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Journal
Business Lawyer, 77

Authors
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Publication Date
2022

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PAPER NO. 25/2021

JUNE 2021

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LAW & ECONOMICS RESEARCH PAPER NO. 22-02

CORPORATE LAW'S CRITICAL JUNCTURES

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In 77 THE BUSINESS LAWYER (Winter 2021-2022).

Electronic copy available at: https://ssrn.com/abstract=3877329

Corporate Law's Critical Junctures

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June 2021

Abstract

What accounts for substantial legal change? With corporate law, many think a stock market crash is key. But not all crashes lead to reform. So, what else is necessary? This paper uses a "critical junctures" model borrowed from social science to explain when and why major corporate law change happens. The model indicates that a combination of a lengthy period of depressed share prices and a perception that business wrongdoing was integrally related to the slump are required to create the window of opportunity for significant and enduring reform. It follows that the COVID-19 pandemic is unlikely to serve as a catalyst for major changes to corporate law.

JEL Codes: G01, G30, G38, K22, N22

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I. INTRODUCTION

What accounts for substantial legal change? Roberta Romano, a pre-eminent corporate law scholar, has observed "There is no rigorous theory of how policy proposals come to the forefront of the legislative agenda."[1] Still, there is something of a consensus that with corporate law, in contrast with the general pattern,[2] substantial change is not the product of an incremental, evolutionary process. Those seeking to account for major corporate law developments have observed a pattern of bursts of reform activity interspersed with extended periods of quiet. Further, the regulatory surges do not occur randomly. What is the catalyst? Stuart Banner, writing about securities regulation in 1997, said "The answer is a crash."[3] Numerous observers have subsequently concurred, extending the logic in so doing from regulation of the issuing and trading of shares (securities law) to corporate law generally.[4] Succinctly put, with respect to corporate/securities law "crash-then-law."[5]

The "crash-then-law" account chimes with a headline history of the cycle of corporate and securities regulation in the United States. In the wake of the stock market crash of 1929, the foundation of federal securities law was put in place via the enactment of the Securities

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1 Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1524 (2005).

2 *See, e.g.*, Karrigan S. Bork, *An Evolutionary Theory of Administrative Law*, 72 SMU L. REV. 81, 83 (2019) ("Law evolves. Law evolves to accommodate changes in societal goals, physical conditions, cultural norms, technology, and scientific understanding" – footnotes omitted).

3 Stuart Banner, *What Causes New Securities Regulation--300 Years of Evidence*, 75 WASH. U. L. Q. 849, 855 (1997).

4 *See, e.g.*, Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77 (2003); Lucian Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1798, n. 16 (2006); John C. Coffee, *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1078 (2012). *See also infra* notes 65-67.

5 Ribstein, supra note 4, at 78, n. 3; Frank Partnoy, *Why Markets Crash and What Law Can Do about It*, 61 U. PITT. L. REV. 741, 743, n. 11 (2000).

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Act of 1933[6] and the Securities Exchange Act of 1934.[7] The Sarbanes-Oxley Act (SOX),[8] which made numerous changes to governance arrangements in publicly traded companies through amendments of federal securities law, was enacted in 2002 after a "dot.com"-driven bull market went sharply into reverse. The Dodd-Frank Act of 2010[9] was the primary federal legislative response to the financial crisis of 2008, which hammered share prices. While the Dodd-Frank Act focused primarily on overhauling financial regulation, the legislation made various notable changes to corporate governance and most were applicable to all issuers falling under the jurisdiction of the Securities and Exchange Commission (SEC).[10] The Jumpstart Our Business Startups (JOBS) Act, enacted by Congress in 2012,[11] fortified the corporate related legacy of the financial crisis by relaxing aspects of securities law to improve access to capital following retrenchment by banks.

Romano's logical retort to the crash-then-law account of corporate law change would be that there is a lack of sufficient theoretical precision. Various questions indeed spring to mind with the crash-then-law account. For instance, what changes to corporate law does the theory purport to account for? Deregulation, for instance, in addition to new regulation?[12] Is a crash necessary for major change? Is a crash sufficient to cause major change? What counts as a crash? For example, stock prices dropped precipitously over a period of a few weeks in February and March 2020 as investors reacted to the start of the COVID-19

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6 48 Stat. 74.

7 48 Stat. 881.

8 Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745.

9 Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376 [hereinafter Dodd-Frank Act].

10 *See infra* notes 221, 224-33 and accompanying text.

11 Pub. L. No. 112-106, 126 Stat. 306.

12 Usha R. Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 435, 443-46 (2017) (suggesting "crash-then-law" reasoning accounts poorly for deregulatory securities law reform).

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pandemic but rebounded quickly and hit record highs before the end of the year.[13] Was this a crash within the understanding of the "crash-then-law" account? If so, can we expect a corresponding push to reform corporate and securities law?

This paper seeks to answer these key questions by deploying a critical junctures framework largely novel to legal scholarship. The critical junctures concept has gained a solid foothold in the social sciences.[14] This has not happened, however, with law.[15]

In the social sciences context, a critical juncture is an historical moment during which substantially greater change is possible than during the preceding and subsequent periods of stability.[16] The critical juncture framework focuses on major episodes of political and institutional innovation that generate an enduring legacy.[17] As we show, critical juncture analysis addresses questions of when, why, and what[18] the "crash-then-law" account of corporate and securities law tends to leave open. The crucial junctures model correspondingly offers valuable insights regarding corporate law reform.

We define corporate law broadly to include federal securities law with a strong corporate law dimension, reflecting the fact that federal intervention in the corporate law

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13 Gunjan Banerji, Akane Otani & Michael Wursthorn, *Buy-and-Hold Mantra Fuels Stocks' Rise*, WALL ST. J., Nov. 25, 2020, at A1 (indicating the Dow Jones Industrial Average closed above 30,000 for the first time ever). See also *infra* notes 420-30 and accompanying text.

14 *See infra* note 77 and related discussion.

15 *See infra* note 87 and accompanying text.

16 Tim Büthe & Alan M. Jacobs, *Letter from the Editor*, QUALITATIVE & MULTI METHOD RES., Spring 2017, at 1, 1; Florian Bieber, *Global Nationalism in Times of the COVID-19 Pandemic*, NATIONALITIES PAPERS, special issue article, 1, 3 (2020).

17 David Collier & Gerardo L. Munck, *Building Blocks and Methodological Challenges: A Framework for Studying Critical Junctures*, QUALITATIVE & MULTI METHOD RES., Spring 2017, at 2, 6.

18 *Id.* at 4.

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arena has often been effected through the use of securities laws.[19] Corporate law in the U.S. is anchored in state law, with Delaware being the state in which a majority of U.S. public companies are incorporated,[20] so the state level in general and Delaware in particular would seem to be the obvious venue for major corporate law change. In fact, at the state level there is a strong bias in favor of continuity. Correspondingly, corporate law critical junctures are only realistic at the federal level. The three federally oriented crash-then-law instances specified above stand out as obvious contenders.

In addition to considering instances where substantial corporate law change can potentially be accounted for by way of a stock market-driven critical juncture, the paper shows that a bear market will not always result in major reforms and will explain what elevated 1929, the early 2000s and 2008 above other stock market downturns as catalysts for regulatory change. To anticipate, the pivotal additional features appear to be a lengthy period of depressed share prices and a perception amongst contemporaries that business wrongdoing precipitated or was otherwise integrally related to the slump.[21] These additional ingredients are crucial because the prolonged downturn and the discrediting of the status quo provide an opening for major change absent under normal circumstances. Investors bruised by heavy stock market losses become advocates of regulation, reinforced by public outrage fuelled by allegations of business chicanery. The influence of incumbent financial and business

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19 See, e.g., Bebchuk & Hamdani, supra note 4, at 1800-19. On other examples of federal corporate-related interventions see Steven A. Bank, *Corporate Managers, Agency Costs, and the Rise of Double Taxation*, 44 WM. & MARY L. REV. 167, 195-96 (2002) (canvassing the 1936 undistributed profits tax); Steven A. Bank & Brian R. Cheffins, *The Corporate Pyramid Fable*, 84 BUS. HIST. REV. 435, 458 (2010) (discussing the Public Utility Holding Company Act of 1935).

20 John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1348 (2012).

21 *See infra* text accompanying notes 130, 413.

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interests typically well-positioned to fend off proposals for thoroughgoing reform will also be eroded.

We conclude our paper by using the critical junctures framework to assess the current COVID-19 pandemic. Pundits have regularly predicted the pandemic will change everything.[22] What about corporate law? Lynn Paine of the Harvard Business School has said "In the wake of Covid-19 boards can expect institutional investors, governments, and the general public to renew their calls for companies to pay more attention to societal problems and to take a more active role in helping address them."[23] Will a by-product be major changes to corporate law? Although we are well aware that using history to make predictions is controversial,[24] we argue substantial reform is unlikely. There may have been a stock market crash early in the COVID-19 pandemic but there has not been a sustained decline in share prices. Moreover, the pandemic, not corporate chicanery, has been blamed for a sharp 2020 downturn the U.S. economy suffered. The ingredients seemingly required for a corporate law critical juncture therefore are currently lacking.

The paper is organized as follows. Part II sets the scene for our critical junctures analysis by canvassing from a corporate law perspective past explanations for law reform bursts, indicating in so doing that while each is instructive, each suffers from noteworthy limitations. Part III summarizes critical junctures theory and describes the potential it has for

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[22] Walter Scheidel, *The Spanish Flu Didn't Wreck the Global Economy -- What Is Different About the Coronavirus Pandemic?*, FOREIGN AFFAIRS (May 28, 2020), https://www.foreignaffairs.com/articles/united-states/2020-05-28/spanish-flu-didnt-wreck-global-economy . *See* also *infra* notes 394-96 and accompanying text.

[23] Lynn S. Paine, *Covid-19 Is Rewriting the Rules of Corporate Governance*, HBR.ORG., Oct. 6, 2020, https://hbr.org/2020/10/covid-19-is-rewriting-the-rules-of-corporate-governance .

