilrecht und Gesellschaftsrecht im Vergleich' (2014) 214 AcP 188.

<sup>2</sup> See Hans-Ueli Vogt, Holger Fleischer and Susanne Kalss (eds), *Protagonisten im Gesellschaftsrecht* (Mohr Siebeck 2020).

<sup>3</sup> Thought provoking is Friedrich Kübler, 'Wirtschaftsrecht in der Bundesrepublik. Versuch einer wissenschaftshistorischen Bestandsaufnahme' in Dieter Simon (ed), *Rechtswissenschaft in der Bonner Republik* (Suhrkamp 1994); Jan Thiessen, 'In neuer Gesellschaft? Handels- und Gesellschaftsrecht in der Berliner Republik' in Thomas Duve and Stefan Ruppert (eds), *Rechtswissenschaft in der Berliner Republik* (Suhrkamp 2018); Tobias Tröger, 'Vom Rheinischen Kapitalismus zum Kapitalmarktrecht (und wieder zurück?)' in *ibid.*

<sup>4</sup> See Holger Fleischer and Jan Thiessen (eds), *Gesellschaftsrechts-Geschichten* (Mohr Siebeck 2018); for a didactic approach, see Jan Lieder and Martin Bialluch, *Handels- und Gesellschaftsrecht in 100 Leitentscheidungen* (Mohr Siebeck 2022).

<sup>5</sup> See Holger Fleischer and Sebastian Mock (eds), *Große Gesellschaftsverträge aus Geschichte und Gegenwart* (De Gruyter 2021).

<sup>6</sup> See Holger Fleischer, 'Große Debatten im Gesellschaftsrecht: Fiktionstheorie versus Theorie der realen Verbandspersönlichkeit im internationalen Diskurs' (2023) 87 RabelsZ 5. The complete book has since been published: Holger Fleischer, Jens Koch and Klaus Ulrich Schmolke (eds), *Gesellschaftsrecht im Spiegel großer Debatten* (De Gruyter 2024).

<sup>7</sup> See Andrew Johnston and Lorraine Talbot, *Great Debates in Commercial and Corporate Law* (Red Globe Press 2020); Lorraine Talbot, *Great Debates in Company Law* (Hart 2014).

<sup>8</sup> Bruno Latour, 'Von der „wissenschaftlichen Wahrheit“ zur Kartographie von Kontroversen' in Wolf-Andreas Liebert and Marc-Denis Weitze (eds), *Kontroversen als Schlüssel zur Wissenschaft?* (transcript 2006).

ing to their main topics before Part VII turns to look at the debate participants, the forums, and the discourse culture. Finally, Part VIII sorts out which of these discourses in company law were or are of purely national interest and which of them also had or have international components or relevance.

## II. Insights from the Study of Controversies

For the scientific community, major debates are centres of gravity that command attention in many disciplines. Thus the topic of great debates itself has attracted interest not only in the natural sciences but also in the humanities, cultural studies, and social sciences.<sup>9</sup> One can list the edited volumes devoted to salient controversies in the fields of history,<sup>10</sup> philosophy,<sup>11</sup> sociology<sup>12</sup> and literature.<sup>13</sup> Read together they suggest there is much insight to be gained from the systematic study of controversies.

### 1. Milestones

Major debates encapsulate the history of a discipline. Some fields consist entirely of one or more major debates.<sup>14</sup> That would probably be an exaggeration in the

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<sup>9</sup> See, for example, Wolf-Andreas Liebert and Marc-Denis Weitze, 'Kontroversen als Schlüssel zur Wissenschaft – Probleme, Ideen und künftige Forschungsfelder' in Liebert and Weitze (n 8) 12: 'We believe – and this is the starting point of this book – that controversies are an essential part of knowledge about science, that they play such a central role in science that they can be considered a key to science.' For a view from popular science, cf Hal Hellman, *Great Feuds in Science* (Trade Paper Press 1998); Hal Hellman, *Great Feuds in Mathematics* (Trade Paper Press 2006).