[24] James Marriott, *A High-Seas Heist That Changed History*, TIMES (U.K.), May 30, 2020. *See also* JULIAN ZELIZER, GOVERNING AMERICA: THE REVIVAL OF POLITICAL HISTORY 66 (2012); DAVID M. SMICK, THE GREAT EQUALIZER: HOW MAIN STREET CAPITALISM CAN CREATE AN ECONOMY FOR EVERYONE 36 (2017).

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generating insights regarding law reform. Part IV discusses the most obvious U.S. corporate law critical juncture contenders, again the stock market crash of 1929, the dot.com meltdown in the early 2000s (accompanied by corporate scandals) and the financial crisis of 2008. Part V considers whether there have been any additional such market-driven critical junctures, focusing on economic traumas occurring since 1900 to see if they were associated with major changes to corporate law. Part VI canvasses state law and explains why corporate law critical junctures have not occurred at state level; sudden substantial state-oriented changes have focused on specific topics and thus have been no more than "mini" critical junctures. Part VII draws together the insights Parts III to VI provide to assess whether the COVID-19 pandemic is likely to elicit major changes to corporate law. Part VIII concludes.

II. EXPLAINING THE RHYTHM OF LAW REFORM – THE STORY TO DATE

The general tendency among legal scholars has been to assume law evolves and adapts piecemeal in response to changing norms and values combined with technological innovations.[25] For instance, law professor David Skeel has used evolutionary theory to explain the development of bankruptcy law, highlighting the roles played by interest groups, structural constraints -- primarily federalism enshrined by the U.S. constitution -- and ideology.[26] While the idea that law evolves and adapts over time has been described as "deeply ingrained,"[27] various academics have deployed "transformational" as well as "evolutionary" frameworks in offering accounts of legal change.[28] Perhaps the best known is

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25 *See supra* note 2 and accompanying text.

26 David A. Skeel Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1323, 1351-53 (1998).

27 E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 38 (1985).

28 *See* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 274-75 (1991) (discussing "transformational" and "evolutionary" nomenclature).

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Bruce Ackerman's analysis of "constitutional moments," where political leaders secure mass support for "higher lawmaking" with change "measured in years, not decades."[29] Jonathan Tepper and Denise Hearn maintain as well that "Antitrust law has experienced its own revolutions with each passing generation."[30] Peter Conti-Brown and Brian Feinstein have sought to account for the evolution of federal financial (primarily banking) law by reference to "major legislative events" sparked by financial crises and other key unanticipated events.[31]

With corporate law, Martin Gelter and Julia Puaschunder have suggested "its evolution often happens in leaps".[32] Generally, however, distinguishing between "transformational" and "evolutionary" change has not been a priority for corporate law scholars. Companies incorporate under the laws of one of the 50 states rather than under a federal statute.[33] Delaware has clearly won a "race" to attract businesses prepared to incorporate in a state other than the one in which they are headquartered.[34] There has been intense debate whether the "race" between the states for incorporation business is to the "bottom," with states competing counter-productively to promulgate manager-friendly laws, or the "top" in the sense that states "win" by adopting laws designed to enhance company

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29 BRUCE ACKERMAN: WE THE PEOPLE: FOUNDATIONS 6-7 (1991); BRUCE ACKERMAN: WE THE PEOPLE 2: FOUNDATIONS 5, 160 (1998); Bruce Ackerman, *A Generation of Betrayal*, 65 FORDHAM L. REV. 1519, 1521 (1997). On the prominence of Ackerman's work in this realm, see Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1616-17 (2010).

30 JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION 165 (2019).

31 Peter Conti-Brown and Brian D. Feinstein, *The Contingent Origins of Financial Legislation*, forthcoming WASH. U. L. REV., 4 (2021), https://ssrn.com/abstract=3778189.

32 Martin Gelter & Julia Puaschunder, *COVID-19 & Comparative Corporate Governance*, Fordham University School of Law Working Paper, 66 (2021).

33 Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Shareholder Protection Across Time*, 68 FLORIDA L REV. 691, 693 (2016).

34 See *supra* note 20 and accompanying text.

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value and attract investors.[35] Little has been said, however, about the pace of the corporate law race or the chronology of corporate law reform more generally. Only a few studies have attempted to measure systematically changes in U.S. corporate law across time.[36] Correspondingly, when in the late 1990s Stuart Banner drew attention to stock market crashes as a pivotal agent of regulatory innovation in the corporate realm, he was working with a largely blank canvass.

Banner, in a 1998 book on the development of securities regulation in the United Kingdom and the United States between the late 17th century and mid-19th century, put forward a model of legal change.[37] He maintained that during this era there were extended periods where change was "internal", with lawyers being left to themselves to adjust the law incrementally, periodically interrupted by episodes of "external" change where developments outside the legal system provided the catalyst for reform.[38] In 1997 Banner brought the story up to the then present day in a law review article that formed part of a symposium on the impact of electronic technology on securities regulation.[39]

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35 Cheffins, Bank & Wells, *supra* note 33, at 694; Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 1 (2009); Omari Scott Simmons: *The Federal Option: Delaware as a de Facto Agency*, unpublished working paper, 19 (2021), https://ssrn.com/abstract=3786444.

36 See Brian R. Cheffins, Steven A. Bank, & Harwell Wells, *Law and History by Numbers: Use, But With Care*, [2014] U. ILL. L. REV. 1739, 1742-43, discussing quantitative studies of the rate of change by William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715 (1998); Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006). See also Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791 (2002) (discussing Delaware law as part of a cross-country study). On the level of protection afforded to shareholders over time, see Cheffins, Bank & Wells, *supra* note 33.

37 STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690-1860 2-4, 284-89 (1998).

38 *Id.* at 288-89.

39 Banner, *supra* note 3.

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Banner, in his 1997 law review article, maintained that information technology trends had not over time prompted major securities law changes.[40] Banner then posed the logical follow up question: "If new technology doesn't cause new securities regulation, what does?"[41] His answer: "In a nutshell, crashes."[42] He maintained "most of the major instances of new securities regulation in the past three hundred years of English and American history have come right after crashes."[43] He cited two American examples, the enactment of federal securities legislation following the 1929 stock market calamity and a stock-jobbing statute enacted in New York after a 1792 crash.[44]

As Banner was writing, the stock market was surging dramatically as part of an internet-focused "dot.com" frenzy.[45] Amidst much speculation about a share price "bubble,"[46] Frank Partnoy sought to explain in a 2000 law review article why markets crash and spelled out what law could do about it.[47] In so doing, he canvassed briefly what had inspired previous regulation. Partnoy concurred with Banner without specifically citing Banner. Having indicated the introduction of federal securities law followed on from the 1929 crash Partnoy said "The same type of crash-then-law sequence has occurred during the past several hundred years, with financial market regulation following largely as a response to market crashes."[48]

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40 *Id.* at 849.

41 *Id.* at 850.

42 *Id.*

43 *Id.*

44 *Id.*

45 BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 229-31 (2018).

46 *Id.* at 231.

47 Partnoy, *supra* note 5.

48 *Id.* at 743, n. 11.

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While by 2000 the view that securities law tended to evolve in accordance with a burst then lull pattern was gaining traction, the analysis lacked a theoretical varnish. Political scientist David Prindle has explained why political scientists imported the concept of "punctuated equilibrium" from evolutionary biology in the 1990s to conceptualize bold policymaking trajectories that were a poor fit with a prevailing "incrementalism" model, saying "lurches, bursts, waves, and jumps are rather undignified and certainly unscientific concepts."[49] Legal academics seeking to account for changes to corporate and securities law engaged in a similar borrowing process in the early 2000s, fortified by a new "crash-then-law" example that the collapse of the dot.com stock market frenzy helped to foster. This was the Sarbanes-Oxley Act, enacted in mid-2002 in response to the bear market and corporate scandals afflicting Enron, WorldCom, and various other prominent companies.[50]

Law professor and former SEC Commissioner Joseph Grundfest drew on SOX's enactment to engage with the issue of legal change in an essay introducing a law review symposium issue on the Enron scandal.[51] As with political scientists in the 1990s, Grundfest drew upon key evolutionary biology literature when claiming there could be "no doubt that 'punctuated equilibrium' is a stunningly accurate description of the evolution of United States securities laws."[52] Grundfest maintained "(t)he history of our securities laws is sufficiently brief and well documented that we can describe with precision each capital market event that

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49 David F. Prindle, *Importing Concepts from Biology into Political Science: The Case of Punctuated Equilibrium*, 40 POLICY STUD. J. 21, 31 (2012).

50 *See infra* notes 55, 187-89 and accompanying text. On other companies affected see CHEFFINS, *supra* note 45, at 282-85.

51 Joseph A. Grundfest, *Punctuated Equilibria in the Evolution of United States Securities Regulation*, 8 STAN. J.L. BUS. & FIN. 1, 1-2 (2002).

52 *Id.* (citing Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phylactic Gradualism*, in MODES IN PALEIOBIOLOGY 82 (T.J. M. Schopf, ed., 1972); Stephen Jay Gould, *The Episodic Nature of Evolutionary Change*, reprinted in THE PANDA'S THUMB 179 (1982)).

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acted as a 'punctuation' stimulating a sudden evolutionary spurt between relatively tranquil periods of common law interpretation."[53] He claimed "every dramatic change in the structure of our securities laws has been provoked by a perceived failure in the capital markets that stimulated a regulatory response."[54] He mentioned only two specific examples, the federal securities legislation introduced in the mid-1930s and the regulatory aftermath of the Enron and WorldCom scandals i.e. SOX.[55]

Grundfest's punctuated equilibrium analysis has been cited with regularity in discussions of reform of both corporate and securities law.[56] The closely related crash-then-law account has not been forsaken, however. Banner and Partnoy's version of legislative change has been invoked frequently post-SOX,[57] often in relation to corporate law despite their focus on securities law.[58] For instance, various commentators discussing Dodd-Frank's corporate governance reforms specifically cited crash-then-law reasoning in accounting for Dodd-Frank's enactment.[59]

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53 Grundfest, *supra* note 51, at 1.

54 *Id.*

55 *Id.*

56 *See, e.g*., Ribstein, *supra* note 4, at 78, n. 3; James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 675, n. 199 (2007); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility after Citizens United*, 89 N.C. L. Rev. 1197, 1238, n. 154 (2011); Tom C. W. Lin, *The New Financial Industry*, 65 ALA. L. REV. 567, 569, n. 6, 592, n. 154 (2014).

57 *See, e.g*, Ribstein, *supra* note 4, at 78, n. 3 (citing Banner, Partnoy and Grundfest); Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35, 102, n. 387 (2005); Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1031, n. 17 (2009) (citing Banner).

58 Bebchuk & Hamdani, *supra* note 4, at 1798, n. 16 (citing Banner); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1589, n. 42 (2005).

59 Coffee, *supra* note 4, at 1020-21; Lin, *supra* note 56, at 592. See also Iman Anabtawi & Steven L. Schwarcz, *Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure*, 92 TEX. L. REV. 75, 96-97 (2013) (discussing financial regulation); Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95

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When social scientists have invoked punctuated equilibrium logic an analytical shortcoming has been a tendency to treat punctuated equilibrium as a statement of descriptive reality – sudden change happens – and leave the precise causation mechanism unidentified.[60] In the corporate context, the point is less telling with the "crash-then-law" explanation for major legislative shifts, with the sharp drop in share prices being by default the mechanism providing the jolt out of the prevailing law reform lull. To elaborate, in normal times the attention of interest groups such as shareholders as well of the general public is elsewhere. There is correspondingly little appetite for substantial change to corporate and securities law.[61] The crash-then-law account presupposes a crash destabilizes the equilibrium favoring the status quo. Aggrieved investors begin to demand change, reinforced by public discontent as economic conditions deteriorate.[62] The market turmoil will also be a blow to entrenched interests that could oppose regulation effectively under conventional circumstances.[63]

While the "crash-then-law" account of corporate reform and its closely related punctuated equilibrium cousin offer noteworthy insights, they also raise key questions those who have deployed the reasoning leave largely unaddressed. First, is crash-then-law meant to offer a definitive analysis of major changes? In other words, to what extent can substantial reform happen in the absence of a stock market collapse? Or, more pithily, is a crash a necessary condition for major change? The punctuated equilibrium approach implies the

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MINN. L. REV. 1779, 1785-86 (2011) (focusing on the bursting of stock market "bubbles" rather than share price crashes. On the distinction between the two, see *infra* notes 416-19 and related discussion.)

60 Prindle, *supra* note 49, at 38.

61 Ribstein, *supra* note 4, at 79; Anabtawi & Schwarcz, *supra* note 59, at 97-98.

62 Ribstein, *supra* note 4, at 79; Anabtawi & Schwarcz, *supra* note 59, at 98; Bainbridge, *supra* note 59, at 1786.

63 Ribstein, *supra* note 4, at 79.

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answer is "no"; presumably there could be other catalysts. None, however, have been identified.

Second, is a crash a sufficient condition for decisive change? That is to say, will sufficiently robust stock market turmoil always yield major regulatory reform? If not, why not? What additional ingredients are required? For instance, to what extent are perceptions of corporate misconduct a necessary ingredient? Various observers have cited the importance of this variable. Law professors Marcel Kahan and Ed Rock wrote in 2005 "(t)he classic examples of large scale federal incursion into corporate law in response to crisis and scandal are the enactment of the 1933 Securities Act and the 1934 Securities Exchange Act, which created the SEC and, more recently, the enactment of the Sarbanes-Oxley Act."[64] Stephen Bainbridge has said similarly that "(i)n ordinary times, Washington typically has more important issues on its plate than corporate governance," but maintains that in the wake of a burst stock market bubble "investors… outraged by evidence of misconduct by corporate insiders and financial bigwigs create populist pressure for new regulation."[65] His UCLA colleague James Park has likewise specifically cited SOX as an example to illustrate the proposition that "(b)usts tend to reveal scandals that cause public outrage, reducing industry influence, emboldening regulators, and leading to the passage of more restrictive laws."[66]

Third, assuming that crashes can elicit major regulatory changes, what counts as a crash? Stock market trends relating to the COVID-19 pandemic demonstrate that answering

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64 Kahan & Rock, *supra* note 58, at 1589.

65 Bainbridge, *supra* note 59, at 1785.

66 Park, *supra* note 56, at 675. See also John C. Coates, *Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis*, 41 VA. J. INT'L. L. 531, 570 (2001) ("recessions, crashes and scandals can make regulation politically irresistible"); Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 776 (2006) ("Loose [securities] regulation allows for scandal, which then creates a political atmosphere supportive of aggressive regulation.")

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this question is not straightforward. The stock market initially fell precipitously but then rebounded quickly.[67] Was this a downturn of the sort that has been associated with major changes to corporate law?

In a sense, it is unfair to pose these questions in relation to the crash-then-law thesis. Banner was focusing on securities law, not corporate law.[68] Moreover, neither he nor Partnoy were intending to offer a thoroughgoing theory of legal change. Instead, they were advancing a proposition intended to have substantial rather than definitive explanatory power. In this regard they succeeded admirably, with their accounts being cited liberally subsequently.[69]

While the crash-then-law account Banner and Partnoy offered was insightful and it is entirely understandable key questions were left open, the fact remains that crash-then-law logic does not provide a fully satisfactory account of major changes to corporate law. The punctuated equilibrium model apparently is no better positioned. There correspondingly is room for a different analytical template to offer insights. A critical junctures framework is a promising candidate. We turn next to its essential features.

III. CRITICAL JUNCTURES THEORY: A SYNOPSIS

Given that the "crash-then-law" and punctuated equilibrium accounts of corporate law change each suffer from limitations, it is appropriate for another batter to step up to the plate. A "critical junctures" model stands out as a contender worth considering. "The goal of the

67 See *infra* notes 420-30 and accompanying text.

68 *See supra* notes 3, 37, 40 and related discussion.

69 *See supra* notes 56-59 and accompanying text.

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critical juncture framework is to address…questions of *when*, *why*, and *what*,"[70] which are points where current models of corporate law change come up short to varying degrees.

A. The Critical Junctures Model Comes to the Fore

Critical juncture theory's academic pedigree can be traced back at least to the early 1990s.[71] Nevertheless, a 2007 article by Giovanni Capoccia and Daniel Kelemen[72] stands out as a particularly "important…contribution"[73] that "offered valuable conceptual and terminological clarity."[74] Following its publication "(t)he critical junctures conceptual literature…flourished",[75] taking "a deeper analytical turn."[76]

The critical junctures model has now gained a firm foothold in the social sciences.[77] Topics canvassed have included the development of regional institutions in East Asia,[78] the

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70 Collier & Munck, *supra* note 17, at 4 (emphasis in original).

71 Graham Odell, *Temporal Varieties of Critical Junctures*, unpublished working paper, 3 (2018), https://www.academia.edu/42088887/Temporal_Varieties_of_Critical_Junctures; RUTH BERINS COLLIER & DAVID COLLIER, SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA (1991).

72 Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341, 345 (2007).

73 Benjamin Braun, *Preparedness, Crisis Management and Policy Change: The Euro Area at the Critical Juncture of 2008–2013*, 17 BRIT. J. POL. & INT'L. RELATIONS 419, 421 (2015).

74 Büthe & Jacobs *supra* note 16, at 1.

75 Odell, *supra* note 71, at 2.

76 John Hogan, *The Critical Juncture Concept's Evolving Capacity to Explain Policy Change*, 5 EUR. POLICY ANALYSIS 170, 185 (2019).

77 Hillel David Soifer, *The Causal Logic of Critical Junctures*, 45 COMP. POL. STUD. 1572, 1572 (2012); Laura García-Montoya & James Mahoney, *Critical Event Analysis in Case Study Research*, unpublished working paper, 2-3 (2020) (forthcoming SOCIOLOGICAL METHODS & RES.)

78 HIDETAKA YOSHIMATSU, COMPARING INSTITUTION-BUILDING IN EAST ASIA: POWER POLITICS, GOVERNANCE, AND CRITICAL JUNCTURES (2014).

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promotion of industrialization policy in mid-20th century Latin America,[79] the formulation of Mexico's macroeconomic policy,[80] and the Eurozone crisis afflicting the European Union in the wake of the 2008 financial crisis.[81] Much has been done in the process "to make the critical juncture a more rigorous concept."[82] The critical juncture has in turn emerged in the social sciences as "an important analytical concept to explain incidences of institutional change,"[83] fostering in the process a "better understanding derived from a deeper appreciation of the nature of change."[84]

In contrast with the social sciences, the critical juncture model's impact on legal scholarship has been negligible. Law professors frequently use the term "critical juncture" [85] informally as a synonym for a turning point, as Gelter and Puaschunder did in their paper when suggesting that COVID-19 could bring big changes to corporate governance.[86] However, legal academics have referred to the critical junctures model itself only sparingly and in passing.[87] Given that the "framework has been highly productive—for many scholars

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79 Soifer, *supra* note 77, at 1577-79.

80 Hogan, *supra* note 76, at 181-84.

81 Braun, *supra* note 73.

82 Odell, *supra* note 71, at 32.

83 Adrian Rinscheid *et al.*, *Why do Junctures Become Critical? Political Discourse, Agency, and Joint Belief Shifts in Comparative Perspective*, 14 REG. & GOVERNANCE 653, 654 (2020).

84 Hogan, *supra* note 76, at 185.

85 As of June 2021, a search of "critical juncture" on Hein Online's Law Journal Library yielded just over 3700 hits.

86 Gelter & Puaschunder, *supra* note 32, at 2.

87 According to Google Scholar, Capoccia & Kelemen's influential critical junctures 2007 article (*supra* note 73) has been cited nearly 2000 times, but has only been referenced in a few law review articles: Davidson & Rashmi Dyal-Chand, *supra* note 29, at 1616, n. 33; Jacob Katz Cogan, *Review – The Dynamics of International Law*, 105 AM. J. INT'L L. 844, 847 (2011); Hanna Lerner, *Critical Junctures, Religion, and Personal Status Regulations in Israel and India*, 39 LAW & SOC. INQUIRY 387, 391 (2014); Amal Jamal & Anna Kensicki, *A Theory of Critical Junctures for Democratization: A Comparative Examination of Constitution-Making in Egypt and Tunisia*, 10 L. & ETHICS HUM. RTS. 185, 187 (2016); Paul

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over several decades,"[88] critical junctures merits consideration as a theory for explaining change with respect to corporate law. The next two sub-sections of the paper provide necessary context by summarizing the model's key features, initially by defining critical junctures and then by rounding out the framework by canvassing key points relating to it.