<sup>10</sup> See Jürgen Elvert and Susanne Krauß (eds), *Historische Debatten und Kontroversen im 19. und 20. Jahrhundert* (Franz Steiner 2003); Klaus Große Kracht, *Die zankende Zunft. Historische Kontroversen in Deutschland nach 1945* (Vandenhoeck & Ruprecht 2005); Hartmut Lehmann (ed), *Historikerkontroversen* (Wallstein 2000); Martin Sahrow, Ralph Jessen and Klaus Große Kracht, *Zeitgeschichte als Streitgeschichte. Große Kontroversen nach 1945* (CH Beck 2003); The Rohr Jewish Learning Institute, *Great Debates in Jewish History* (Jewish Learning Institute 2017).

<sup>11</sup> See Kurt Flasch, *Kampfplätze der Philosophie. Große Kontroversen von Augustin bis Voltaire* (2nd edn, Vittorio Klostermann 2009); Bernward Gesang and Julius Schälike (eds), *Die großen Kontroversen der Rechtsphilosophie* (Brill 2011); see also Marcelo Dascal, *Gottfried Wilhelm Leibniz: The Art of Controversies* (Springer 2008).

<sup>12</sup> See Georg Kneer and Stephan Moebius, *Soziologische Kontroversen* (Suhrkamp 2010).

<sup>13</sup> Cf Ralf Klausnitzer and Carlos Spoerhase, *Kontroversen in der Literaturtheorie/Literaturtheorie in der Kontroverse* (Peter Lang 2007).

<sup>14</sup> See Georg Kneer and Stephan Moebius, 'Vorwort' in Kneer and Moebius (n 12) 8: 'We believe that sociology owes its (incidentally, constantly changing) identity, if not exclusively, then to a considerable extent to a series of fundamental theoretical conflicts and far-reaching methodological debates.' See also Lutz Niethammer, 'Über Kontroversen in der Geschichtswissenschaft' (1989) 43 *Merkur* 73: 'Because of this dual role as scientific research into tradi-

case of company law. Like most other legal disciplines company law largely owes its identity to a regulatory framework. But major debates do provide a good way to trace the history of company law as a subject. Its major debates alone capture in time-lapse fashion the paths as well as the detours that the discipline, as we know it today, took as knowledge accumulated and various research questions were pursued. Such a longitudinal view also provides a basis for critical self-reflection and an assessment of the current state of affairs in the discipline.<sup>15</sup>

## 2. *A Legacy of Traditions*

In addition, major debates are part of the traditional heritage of every discipline. Reconstructing them and mapping them out fulfils an important archival function, preventing knowledge from being permanently lost.<sup>16</sup> A compendium of fundamental debates in company law, past or present, introduces beginner researchers to established traditions of thought<sup>17</sup> and prevents them from mistakenly characterizing something as new that has actually long been known and that past scholars have already thoroughly fleshed out. And even experienced scholars can benefit, because with experience often comes the ability to see the classic debates in a new light,<sup>18</sup> much like someone reading Goethe's *Faust* or Thomas Mann's *The Magic Mountain* will respond differently depending on whether they are 17

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tion and as a basis of public discourse, controversies in history are constitutive and not, as in other sciences, merely incidental, namely related to the stimulation and integration of innovations and to the honor of fellow members of the profession.' See also Jürgen Elvert, 'Zur Einführung' in Elvert and Krauß (n 10) 9: 'This volume deals with the significance of historical debates and controversies for historical knowledge in the narrower scientific and broader public sense. It aims to recall the tradition of scientific debates and controversies as a whole that have shaped the history of historical science since Ranke at the latest.'

<sup>15</sup> For a detailed discussion of self-reflection in company law, see Holger Fleischer, 'Selbstreflexion im Gesellschaftsrecht: „Hottest Game in Town“ oder „Death of Corporate Law“?' (2022) 51 ZGR 466.

<sup>16</sup> For examples of a loss of knowledge in the related field of business administration, see Klaus Brockhoff, *Betriebswirtschaftslehre in Wissenschaft und Geschichte* (5th edn, Springer Gabler 2017) 41f.

<sup>17</sup> See also, in general, Marcelo Dascal, 'Die Dialektik in der kollektiven Konstruktion wissenschaftlichen Wissens' in Liebert and Weitze (n 8) 36f: 'In addition, prospective scholars must at least be familiarized with the most important controversies that have been debated in their respective fields in the past and present.'