B. Defining Critical Junctures

In order to think through changes to corporate law in terms of critical junctures it is necessary to define what constitutes a critical juncture. Capoccia and Kelemen noted in their influential 2007 article that "(m)any scholars define critical junctures on the basis of their outcome, namely, change".[89] They argued it was necessary to go further and emphasized in so doing the "structural fluidity and heightened contingency" involved with critical junctures.[90] Capoccia and Kelemen correspondingly defined "critical junctures as relatively short periods of time during which there is a substantially heightened probability that agents' choices will affect the outcome of interest."[91]

Subsequent definitional efforts similarly associate a critical juncture with a window of opportunity when substantial change comes on to the agenda. Political scientist Hillel Soifer, in a 2012 article that "formalized the causal logic of critical junctures",[92] said "(c)ritical junctures are marked by heightened contingency, or increased causal possibility."[93]

Baumgardner, *On Critical Junctures, Intercurrence, and Dynamic Political Orders*, 9 CONLAWNOW 65, 67 (2017-2018); Mirit Eyal-Cohen, *Unintended Legislative Inertia*, 55 GA. L. REV. 1193, 1225-26, 1232, n. 226 (2021). See also Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213, 236 (2017) (discussing the critical junctures model without citing Capoccia and Keleman).

88 Collier & Munck, *supra* note 17, at 2.

89 Capoccia & Kelemen, *supra* note 72, at 352.

90 *Id.*

91 *Id.*, at 348.

92 Rinscheid *et al.*, *supra* note 83, at 654.

93 Soifer, *supra* note 77, at 1574.

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Capoccia, in a 2016 chapter on critical junctures, spoke of "moments of openness for radical institutional change."[94]

Capoccia's "moments of openness" terminology draws attention to another feature of definitions of critical junctures. This is duration – the length of the time period where change is in the cards. The emphasis has been on brevity. In a 2017 article that sought to map out a methodology for studying critical junctures, David Collier and Gerardo Munck describe one element of a critical juncture as "a major episode of institutional innovation."[95] Others defining critical junctures have referred to "concentrated periods",[96] "trigger events"[97] and "episodes or events."[98]

A legacy of change also features with some regularity in definitions of critical junctures. While critical junctures themselves should be relatively brief, there should also be a meaningful outcome that stands the test of time. The point has been made in various ways. Collier and Munck say a critical juncture generates "an enduring legacy."[99] Others have suggested there should be a "paradigm shift in policy."[100] Or critical junctures should "set an institution's development onto a certain path, which then ensures, through self-reinforcing feedback, its own reproduction over time."[101] In other words, what makes junctures "critical"

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94 Giovanni Capoccia, *Critical Junctures* in THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM 89, 98 (Orfeo Fioretos, Tulia G. Falleti & Adam Sheingate, 2016).

95 Collier & Munck, *supra* note 17, at 2.

96 Michael Bernhard, *Chronic Instability and the Limits of Path Dependence*, 13 PERSPECTIVES & POLITICS 976, 978 (2015).

97 John Hogan & David Doyle, *The Importance of Ideas: An A Priori Critical Juncture Framework,* 40 CANADIAN J. POL. SCI. 883, 885 (2007).

98 Rinscheid *et al.*, *supra* note 83, at 654.

99 Collier & Munck, *supra* note 17, at 2.

100 John Hogan & David Doyle, *A Comparative Framework: How Broadly Applicable is a "Rigorous" Critical Junctures Framework?* 44 ACTA POLITICA 211, 212 (2009).

101 Rinscheid *et al.*, *supra* note 83, at 654.

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is that "they generate path dependence."[102] Certainly the effects of the change should last longer than the critical juncture that prompted the change in the first place. Capoccia and Kelemen say on this "the duration of the critical juncture must be brief relative to the duration of the path-dependent process that it initiates."[103]

In the legal context, the most obvious type of "enduring legacy" will be substantial legislative reform. A legislature will typically be much better positioned to recast the law substantially than the judiciary. Judges can only act after litigants have commenced court proceedings and operate within the confines of case law precedent in a way legislators do not.[104]

Normally a legislative legacy will be associated with increased regulation, but substantial change can run in the opposite deregulatory direction. Which direction will change go? The famous neoliberal economist Milton Friedman suggested "(o)nly a crisis -- actual or perceived -- produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around."[105] It follows that if the ideas "lying around" are market-friendly when a critical juncture occurs, the legacy could well be deregulatory. Indeed, social activist Naomi Klein has suggested "Friedmanites stock-pile free market ideas" they try to foist quickly upon crisis-racked polities before there can be a reversion to the status quo.[106] Whatever the merits of this "shock doctrine" thesis,[107] a major shift to market-

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102 Bernhard, *supra* note 96, at 978. See also Eyal-Cohen, *supra* note 87, 1225.

103 Capoccia & Kelemen, *supra* note 72, at 350.

104 BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION 191 (1997).

105 MILTON FRIEDMAN, CAPITALISM AND FREEDOM ix (1982 ed.).

106 NAOMI KLEIN: THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 6-8 (2008).

107 *Id*., at 6.

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oriented neoliberalism in Mexico in the early 1980s marked by privatization and deregulation is thought of as being the product of a critical juncture in that country.[108]

B. Rounding Out the Critical Junctures Framework

Teasing out a definition of critical junctures yields important insights regarding the formulation of a critical junctures framework that can be deployed to analyze changes to corporate law. There is a set of issues, however, associated with critical junctures that merit elaboration to round out the critical junctures framework before we turn to corporate law. These relate to the frequency of critical junctures, the chronological proximity between a putative critical juncture and the change of interest and the relationship between critical junctures on the one hand and external shocks and the prospects for transformative change on the other.

1. How Common are Critical Junctures?

Critical junctures are a departure from the norm, occurring outside the ordinary course of events. As Capoccia & Kelemen have said, "the critical juncture constitutes a situation that is qualitatively different from the 'normal' historical development of the institutional setting of interest."[109] Capoccia, writing on his own, has suggested a critical juncture perspective is not applicable "if institutions are constantly vulnerable to piecemeal modification and reinterpretation and their shape changes continuously in accordance with shifts in power and influence among the relevant actors."[110] In short, critical junctures analysis does not account for routine change.

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108 Hogan, *supra* note 76, at 184.

109 Capoccia & Kelemen, *supra* note 72, at 348.

110 Giovanni Capoccia, *Critical Junctures and Institutional Change* in ADVANCES IN COMPARATIVE-HISTORICAL ANALYSIS 147, 175 (James Mahoney & Kathleen Thelen eds., 2015).

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2. How Soon Does the Change Have to Occur?

A critical juncture need not be simultaneous with the change of interest. As sociologist Taylor Boas has suggested, "(t)he emergence of the legacy may also be temporally removed from the critical juncture itself."[111] However, if whatever change occurs is not roughly proximate in time with the catalyst for change then it is unlikely that a critical juncture will be involved. Under such circumstances, there will not be the "short-term cause" that should be present.[112] As Capoccia & Kelemen note, if an explanation for change "relies on a cause that has a relatively long-term time horizon, then it is highly unlikely that a critical juncture framework will be applicable."[113]

3. Will a Major Shock Always Yield a Critical Juncture?

Potent external events such as an economic crisis or a natural disaster increase the likelihood that critical juncture-style change will occur, whether in the legal realm or more broadly.[114] Indeed, theories of institutional change often put exogenous shocks ("focusing events") center stage.[115] But will a shock necessarily amount to a critical juncture? Law professor Steven Ramirez has suggested "yes", at least in relation to financial crises, saying they "invariably lead to federal intervention."[116] In fact, shocks do not always yield the enduring legacy associated with critical junctures.[117] Instead, substantial "institutional

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111 Taylor C. Boas, *Potential Mistakes, Plausible Options: Establishing the Legacy of Hypothesized Critical Junctures*, QUALITATIVE & MULTI METHOD RES., Spring 2017, at 18.

112 Capoccia & Kelemen, *supra* note 72, at 351.

113 *Id.*

114 Bieber, *supra* note 16, 3; John Twigg, *COVID-19 as a 'Critical Juncture': A Scoping Review*, GLOBAL POLICY, Dec. 2020, 1, 1.

115 Rinscheid *et al.*, *supra* note 83, at 653.

116 Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 325, n. 77 (2007).

117 Collier & Munck, *supra* note 17, at 5.

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change is obviously not a necessary response to such events."[118] Indeed, possibly "(m)ost crises are followed either by policy continuity or by incremental change, not critical junctures."[119] Circumstances where a shock or crisis occurs and a critical juncture does not follow on "may be seen as analogous to a missed opportunity."[120] But there will be no critical juncture.

4. Is a Critical Juncture Necessary for Transformational Change?

"Causally important events" do not have to be associated with a critical juncture.[121] According to political scientists John Hogan and David Doyle , "(s)ometimes there are no wars, or other great events…that can be held to account for dramatic policy and/or structural changes."[122] Substantial policy innovation thus can occur as part of a "concentrated" or an "extended" episode.[123] Only the former, however, can be part of a critical juncture. A critical juncture will not be involved if substantial change occurs over a prolonged period, featuring "smaller steps that eventually add up to a major transformation."[124]

IV. CORPORATE LAW'S CRITICAL JUNCTURES

Academics who have analyzed changes to U.S. corporate law by reference to "crash-then-law" and punctuated equilibrium patterns have focused on three episodes of federally-oriented legislative change: the introduction of federal securities law, SOX, and Dodd-

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118 Rinscheid *et al.*, *supra* note 83, at 653. See also Bieber, *supra* note 16, 3 ("Critical junctures do not imply that a radical change is the inevitable outcome but rather that it becomes a greater possibility").

119 Hogan, *supra* note 76, at 172.

120 Odell, *supra* note 71, at 4; Soifer, *supra* note 77, at 1579-80.

121 García-Montoya & Mahoney, *supra* note 77, at 15.

122 Hogan & Doyle, *supra* note 100, at 213.

123 Collier & Munck, *supra* note 17, at 4.

124 *Id.*

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Frank.[125] What explains the occurrence of these bouts of regulatory reform, this corporate and securities law "big three"? A sharp drop in share prices has been implicated, but there have been other bear markets. As we will see in this Part of the paper, the critical junctures framework fills in the gaps.

A reader familiar with the basic jurisdictional terrain for corporate law might wonder how federal reforms come into play at all. Corporate law is a state-based affair, with companies incorporating under the laws of one of the 50 states rather than under a federal statute.[126] The U.S. Supreme Court said in 1987 in *CTS Corp. v. Dynamics Corp. of America* "(i)t thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares."[127] From this departure point law professor Mark Roe has observed:

> "If one were only to skim the doctrinal surface, one might think there was a sharp divide between state and federal corporate authority: states govern internal corporate affairs, while the federal rulemakers, via the SEC, govern the external trading of the firm's securities."[128]

Despite "the doctrinal surface", as Roe and various other legal academics have argued, federal authorities can make corporate law and quite often do so.[129] The corporate and securities law "big three" stand out in this regard.

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125 *See supra* notes 44, 48, 52-59 and accompanying text.

126 *See supra* notes 20, 34 and accompanying text; Cheffins, Bank & Wells, *supra* note 33, at 693.

127 481 U.S. 69, 91 (1987).

128 Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 596 (2003).

129 *Id.* at 598-600, 607-34; Roe, *supra* note 35, at 7-12; Kahan and Rock, *supra* note 58, at 1578-90; Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REG., Spring 2003, at 26.

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Again, a critical juncture involves a relatively short period of "structural fluidity" that yields significant change with lasting consequences.[130] With each of the big three, there was a shock that created the necessary "moment of openness" followed in reasonably short order by substantial legislative changes that endured. Hence, each was a corporate law critical juncture episode. The nature of the critical juncture was similar moreover in each instance. There was a prolonged stock market slump associated with allegations of corporate misconduct that fostered the belief that reform was necessary and weakened otherwise potentially influential opponents of substantial change. A succinct summary of each of the big three corporate law critical junctures demonstrates these points.

A. The Introduction of Federal Securities Law

The introduction of federal securities law in the mid-1930s was the first of the big three, and on various counts the biggest. The enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934 underpinned the most extensive corporate governance-related reform wave ever in the United States.[131] From a corporate law perspective, the 1933 and 1934 Acts marked "the starting point" with "federal law developments that have replaced or supplemented areas traditionally within the purview of the states."[132]

It is doubtful whether Congress intended when enacting the 1933 and 1934 Acts to authorize federal securities regulators to interfere in the management of companies.[133] Nevertheless, the potential significance of federal securities law from a corporate law perspective has been recognized for decades. In a 1961 SEC opinion in an administrative

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130 *See supra* notes 90-91 and accompanying text.

131 GARY GIROUX, BUSINESS SCANDALS, CORRUPTION, AND REFORM: AN ENCYCLOPEDIA, VOLUME I: A-L 137-38 (2013).

132 MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 20 (2018).

133 Patrick Moyer, *The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States*, 55 U. TOR. FAC. L. 43, 49-50 (1997).

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broker-dealer disciplinary proceeding that "set in motion the modem law of insider trading"[134] SEC chair William Cary said the federal securities laws had created "a wholly new and far-reaching body of Federal corporation law."[135] And this potential subsequently was amply fulfilled. Mark Roe argues "(m)uch securities regulation impinges on or overturns state corporate governance rules" and cites as a key example shareholder voting, saying it is "perhaps the core 'internal affair.' Lawyers who work on corporate voting and proxy solicitations operate primarily not under state law but under the 1934 Securities and Exchange Act's federal proxy law, which transformed most voting rules into federal rules."[136]

The most dramatic bear market in American history and the traumatic onset of the Great Depression set the scene for the 1930s enactment of federal securities legislation. In 2020 Morningstar, an American financial services firm, released a report on 17 instances occurring over the previous 150 years where share prices had declined by 20% or more.[137] Morningstar graded the downturns in accordance with a "pain index" that measured "the severity of each market crash in a way that takes into account both the degree of the decline and how long it took to get back to the prior level of cumulative value."[138] Morningstar said amongst this cohort of bear markets[139] "(t)he 79 per cent loss due to the crash of 1929, which

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134 Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319, 1319 (1999).

135 *In re* Cady, Roberts & Co., 40 S.E.C. 907, 911 (1961).

136 Roe, *supra* note 128, at 598.

137 Paul D. Kaplan, *What Prior Market Crashes Can Teach Us About Navigating the Current One*, July 23, 2020, https://www.morningstar.com/features/what-prior-market-crashes-can-teach-us-in-2020.

138 *Id.*

139 Morningstar was following the standard definition of a bear market, which is a share price decline of 20% or more from a recent high. See Alessandra Malito, *The Difference Between a Correction and a Bear Market — and 5 Other Financial Terms to Know for 2019*, January 3, 2019, https://www.marketwatch.com/story/the-difference-between-a-correction-and-a-bear-market-and-5-other-financial-terms-to-know-for-2019-2019-01-01 .

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led to the Great Depression" was "the worst drop on the chart."[140] That decline took place over a period of nearly three years, running from the market peak in August 1929 to May 1932. The downward spiral began in earnest in September 1929, followed by a 13.5% decline on October 28 of that year ("Black Thursday") that was the largest single day loss ever until "Black Monday" in October 1987.[141]

And the pain endured. Only in the mid-1950s did stock prices recover fully from losses inflicted between 1929 and 1932.[142] Not surprisingly, according to Morningstar, the 1929-32 crash was the worst occurring over the 150 years it canvassed. Accordingly, this crash was assigned 100% on Morningstar's "pain index," with other bear markets' percentages representing how closely they matched its level of severity.[143]

"Mainstream" corporate law enacted at state level was largely unaffected by the 1929-32 crash and the associated market turmoil.[144] There was a movement at the time to reform state corporation laws but the priority was to keep locally based businesses incorporated in-state.[145] Substantially bolstering protection of investors side-swiped by the market calamity was not a realistic option for a reform-minded state because if its laws were thought to be

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140 Kaplan, *supra* note 137.

141 GIROUX, *supra* note 131, at 149.

142 *Id.*; Dorothy Neufeld, *How the S&P 500 Performed During Major Market Crashes*, VISUAL CAPITALIST, August 5, 2020, available at https://www.visualcapitalist.com/sp-500-market-crashes/; Jason Zweig, *Think Twice Before Cuddling This Bear*, WALL ST. J., May 1, 2021, B4, Figure: Bear Minimum. *See*, though, Mark Hulbert, *25 Years To Bounce Back? Try 4*, N.Y. TIMES, Apr. 26, 2009, Business, at 5.

143 Kaplan, *supra* note 137.

144 Harwell Wells, *The Modernization of Corporation Law, 1920-1940*, 11 U. PA. J. BUS. L. 573, 624 (2009) (concluding federal securities law reforms "did not trigger a wholesale revision of state corporation law").

145 *Id.* at 601-2.

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insufficiently manager-friendly local corporations would simply reincorporate in Delaware or another hospitable state.[146]

While the stock market devastation occurring between 1929 and 1932 did not markedly affect state corporate law, at the federal level the trauma did much to create the structural fluidity associated with critical junctures. When Franklin Roosevelt took office after winning the 1932 presidential election, it was, according to Joel Seligman's history of the Securities and Exchange Commission, "that rare time when money talked and nobody listened."[147] The highly distressed economic conditions played a key part in setting the scene for the introduction of federal securities law.[148] Reports of business wrongdoing also played a significant role, however.

Congressional hearings on the operation of securities markets that ran from 1932 to 1934 with lead counsel Ferdinand Pecora playing a starring role did much to create the narrative in favor of federal regulation by discrediting Wall Street.[149] According to Seligman, by the time of the enactment of the 1933 Act "Wall Street and business in general were on the defensive, daily embarrassed by the Pecora investigation's revelations."[150] The charges Pecora levelled may have been exaggerated in material respects.[151] Moreover, there

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146 *Id.* at 594.

147 JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 66 (3rd ed., 2003).

148 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 21 (5th ed., 2006).

149 CHEFFINS, *supra* note 45, at 47; DAVID A. SKEEL, ICARUS IN THE BOARDROOM THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM 95 (2006) ("The Pecora hearings set the stage for all of the New Deal banking and securities regulation….").

150 SELIGMAN, *supra* note 147, at 72.

151 Paul G. Mahoney, *The Stock Pools and the Securities Exchange Act*, 51 J. FIN. ECON. 343 (1999) (arguing that evidence tendered failed to support the Pecora Commission's intense criticism of stock market pools).

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were more obvious culprits for the 1929 crash and the ensuing economic turmoil than Wall Street chicanery, such as acute late 1920s investor overconfidence, imprudent lending by commercial banks and missteps by the Federal Reserve.[152] Nevertheless, in contrast with numerous attempts earlier in the 20th century to regulate corporations at the federal level that failed,[153] the Pecora hearings' tales of corporate and financial skulduggery combined with the harsh market conditions to create the "increased causal possibility" associated with critical junctures.[154] Quoting Seligman again "(i)n spite of the severity of the stock market crash, effective securities legislation might not have been enacted had Pecora's revelations not galvanized broad public support for direct federal regulation of the stock markets."[155]

The Securities Act of 1933 focused on securities being sold to the public for the first time and in relation to these required the submission of prescribed financial information, prohibited material misstatements and created a number of private remedies for aggrieved purchasers.[156] The 1933 Act contemplated Federal Trade Commission (FTC) oversight of securities markets.[157] The Securities and Exchange Act of 1934 relieved the FTC of this regulatory responsibility by creating the Securities and Exchange Commission.[158] The 1934

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152 Olivia Waxman, *What Caused the Stock Market Crash of 1929—And What We Still Get Wrong About It*, TIME.COM, Oct. 24, 2019, https://time.com/5707876/1929-wall-street-crash/; Anne Field, *The Main Causes of the Great Depression, and How the Road to Recovery Transformed the US Economy*, BUSINESSINSIDER.COM, Sept. 24. 2020, https://www.businessinsider.com/what-caused-the-great-depression?r=US&IR=T.