<sup>18</sup> For a view on the 'potentially creative function of re-reading the classics' from a sociological perspective, see Robert K Merton, *Social Theory and Social Structure* (Free Press 1968) 37: 'For just as new knowledge has a retroactive effect in helping us to recognize anticipations and adumbrations in earlier work, so changes in current sociological knowledge, problems, and foci of attention enable us to find *new* ideas in a work we had read before. The new context of recent developments in our own intellectual life or in the discipline itself brings into prominence ideas or hints of ideas that escaped notice in an earlier reading.'

or 70 years old.<sup>19</sup> However, despite all justified respect for tradition, one caveat is in order: Erudition must not inhibit scientific originality,<sup>20</sup> nor must it lead later generations to uncritically glorify the discipline's classic texts.<sup>21</sup>

### 3. *A Repository of Ideas, Doctrines, and Dogmas*

Furthermore, a close examination of major debates will help scholars achieve an understanding of the doctrinal and intellectual history of their fields. Today this is actually a pressing necessity in company law, in which the history of the science so far has been beggared and marginal.<sup>22</sup> The topic of great debates has found no real home in the ubiquitously dominant commentary literature, and the great textbooks that have long done outstanding service in this area<sup>23</sup> are probably a dying species. An edited volume on fundamental debates in the field, by contrast, seems an ideal forum in which to shed light on the historical, theoretical, and economic conditions that have propelled the main currents in company law. It is precisely through the sharp juxtaposition of rival explanations and schools of thought – the ‘agonistic discourse formations’<sup>24</sup> – that doctrines diverge and material differences of assessment become more apparent. Moreover, a more diligent search for clues can help scholars identify intellectual breaks and continuities in the history of company law, revivals of earlier doctrine, and ‘pre-discovery’ formulations of what would later become doctrine.<sup>25</sup>

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<sup>19</sup> Example based on Merton (n 18) 37: ‘Just as the *Song of Songs* is different when it is read at age 17 and at age 70, so Weber’s *Wirtschaft und Gesellschaft* or Durkheim’s *Suicide* or Simmel’s *Soziologie* differ when they are read at different times.’

<sup>20</sup> See Merton (n 18) 30ff under the subheading ‘Erudition Versus Originality’.

<sup>21</sup> See Merton (n 18) 30: ‘uncritical reverence toward almost any statement made by illustrious ancestors’.

<sup>22</sup> See Holger Fleischer, ‘Unternehmensinteresse und intérêt social: Schlüsselfiguren aktienrechtlichen Denkens in Deutschland und Frankreich’ (2018) 47 ZGR 703, 704: ‘Publications on company law usually revolve around individual legal provisions or court decisions. This is immediately obvious, because our field has always thrived on dealing with practical problems. Nevertheless, it is also worth reflecting on theoretical concepts here, even if this does not provide any immediate answers to questions of day-to-day company law.’ See also Eckart Bueren, *Short-termism im Aktien- und Kapitalmarktrecht* (Mohr Siebeck 2022) 4: ‘This work closes this gap in basic research by examining the controversy surrounding short-termism and thus the protection of the functioning of stock corporations as one of the “great debates in company law” for the first time in its entirety from the perspective of legal and intellectual history, comparative law, and law and economics.’

<sup>23</sup> For an appreciation of this genre of literature in German corporate law, see Holger Fleischer, ‘Gesellschaftsrecht’ in Dietmar Willoweit (ed), *Rechtswissenschaft und Rechtsliteratur im 20. Jahrhundert* (CH Beck 2007) 493f.

<sup>24</sup> Kneer and Moebius (n 14) 8: ‘agonale Diskursformationen’.

<sup>25</sup> Merton (n 14) 9.

#### 4. Drivers of Progress

Finally, following *Karl Raimund Popper*,<sup>26</sup> the internal debates in any field of science can be considered an engine of scientific progress.<sup>27</sup> In his fallibilistic model of science, the critical debates that play out within the scientific community are central tests of scientific knowledge. New claims and hypotheses are put to the test in a ‘friendly but also fiendish competition between scientists’.<sup>28</sup> The extent to which this linear concept of progress in the natural sciences can be transferred to jurisprudence in general, much less to company law, is yet to be examined in detail.<sup>29</sup> Prominent voices contributing to the development of legal doctrine do consider such progress to be achievable.<sup>30</sup> In company law, the maturation of basic categories such as the recognition of corporate personhood comes to mind as a possible example of such progress.<sup>31</sup> Diving into these and other debates will help us understand how they contributed to our field and its most important intellectual achievements.

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<sup>26</sup> See Karl Popper, *Logik der Forschung* (1st edn, Springer 1935, 11th edn, Mohr Siebeck 2005), English: *The Logic of Scientific Discovery* (1st edn, Basic Books 1959).

<sup>27</sup> In the present context, Andrea Hamp, *Der praktische Sinn in wissenschaftlichen Diskussionen* (Springer VS 2017) 14; Kneer and Moebius (n 14) 8f.

<sup>28</sup> Franz Kreuzer (ed), Karl R Popper and Konrad Lorenz, *Die Zukunft ist offen: das Altenberger Gespräch, mit den Texten des Popper Symposiums* (Piper 1985) 51.

<sup>29</sup> See Holger Fleischer, ‘Gesellschaftsrechts-Innovationen: Eine Gedankenskizze’ in Christian Deckenbrock and others (eds), *Arbeit, Wirtschaft, Recht. Festschrift Henssler* (CH Beck 2023) (distinguishing between legal inventions, discoveries, and innovations); see also Frank Saliger, ‘Intra- und Interdisziplinarität: Wie kommt das Neue in die Rechtswissenschaft?’ in Eric Hilgendorf and Helmuth Schulze-Fielitz (eds), *Selbstreflexion der Rechtswissenschaft* (2nd edn, Mohr Siebeck 2021) 120: ‘Regardless of any optimism or skepticism about progress, the following article avoids explaining the issue in terms of the idea of progress. The reason for this is that any talk of progress presupposes a reference to an evaluation criterion that can come under pressure from contingency’ (raising but not answering the question).

<sup>30</sup> See Robert Alexy, *Theorie der juristischen Argumentation* (Suhrkamp 1978) 328; for a more detailed discussion from a criminal-law perspective, see Björn Burkhardt, ‘Hauptreferat. Geglückte und folgenlose Strafrechtsdogmatik’ in Albin Eser, Winfried Hassemer and Björn Burkhardt (eds), *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende* (CH Beck 2000) 124ff; Heinz Müller-Dietz, ‘Gibt es Fortschritt im Strafrecht?’ in Heike Jung (ed), *Perspektiven der Strafrechtsentwicklung* (Nomos 1996) 31.

<sup>31</sup> On the concept of ‘legal entity’ as a creation of doctrine and legislation in the 19th and 20th centuries, see Filippo Ranieri, ‘Die Rechtskategorie „Juristische Person“ als Schöpfung von Doktrin und Gesetzgebung im 19.–20. Jahrhundert. Zugleich ein Kapitel aus der neueren Geschichte des kontinentalen Zivil- und Handelsrechts’ in Herbert Kronke, Heinz-Peter Mansel and Marc-Philippe Weller (eds), *Liber Amicorum Giuseppe B Portale* (Nomos 2019) 109ff with further references.

### III. A Brief Chronicle of Great Debates in Company Law

A first impression of the wealth of debates in company law can be gained from a diachronic review of the available material. However, it will not be possible, nor will it make sense to try, to cover all the fundamental debates past and present in a single edited volume. An informed selection must be made, which inevitably involves subjective value judgments. The dictum that history is a construct will also apply to a chronicle of company law. The aim is to achieve a healthy balance that ranges from the classic to the current controversies and also covers the doctrinal, theoretical, and policy disputes that have left their marks in stock corporation, GmbH, partnership, and association law. Debates about major court decisions have already been extensively studied elsewhere and are thus omitted.<sup>32</sup> Furthermore, as far as terminology is concerned, no distinction will be made and none is intended at the analytical level between debates, discussions, disputes, or controversies;<sup>33</sup> these terms are used interchangeably.

#### 1. *Generational Issues*

It is often said that each successive generation of company law scholars has its own row to hoe. This is also reflected in the chronology of major debates. The ‘golden generation’ of great company lawyers, who became professors in the 1960s, focused largely on the inclusion of concerns or groups of companies in company law,<sup>34</sup> inspired by the world’s first codification of a body of statutes applicable to them in the German Stock Corporation Act of 1965.<sup>35</sup> This was followed in the 1970s by wrangling over legal policy with respect to an overarching ‘enterprise law’<sup>36</sup> and co-determination, and by the doctrinal analysis, in essays and commentaries, of the Co-Determination Act of 1976.