153 For examples, *see infra* notes 253-55, 276-77 and accompanying text.

154 *See supra* note 93 and accompanying text.

155 SELIGMAN, *supra* note 147, at 2.

156 For succinct summaries of the 1933 Act, *see* HAZEN, *supra* note 148, at 22; Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 343-47 (1988); GARY GIROUX, BUSINESS SCANDALS, CORRUPTION, AND REFORM: AN ENCYCLOPEDIA, VOLUME II: M-Z 537 (2013).

157 SELIGMAN, *supra* note 147, at 70.

158 HAZEN, *supra* note 148, at 22; Keller & Gehlmann, *supra* note 156, at 347.

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Act also broadened the regulatory net considerably. With respect to investor protection, the 1934 Act went beyond the issuance of securities and imposed periodic reporting requirements on companies with securities traded on a national stock exchange and barred fraud and market manipulation with respect to the purchase and sale of securities of such firms.[159] The legislation also provided for oversight of the marketplace for securities – stock exchanges -- including giving the SEC authority to approve stock exchange listing rules.[160]

With respect to corporate law, the enactment of the 1933 and 1934 Acts threw into sharp relief the potential for federal intervention into the states' traditional corporate law space. That potential was only partially fulfilled for the remainder of the 20th century. The post-1934 regulatory pattern was generally assumed to be one where Congress focused on correcting public markets for shares and bonds by way of disclosure and anti-fraud rules ("securities law") and left "corporate law" relating to the internal affairs of companies to the states.[161] Hence, with some notable exceptions – proxy voting, insider dealing and takeover regulation[162] -- "corporate law" relating to the internal affairs of companies was a state matter. The Sarbanes-Oxley Act of 2002, discussed next, would be a game-changer in this regard, demonstrating an unprecedented federal willingness to regulate corporate internal affairs.[163]

B. SOX

Alan Greenspan, chair of the Federal Reserve from 1987 to 2006, said of the stock market in the second half of the 1990s, "hi-tech excitement brought extra sizzle to what was

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159 HAZEN, *supra* note 148, at 23; Keller & Gehlmann, *supra* note 156, at 348-51.

160 GIROUX, *supra* note 156, at 537.

161 William W. Bratton and Joseph A. McCahery, *The Equilibrium Content of Federalism*, 41 WAKE FOREST L. REV. 619, 624-25 (2006).

162 Roe, *supra* note 128, at 612-19, 625.

163 Simmons, *supra* note 35, 47.

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already a hot market for stocks."[164] The 2000s would be a much different proposition, amounting to a "decade from hell" for the public company.[165] The gloom set in promptly as the decade got underway. The 1990s stock market frenzy ended in the first half of 2000 and the economy fell into recession for much of 2001.[166] The Dow Jones Industrial Average accordingly declined 36% between January 2000 and September 2002 and the S&P 500 dropped 48% between March 2000 and September 2002.[167] The S&P 500 only made up the lost ground fully 86 months later, at the end of May 2007.[168]

The bear market of the early 2000s would, in combination with scandals involving Enron, WorldCom and a number of other high-profile public companies,[169] set the scene for regulatory change. Leo Strine, then Vice-Chancellor of the Delaware Court of Chancery, said state policymakers would "not block their ears" to calls for reform[170] but ultimately his influential corporate law state would "stand pat".[171] Change would instead occur at the

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164 ALAN GREENSPAN, THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD 164 (2007).

165 CHEFFINS, *supra* note 45, at 278.

166 *Id.* at 233.

167 Brian R. Cheffins, *Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P500*, 65 BUS. LAW. 1, 10 (2009); Kimberley Amadeo, *History of Recessions in the United States*, https://www.thebalance.com/the-history-of-recessions-in-the-united-states-3306011; Tom Huddleston, *How Many Recessions You've Actually Lived Through and What Happened in Every One*, April 9, 2020, CNBC.COM https://www.cnbc.com/2020/04/09/what-happened-in-every-us-recession-since-the-great-depression.html .

168 Neufeld, *supra* note 142.

169 *See supra* notes 50, 55 and accompanying text.

170 Leo E. Strine, *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371, 1372 (2002).

171 Robert B. Thompson, *Delaware's Disclosure: Moving the Line of Federal-State Corporate Regulation*, [2009] U. ILL. L. REV. 167, 178. There was, however, some state-level impact as the Model Business Corporation Act was amended in a few respects in response to the scandals -- Hillary A. Sale, *The New Public Corporation*, 74 LAW & CONTEMP. PROBS. 137, 137 (2011).

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federal level, in the form of the second of the corporate and securities law "big three", the Sarbanes-Oxley Act of 2002.

Law professor Robert Thompson suggested in 2004 that with SOX and associated revisions to the listing rules of the New York Stock Exchange and its rival NASDAQ corporate America had "experienced…something like a hundred year flood of reform."[172] Key reform topics SOX addressed included boards and executive conduct. With boards, SOX mandated listing rule changes that required a listed company to have an audit committee composed entirely of independent directors, prescribed the formal duties of audit committees and obliged a listed company to offer an explanation if its audit committee lacked a member who was a financial expert.[173]

As for executive conduct, SOX prohibited public corporations from giving loans to their top managers.[174] The legislation also required the chief executive officer (CEO) and chief financial officer of a publicly traded corporation to attest together with the corporation's auditor that the corporation had a robust internal financial control system and to certify personally the accuracy and completeness of quarterly and annual financial reports filed with the SEC.[175] Knowingly false certifications were deemed punishable by criminal penalties.[176] Executives could also be required to give back bonuses received after the filing of inaccurate financial reports that failed to comply with securities law requirements.[177]

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172 Robert B. Thompson, *Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law*, 29 DEL. J. CORP. L. 779, 791 (2004). See also SKEEL, *supra* note 149, at 177 ("the most sweeping changes to the securities law in a generation").

173 Sarbanes-Oxley Act of 2002, §§ 301, 407.

174 Sarbanes-Oxley Act of 2002, § 402.

175 Sarbanes-Oxley Act of 2002, §§ 302, 404.

176 Sarbanes-Oxley Act of 2002, § 304.

177 Sarbanes-Oxley Act of 2002, §§ 304, 906.

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Despite imposing various new requirements on public companies and their executives and directors, SOX did not constitute a radical departure from past practice.[178] Instead, it built on existing federal regulations, state laws and corporate governance conventions.[179] On the other hand, SOX marked a substantial change in approach for the federal government in the corporate context.

The federal securities laws enacted in the mid-1930s amounted to the first meaningful federal foray into the corporate law realm but this was a tentative jurisdictional intrusion.[180] Hence, despite periodic 20th century federal incursions into corporate law territory, SOX stood out.[181] The nature and depth of SOX's corporate law content "upset settled expectations."[182] According to Mark Roe

> "With Sarbanes-Oxley in 2002, Congress did not even pretend to stay on the disclosure-and-trading side of the rhetorically traditional federal-state division of power, not even offering perfunctory respect for state rules governing the corporation's internal affairs."[183]

Hence, with respect to the division of labor between the states and the federal government with the making of corporate law there was a paradigm shift that would have the sort of lasting consequences associated with critical junctures.

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178 PAUL G. MAHONEY, WASTING A CRISIS: WHY SECURITIES REGULATION FAILS 151-52 (2015); Hugo van Driel, *Financial Fraud, Scandals, and Regulation: A Conceptual Framework and Literature Review*, 61 BUS. HIST. 1259, 1289 (2019).

179 ROY C. SMITH & INGO WALTER, GOVERNING THE MODERN CORPORATION: CAPITAL MARKETS, CORPORATE CONTROL, AND ECONOMIC PERFORMANCE 245 (2006); ZABIHOLLAH REZAEE, CORPORATE GOVERNANCE POST-SARBANES-OXLEY 36, 247 (2007).

180 Cheffins, Bank & Wells, *supra* note 33, at 715; see also *supra* note 161 and related discussion.

181 Cheffins, Bank & Wells, *supra* note 33, at 715-16.

182 Bratton and McCahery, *supra* note 161, at 668.

183 Roe, *supra* note 128, at 633.

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SOX also fit within the critical junctures framework because reform occurred promptly following a concentrated episode that set the scene for change.[184] Corporate scandals were important in this context. The bear market that began in 2000 could be blamed on flaky internet start-ups and a sub-set of excitable investors getting ahead of themselves.[185] Hence, as David Skeel has pointed out, purely in relation to the dot.com bust "there were no calls for dramatic reform of American business."[186] Enron's scandal-ridden collapse in the second half of 2001 implied, however, all was not well in corporate America and the scandal put downward pressure on the stock market as investors shunned companies known for Enron-like opacity.[187] A reform bandwagon grew accordingly but, as the shock of Enron's collapse began to fade, inertia began to undermine the prospects for meaningful reform.[188]

WorldCom's sudden collapse in mid-2002 would provide the decisive final push in favor of reform. The fraud's brazen nature and WorldCom's notoriety – it was better-known pre-scandal than any other scandal-afflicted company – put opponents of reform squarely on the back foot.[189] As Skeel has said "(t)he WorldCom collapse changed everything."[190] President George W. Bush in turn forsook previous calls for regulatory caution, hailing when signing SOX "the most far-reaching reforms of American business practices since the time of Franklin D. Roosevelt."[191]

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184 *See supra* notes 96, 98, 124 and accompanying text.

185 CHEFFINS, *supra* note 45, at 288.

186 SKEEL, *supra* note 149, at 144.

187 CHEFFINS, *supra* note 45, at 287.

188 *Id.* at 288.

189 *Id.* at 289.

190 SKEEL, *supra* note 149, at 175.

191 Elisabeth Bulmiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, A1.

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The impact corporate wrongdoing such as WorldCom's had on the reform equation in the early 2000s has been widely acknowledged. Law professor Robert Hamilton wrote in 2003 that "a steady drumbeat of embarrassing disclosures…contributed to a sudden and sharp decline in stock prices and to a significant decline in consumer confidence in the honesty and efficiency of…American business" and "an unexpected result of these developments" was that SOX "suddenly acquired legs".[192] Roberta Romano suggested similarly in 2005 "the window of opportunity for advocates of the corporate governance provisions included in SOX" opened because of "a shift in public mood regarding big business, coinciding with the high profile corporate scandals causing significant displacement and financial distress, as well as a sharp decline in the stock market."[193]

C. Dodd-Frank

While SOX emerged as a result of the opening chapter of "the decade from hell" for the public company,[194] the Dodd-Frank Act of 2010 was the product of the jarring final chapter in the 2000s – the financial crisis of 2008. In critical juncture terms, there can be little doubt that the economic trauma associated with the financial crisis gave rise to "heightened contingency, or increased causal possibility."[195] As such, the crisis "sowed the seeds of" Dodd-Frank,[196] one of the most complex laws Congress has ever enacted.[197] What is less clear is whether in the area of corporate law Dodd-Frank fostered the sort of transformational change associated with critical junctures. This is because the legislation was

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192 Robert W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 HOUS. L. REV. 1, 4-5 (2003).

193 Romano, *supra* note 1, at 1524.

194 *See supra* note 165 and accompanying text.

195 *See supra* note 93 and accompanying text.

196 Lin, *supra* note 56, at 592.

197 CHEFFINS, *supra* note 45, at 363.

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concerned primarily with overhauling financial regulation, particularly with respect to banking.[198] In combination, however, with provisions in the JOBS Act of 2012 that relaxed for smaller business enterprises various securities law requirements associated with issuing securities to the public, the legislative legacy of the financial crisis of 2008 pretty clearly is sufficient to qualify for corporate law critical juncture status.

Following on from a "credit crunch" in 2007, the financial crisis hit with dizzying strength in the fall of 2008.[199] Numerous prominent banks either collapsed outright or had to be saved by a "rescue merger" at distress prices.[200] Economic activity declined 8.4% in the fourth quarter of 2008.[201] 2008 would end up the worst year for the S&P 500 since 1937 and the worst for the Dow Jones Industrial Average since 1931.[202] The ensuing recession likely was the most severe since the late 1930s.[203] The S&P 500 did not recover fully until March 2013.[204]

The financial crisis constituted a significant reputational setback for corporate America.[205] There was some criticism of non-financial firms, particularly automobile manufacturers the federal government bailed out. Financial services companies were, however, the primary target of opprobrium. They were unpopular in part because of

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198 *Id*. *See* also ALAN S. BLINDER, AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE AND THE WORK AHEAD 307-9 (2013) (overview of Dodd-Frank).

199 CHEFFINS, *supra* note 45, at 300-2.

200 *Id.* at 302, 304.

201 Andrew Osterland, *Here are Key Ways the Coronavirus Crisis Differs from the Great Recession*, May 27, 2020, https://www.cnbc.com/2020/05/27/here-are-key-ways-coronavirus-crisis-differs-from-the-great-recession.html.

202 CHEFFINS, *supra* note 45, at 304.

203 BLINDER, *supra* note 198, at 14, 22-23; DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM 151-52 (2015).

204 Neufeld, *supra* note 142.

205 CHEFFINS, *supra* note 45, at 300, 305.

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aggressive lending that fostered the cratering of the American residential mortgage market, which in turn set off the 2007 credit crunch that set the scene for the financial crisis. Efforts to rescue crisis-afflicted banks with government financial support exacerbated public misgivings. It appeared as if Wall Street was being bailed out while there was scant relief for Americans suffering the consequences of banker irresponsibility.

The public antipathy toward business played a key role in opening the window for post-financial crisis reform. Stephen Bainbridge wrote in 2011 "populist outrage motivated Congress to pass" Dodd-Frank.[206] Fellow law professor Jack Coffee, having observed that the financial crisis offered "abundant evidence of financial chicanery and fraud that outraged and repulsed the public," said the enactment of Dodd-Frank "showed hints of the public's desire for retribution."[207] Christopher Bruner echoed the same sentiment in a corporate governance-specific context, saying "the emergence of so thoroughly shareholder centric a set of proposals in the wake of the crisis is best understood as one reflection of a much broader populist backlash against managers."[208]

While the 2008 financial crisis "sowed the seeds" of Dodd-Frank,[209] enactment was hardly a straightforward affair. Economist Alan Blinder, in a 2013 study of the financial crisis and its aftermath, noted that although "(t)he electorate is normally a somnolent body"[210] "the intense public anger over the financial crisis" "was a potent political force to be

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206 Bainbridge, *supra* note 59, at 1782.

207 Coffee, *supra* note 4, at 1020-21.

208 Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 333 (2011).

209 *See supra* note 196 and accompanying text.

210 BLINDER, *supra* note 198, at 291.

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reckoned with."[211] Nevertheless, "(a)long the arduous road to passage, reformers had to fight off hordes of bank lobbyists."[212]

With Dodd-Frank it seems that a specific allegation of corporate malfeasance which David Skeel has christened "the Goldman moment" tipped the balance in favor of enactment.[213] As of April 2010, the fate of the legislation that would become Dodd-Frank had been uncertain for several months.[214] That month the SEC sued investment bank Goldman Sachs, "a principal villain of the financial crisis," alleging the firm had engaged in securities fraud when in 2007, at the behest of hedge fund titan Paulson & Co., it structured and marketed a synthetic collateralized debt obligation relating to residential mortgages.[215] According to Skeel, "(t)he securities fraud allegations transformed the political landscape, shifting the momentum decisively in favor of the legislation."[216] In July 2010, President Barack Obama signed the Dodd-Frank Act into law.[217]

Dodd-Frank, taken in its entirety, clearly meets the "significant change" threshold associated with critical junctures. It was described, for instance, as "groundbreaking

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211 *Id.* at 290.

212 *Id.* at 314.

213 DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 56 (2011).

214 *Id.* at 4.

215 *Id.* at 56; Securities & Exchange Commission, *SEC Charges Goldman Sachs With Fraud in Structuring and Marketing of CDO Tied to Subprime Mortgages*, April 16, 2010, https://www.sec.gov/news/press/2010/2010-59.htm .

216 SKEEL, *supra* note 213, at 4.

217 The White House, Office of the Press Secretary, *Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act*, July 21, 2010, https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act .

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legislation" [218] that marked "a new epoch in financial regulation."[219] Dodd-Frank's status as an agent of change in the corporate law realm is less obvious.

Bainbridge notes that "(c)ompared to some of the proposals floated in Congress following the 2007-2008 financial crisis, Dodd-Frank's corporate governance provisions were relatively modest."[220] By his count, only seven sections of the Act specifically addressed corporate governance in publicly traded firms.[221] Even with these, their impact sometimes was tempered. A 2011 judicial ruling against the SEC rendered at least temporarily moot section 971 of the Dodd-Frank Act, which vests the Commission with authority to promulgate a "proxy access" rule giving dissident stockholders seeking board representation the opportunity to communicate to fellow shareholders using proxy documentation their corporations circulate.[222] Moreover, a Dodd-Frank measure obliging stock exchanges to require listed companies to have a board level compensation committee in place to deal with executive pay was largely superfluous because the New York Stock Exchange and its rival NASDAQ had mandated this since 2003.[223]

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218 Rick Claypool, *Virtual Hearing -- Insider Trading and Stock Option Grants: An Examination of Corporate Integrity in the Covid-19 Pandemic*, House Financial Services Subcommittee on Investor Protection, Entrepreneurship and Capital Markets, September 17, 2020, at 9.

219 SKEEL, *supra* note 213, at 1.

220 Bainbridge, *supra* note 59, at 1796.

221 STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE CRISIS 14-15 (2012), listing §§ 951-54, 971-72, 989G. Section 955, which mandates disclosure of hedging by employees and directors to mitigate the risk of employer securities held by them, could also plausibly be included.

222 Dodd-Frank Act, § 971; John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 570-71 (2016).

223 Dodd-Frank Act, § 952; Kevin J. Murphy, *Executive Compensation: Where We Are, and How We Got There, in* 2A HANDBOOK OF THE ECONOMICS OF FINANCE 211, 312 (George M. Constantinites et al. eds., 2013).

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While Dodd-Frank's corporate governance reforms were less impactful than they might have been, the legacy likely was substantial enough for the combination of the 2008 financial crisis and Dodd-Frank's enactment to qualify as a corporate law critical juncture. Though Dodd-Frank's treatment of compensation committees was of limited practical importance, its other executive pay reforms were considerably more consequential. The legislation, for instance, bolstered disclosure requirements regarding managerial compensation by instructing the SEC to require an issuer to disclose the annual total compensation of the issuer's CEO, "the median of the annual total compensation of all employees of the issuer" except the issuer's CEO, and the ratio of the two amounts.[224] A politically fraught seven-year rule-making process ensued that elicited a level of public engagement virtually unprecedented in the long history of the SEC disclosure regime.[225] It is still too early to say if requiring companies to divulge the CEO/rank-and-file pay ratio will alter compensation practices materially, but the change was significant on its own terms because companies were required for the first time to disclose under securities law information about how they pay their workers.[226]

Another noteworthy Dodd-Frank executive pay innovation was the introduction of a "say on pay" regime giving shareholders of publicly traded companies the right to vote on executive pay policy on an advisory basis at least once every three years.[227] With such resolutions shareholder dissent has been rare.[228] This, however, has partly been due to boards

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224 Dodd-Frank § 953(b).

225 Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123, 1141 (2019).

226 *Id.* at 1202.

227 Dodd-Frank § 951(c).

228 CHEFFINS, *supra* note 45, at 378-79; Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All about Pay: The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 102 (2018).