The leading scholars during the 1980s devoted themselves primarily to systems and principles,<sup>37</sup> transforming the disorder of individual laws from different

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<sup>32</sup> See the individual chapters in Fleischer and Thiessen (n 4).

<sup>33</sup> For a subdivision into three ideal main types (discussion, dispute, controversy), see Dascal (n 17) 24ff.

<sup>34</sup> See Wolfgang Zöllner, ‘Alfred Hueck als Arbeitsrechtler’ in Claus-Wilhelm Canaris and others (eds), *Gedächtnisreden auf Alfred Hueck* (1976) 17, 22; Herbert Wiedemann, *Die Unternehmensgruppe im Privatrecht* (Mohr Siebeck 1988) 10: ‘The objective and systematic integration of the group of companies into company law – a task for our generation – is no less radical than the step taken at the beginning of the modern era from the individual merchant to the association of persons.’

<sup>35</sup> See Ernst Geßler, ‘Probleme und Wege der Aktienrechtsreform’ [1966] JBl 169, 179 (taking pride: ‘This provision has no parallel in the world’s stock corporation legislation. It should be regarded as the reformist achievement of the German Stock Corporation Act of 1965’).

<sup>36</sup> See BMJ (ed.), *Bericht über die Verhandlungen der Unternehmensrechtskommission* (1980). This commission met from 1972 to 1980.

<sup>37</sup> See, eg, Herbert Wiedemann, *Gesellschaftsrecht*, vol I: Grundlagen (CH Beck 1980); Karsten Schmidt, *Gesellschaftsrecht* (1st edn, Heymanns 1986, 4th edn 2002).

eras into an authoritative canon of general doctrine.<sup>38</sup> Thematically, significant debates revolved around crisis-related company and enterprise law<sup>39</sup> and the law on shareholder contributions in lieu of equity investment.<sup>40</sup> In the second half of the 1990s, the duties and liability of members of executive and supervisory boards came into focus as favoured topics and were the subject of countless dissertations and habilitation monographs.

In the first decade of the new millennium, three major tasks awaited the quite populous Baby Boomer generation of company lawyers.<sup>41</sup> The German Corporate Governance Code of 2002 was an unmistakable signal that the time was ripe for broad discussions about corporate governance, focusing particularly on listed companies. At the same time, the relationship between company and capital market law commanded considerable attention, especially after the German Securities Acquisition and Takeover Act (WpÜG) came into force in 2002.<sup>42</sup> Finally, the realignment of the private international law of companies following decisions by the European Court of Justice became prominent in the interdisciplinary discourse between company law, private international law, and European law. As a ripple effect of this discourse, there was also a lively debate about reforming the statutory capital system for AGs and GmbHs.

It appears that the latest cohort of company law scholars, more than ever of whom are women,<sup>43</sup> will focus, in this era of ESG, primarily on elements of the sustainability debate as well as the implications of digitalization and artificial intelligence for company law.

## 2. *Eternal Issues*

In addition to debates that began and ended at some point, including any lead-up and follow-up to them,<sup>44</sup> some debates in company law, or in jurisprudence in

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<sup>38</sup> For an appreciation of this enormously fruitful research program on ‘institutional development’, see Fleischer (n 23) 493f.

<sup>39</sup> See, eg, the topics of the 54th Association of German Jurists convention in 1982 (corporate restructuring) and of the 55th in 1984 (measures, particularly in company and capital market law, to improve the equity base of companies long-term).

<sup>40</sup> See a summary by Peter Hommelhoff, ‘Das Gesellschafterdarlehen als Beispiel institutioneller Rechtsfortbildung’ (1988) 17 ZGR 460.

<sup>41</sup> On the record number of 43 postdoctoral theses on company law between 2000 and 2009, see Fleischer (n 1) 197.

<sup>42</sup> See Fleischer, ‘Das Aktiengesetz von 1965 und das neue Kapitalmarktrecht’ [2006] ZIP 451 (on capital market law and the German Stock Corporation Act at 40); Katja Langenbucher, ‘50 Jahre Aktiengesetz – Aktienrecht und Kapitalmarktrecht’ in Holger Fleischer and others (eds), 50 Jahre Aktiengesetz (De Gruyter 2016).

<sup>43</sup> On the low proportion of women and habilitation monographs by woman company law scholars, see Fleischer (n 1) 199 with further references.

<sup>44</sup> On sociological controversies, see Kneer and Moebius (n 14) 13.

general for that matter,<sup>45</sup> never die and can be traced throughout the history of the subject. One of these perennial issues is ‘interest of the enterprise’ (‘Unternehmensinteresse’ in German).<sup>46</sup> For more than a century, the concept of the corporate interest has been a vehicle for fleshing out problems both old and new, such as the enterprise-in-itself (‘Unternehmen an sich’) problem, the stakeholder versus shareholder debate, and corporate social responsibility. One may mock the concept as an ‘egg of Columbus for lawyers’<sup>47</sup> or condemn it as an ‘an ideology that obscures the true connections’<sup>48</sup>; nevertheless, it is a constant companion topic to discussions of stock corporation law.<sup>49</sup>

Ever since the advent of the BGB, the German Civil Code, another debate has persisted about the legal nature of the ‘Gesamthand’ or joint ownership. Since the legislature at the time did not think to establish a doctrinal foundation for this concept,<sup>50</sup> scholars throughout the twentieth century disputed joint ownership<sup>51</sup> in increasingly vehement terms.<sup>52</sup> In some combination of reverence and perplexi-

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<sup>45</sup> See, eg, Wolfgang Loschelder, ‘Religiöse Unterweisung als Merkmal kultureller Identität. Die Auseinandersetzung über Religionskunde und Religionsunterricht für Muslime in Deutschland 1970 bis heute’ in Lothar Gall and Dietmar Willoweit (eds), *Judaism, Christianity, and Islam in the Course of History* (Oldenbourg 2011): ‘In jurisprudence, there are “eternal topics” that can be discussed again and again – and profitably – in a professional context [...]’

<sup>46</sup> Similarly, Peter Hommelhoff, ‘Das Unternehmensrecht vor den Herausforderungen der Globalisierung’ in Uwe H Schneider and Peter Hommelhoff (eds), *Festschrift für Markus Lutter* (O Schmidt 2000) 103: ‘marks a fundamental, century-long problem in the history of German stock corporation law’.

<sup>47</sup> Hans-Joachim Mertens, ‘Der Aktionär als Wahrer des Rechts? – Aktuelle Probleme der Durchsetzung von Aktionärsrechten’ [1990] AG 49, 54.

<sup>48</sup> Wolfgang Zöllner, ‘Das Unternehmensinteresse – eine ideologische Leerformel?’ AG 2003, 2, 8.

<sup>49</sup> See Fleischer (n 22) 704; see also Philip JS Fendt, ‘Der Aufsichtsrat in der Mitverantwortung einer interessenpluralistischen. Formalzielbestimmung’ [2017] AG 99: ‘Please, not another debate about the “interest of the enterprise”. After more than 40 years of abstract and tiresome theoretical debates about the supreme maxim of action for capital market-oriented stock corporations, these could truly be scaled back if recurring corporate turmoil and scandals did not keep reviving this topic.’

<sup>50</sup> See Protokolle, in Benno Mugdan (ed), *Die gesamten Materialien zum BGB für das Deutsche Reich*, vol II (1899) 900, according to which ‘a statement on the scientific dispute about the nature of joint ownership should be avoided’.

<sup>51</sup> See Andreas Dieckmann, *Gesamthand und juristische Person* (Mohr Siebeck 2019); Alexander Wilhelm, *Das Recht der Gesamthand im 21. Jahrhundert* (Mohr Siebeck 2021).

<sup>52</sup> See, eg, Holger Altmeyen, ‘Kritischer Zwischenruf zum „Mauracher Entwurf“’ [2020] NZG 822; Wolfgang Zöllner, ‘Rechtsfähigkeit der BGB-Gesellschaft – ein Sachverstands- oder Kommunikationsproblem?’ in Günther Hönn (ed), *Festschrift für Alfons Kraft* (Luchterhand 1998) 701.

ty, they referred to joint ownership as an ‘unknown creature’,<sup>53</sup> an ‘enigma’,<sup>54</sup> a ‘mystery play’,<sup>55</sup> or even as an ‘inscrutable *mysterium tremendum*’.<sup>56</sup>

Another topic in company law that simply will not rest is multiple-voting shares.<sup>57</sup> Section 252(1)(4) of the German Commercial Code of 1897 expressly permitted them as a separate class of shares; as protection against foreign ownership during the Weimar Republic, one-third of all listed stock corporations featured multiple-voting shares, sometimes with 500 times the voting rights of regular shares.<sup>58</sup> Section 12(2)(1) of the Stock Corporation Act of 1937 then generally abolished multiple-voting shares, but the statute’s next sentence permitted the government’s Minister for Economic Affairs to allow exceptions if the welfare of the company or macroeconomic interests so required.<sup>59</sup> The reforms enacted in the 1965 Stock Corporation Act stipulated, in s 5(1) of the former Stock Corporation Implementation Act (EGAktG) (now superseded), that multiple-voting rights created before the Stock Corporation Act took effect would continue to be valid. In 1998, the Bundestag passed an ‘Act on Monitoring and Transparency of Enterprises’ (known as the ‘KonTraG’), after which s 12(2) of the Stock Corporation Act (now superseded) declared tersely that ‘multiple voting rights are not permitted.’ Recently the latest twist has now materialized in legislation called the ‘Zukunftsfinanzierungsgesetz’ (or the Act on financing investments in the future), which has allowed multiple-voting shares once again (see s 135a of the Stock Corporation Act) under certain conditions.<sup>60</sup>

<sup>53</sup> Peter Ulmer, ‘Die Gesamthandsgesellschaft – ein noch immer unbekanntes Wesen?’ (1998) 198 AcP 113.

<sup>54</sup> Karsten Schmidt, ‘Erbteilsabtretung, Miterbenabfindung und Anwachsung bei der Erbengemeinschaft: Nachdenken über § 2033 BGB und die Struktur der Erbengemeinschaft’ (2005) 205 AcP 305, 312.

<sup>55</sup> Heinrich Weber-Grellet, ‘Die Gesamthand – ein Mysterienspiel?’ (1982) 182 AcP 316.

<sup>56</sup> Alexander Schall, ‘Zur Rechtsnatur der rechtsfähigen Personengesellschaft nach dem MoPeG – Abschied vom „guten alten Recht“?’ in Burkhard Gehle, Heribert Hirte and Daniel Lochner (eds), *Festschrift für Thomas Heidel* (Nomos 2021) 155, 162.

<sup>57</sup> See Sebastian Mock and Jean Mohamed, ‘Goodbye One Share One Vote? – Welcome Dual-Class Shares!’ [2022] NZG 1275: ‘Multiple voting rights shares are a phenomenon of stock corporation law that has been discussed repeatedly in German legal history for over 85 years.’ See also Julia Nicolussi, ‘Mehrstimmrechtsaktie: Renaissance auf europäischer und auf nationaler Ebene’ (2022) 67 AG 753.

<sup>58</sup> See Sebastian Mock and Christoph Beckmann, ‘§ 13 Von der privaten zur staatlichen Aktiengesellschaft – die Satzung der Hamburger Hochbahn AG’ in Fleischer and Mock (n 5) 651ff with further references (discussing the example of Hamburger Hochbahn AG, in which the City of Hamburg held a share with 48,900 votes).

<sup>59</sup> See Holger Fleischer, ‘Die Siemens AG: Rechtliche Wegmarken von der Familien- zur Publikumsgesellschaft’ (2019) 64 AG 481, 489 (examining the case of Siemens AG).

<sup>60</sup> BGBl 2023 I No. 354; see, eg, Tim Florstedt, ‘Das Zukunftsfinanzierungsgesetz – Börsenmantelaktiengesellschaft und Mehrstimmrechtsaktie’ [2024] NZG 139; Mock and Mohamed (n 57) (‘Goodbye One Share One Vote? – Welcome Dual-Class Shares?’); see also Matthias Casper, ‘Das Zukunftsfinanzierungsgesetz – Zwischen Griff in die historische Mottenkiste und behutsamer Fortentwicklung der Unternehmensfinanzierung’ (2023) 187 ZHR 5, 17ff.