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making adjustments to keep investors onside.[229] Shareholders, moreover, are choosy when they dissent, targeting companies delivering poor returns and executive compensation arrangements that seem unduly generous and do little to align pay with performance.[230] More broadly, by introducing say on pay as well as seeking to facilitate proxy access for shareholders, Dodd-Frank moved into largely uncharted territory for Congress – directly empowering shareholders.[231] As law professor Jill Fisch has argued, "Dodd-Frank is different, however. For the first time, Congress has determined that shareholders' governance rights are insufficient and attempted to increase shareholder power relative to management."[232]

Given that with respect to empowering shareholders "the Dodd-Frank intrusions, although small, reflect a difference in kind"[233] and given the attention the CEO/employee pay ratio disclosure initiative elicited, there likely was sufficient change on the corporate and securities law front for the 2008 financial crisis to qualify as a critical juncture with respect to corporate law. The enactment of the JOBS Act of 2012, however, likely resolves any doubts that the crisis and the associated stock market downturn constituted a critical juncture.

The JOBS Act was deregulatory in orientation. For instance, it expanded the number of institutional shareholders a company could have before needing to register with the SEC as a publicly traded company and gave smaller companies seeking to raise capital scope, as

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229 CHEFFINS, *supra* note 45, at 380.

230 Fisch, Palia & Davidoff Solomon, *supra* note 228, at 103, 115-24.

231 Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 734 (2013).

232 *Id.* at 739.

233 *Id.* Section 956 of Dodd-Frank also represented a change of approach, albeit only in relation to "covered financial institutions". Its prohibition of incentive-based pay that encourages "inappropriate risks" was the first attempt in federal or state law to prohibit a prescribed type of executive compensation -- Mark Pengelly, *Fed Moves Toward Rules-Based Approach to Bonuses*, 24 RISK 12 (2011).

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compared with standard federal securities law requirements, to provide less historical accounting data and to disseminate more impressionistic information (e.g. research reports and promotional materials).[234] Law professor Usha Rodrigues maintains that because of the JOBS Act's deregulatory nature it was not enacted in response to the 2008 financial crisis.[235] The deregulatory nature of the JOBS Act is unproblematic from a critical junctures perspective; the enduring policy legacy of a critical juncture clearly can be market friendly.[236] Somewhat less clear is the connection between the JOBS Act and the financial crisis of 2008, given that outcomes with critical junctures need to be proximate in time with the precipitating event.[237] Still, the consensus appears to be that despite a four-year gap the JOBS Act was a product of the 2008 financial crisis, with the legislation constituting an attempt to improve increase access to equity capital with banks having retrenched after the meltdown.[238]

V. IDENTIFYING POTENTIAL ADDITIONAL MARKET-DRIVEN CRITICAL JUNCTURES

We have now seen that the introduction of federal securities law in the mid-1930s, the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 were all associated with corporate law critical junctures. We will now assess whether there are other critical junctures to add to the list. This will be done by deploying two filters: 1) identifying economic

234 *Still Not Working*, ECONOMIST, March 30, 2013, at 76.

235 Rodrigues, *supra* note 12, at 440, 445.

236 *See supra* notes 105, 108 and accompanying text.

237 *See supra* notes 112-13 and accompanying text.

238 John P. Fargnoli, *The JOBS Act: Investor Protection, Capital Formation, and Employment in an Increasingly Political Economy*, 8 BROOK. J. CORP. FIN. & COM. L. 134, 134, 139 (2013); Thaya Brook Knight, *A Walk Through the JOBS Act of 2012 Deregulation in the Wake of Financial Crisis*, CATO INSTITUTE POLICY ANALYSIS, No. 790, May 3, 2016; Michael J. Zeidel, *The JOBS Act: Did It Accomplish Its Goals?*, HARV. L. SCHOOL FORUM CORP. GOV., July 18, 2016, https://corpgov.law.harvard.edu/2016/07/18/the-jobs-act-did-it-accomplish-its-goals/ ; Lynnise E. Phillips Pantin, *What's Wrong with Jumpstart(ing) Our Business Startups (JOBS) Act?*, 16 N.Y.U. J.L. & BUS. 185, 196-97 (2019).

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traumas occurring since 1900[239] akin to those that served as critical junctures for the "big three" to ascertain whether the financial turmoil was associated with major changes to corporate law 2) canvassing corporate law developments at state level to see if there were additional instances of rapid, substantial change akin to the "big three". We deploy the first filter in this Part of the paper and the second in Part VI.

To anticipate, there are no additional fully-fledged corporate law critical junctures. With the economic traumas this Part canvasses, none elicited major changes to corporate law. This was either because the market conditions were not as severe as with the "big three" or because corporate misbehavior did not feature prominently. Correspondingly, the public indignation and investor dissatisfaction that created momentum in favor of reform with the "big three" and put entrenched interests on the back foot were absent. As for corporate law developments at state level, Part VI indicates that the changes either took place too slowly or were insufficiently broadly-based to amount to fully fledged critical junctures.

A. 1907

In October 1907 a failed attempt to "corner" the shares of the United Copper Company triggered a Wall Street panic which prompted uncertainty amongst investors, drove various well-known brokerage houses, banks and trust houses to the wall and stoked concerns about the soundness of the banking system.[240] A rescue operation investment banker J.P. Morgan famously orchestrated stemmed the chaos.[241] Was the panic of 1907 severe enough

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239 We do not consider pre-1900 economic traumas because the modern U.S. market for public company stocks only began to take shape as the 19th century ended -- Thomas R. Navin & Marian V. Sears, *The Rise of a Market for Industrial Securities, 1887– 1902*, 29 BUS. HIST. REV. 105 (1955).

240 ROBERT F. BRUNER & SEAN D. CARR, THE PANIC OF 1907: LESSONS LEARNED FROM THE MARKET'S PERFECT STORM 43–55, 83-86, 97-100, 151 (2007).

241 *Id*. at 121-33.

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to create regulatory possibilities? While historian Robert Wiebe says it "acted as a catalyst in the political ferment"[242] the 1907 panic was not sufficiently traumatic to be a corporate and securities law game-changer. Instead, the financial system promptly returned "to a remarkably stable condition until the commencement of World War I."[243] The nature of the stock market downturn had much to do with this.

Unlike the 1929 stock market crash and the 2008 financial crisis, the panic of October 1907 marked the end, not the beginning of the bear market with which it was associated. The decline that culminated in the October 1907 panic began in mid-1906.[244] As measured by the Dow Jones Industrial Average, the market sustained losses of 9.7% in March 1907 and 8.2% in August 1907, coinciding with an economic slowdown the U.S. experienced.[245] The market hit bottom in November of that year before beginning to recover.[246] All of the lost ground was recaptured by August 1909.[247] According to Morningstar's stock market "pain index," which again measures bear markets by reference to the size and duration of the share price decline, the panic of 1907 only ranked 8th in severity over the past 150 years.[248]

With the panic of 1907 winding down quickly, the statutory legacy was fairly meagre. Congress, aware of "the crude expectation" there would be a law passed that "would prevent

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242 ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877-1920 201 (1967).

243 BRUNER & CARR, *supra* note 240, at 143.

244 Kaplan, *supra* note 137; BRUNER & CARR, *supra* note 240, at 151.

245 Frederic S. Mishkin & Eugene N. White, *U.S. Stock Market Crashes and Their Aftermath: Implications for Monetary Policy*, NBER Working Paper 8992, 8 (2002).

246 *Id.*

247 Robert Shiller, *U.S. Stock Markets 1871-Present and CAPE Ratio*, http://www.econ.yale.edu/~shiller/data.htm .

248 Kaplan, *supra* note 137.

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the possibility of future panics"[249] enacted the Aldrich-Vreeland Act in 1908.[250] This "product of a few days struggle at the end of the session"[251] introduced a scheme that eased the issuance of currency in financial emergencies and created the National Monetary Commission, which generated in 1912 recommendations that led to the enactment of the Federal Reserve Act of 1913.[252]

Even the modest progress made with regulating the financial system ultimately would be substantial compared to corporate law. A plea that President Theodore Roosevelt made to Congress as the panic of 1907 abated to provide for national chartering of corporations fell on deaf ears.[253] A bill introduced to the Senate in late 1907 governing the incorporation and regulation of companies engaged in interstate commerce fell by the wayside, as did a similar bill introduced in early 1908.[254] A 1910 bill that would have provided for voluntary federal incorporation met the same fate.[255]

B. 1917-21

Again, the stock market crash of 1929 scores #1 on the "pain index" Morningstar constructed in 2020 to rank stock market declines of 20% or more occurring over the previous 150 years.[256] Number 2 on the list was a stock market decline Morningstar deemed to begin in June 1911 and end in December 1920, with the peak-to-trough decline being

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249 J. Laurence Laughlin, *The Aldrich-Vreeland Act*, 16 J. POL. ECON. 489, 492-93 (1908).

250 Pub. L. 60-169.

251 Laughlin, *supra* note 249, at 513.

252 Pub. L. 63-43; BRUNER & CARR, *supra* note 240, at 143, 145-46.

253 Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 178 (1982).

254 STEINBERG, *supra* note 132, at 41-46.

255 *Id.* at 48-51.

256 *See supra* note 140 and accompanying text.

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nearly 51%.[257] Morningstar, mindful of the COVID-19 pandemic, said "(t)his market downturn…may be most relevant to today's situation, since it included the influenza pandemic of 1918."[258] Share prices of firms traded on the New York Stock Exchange indeed were negatively correlated with the death rate of the "Spanish Flu"[259] that would persist until early 1920.[260]

While the 1918 influenza pandemic apparently did put downward pressure on share prices, the stock market generally performed well. The Dow Jones Industrial Average increased 10.5% in 1918 and 30.5% in 1919,[261] meaning 1919 was its ninth best year between 1915 and 2020.[262] As Robert Shiller, a leading expert on share prices, said at the outset of the COVID-19 pandemic, based on analysis of a historical dataset of his:

> "the stock market in the United States did not crater when, in September-October 1918, the news media first started covering the Spanish flu pandemic that eventually claimed 675,000 US lives (and over fifty million worldwide). Instead, monthly prices in the US market were on an uptrend from September 1918 to July 1919."[263]

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257 Kaplan, *supra* note 137.

258 *Id*.

259 Ronald G. Shafer, *Spain Hated Being Linked to the Deadly 1918 Flu Pandemic. Trump's "Chinese Virus" Label Echoes That*, WASH. POST, March 23, 2020, https://www.washingtonpost.com/history/2020/03/23/spanish-flu-chinese-virus-trump/.

260 ALFRED W. CROSBY, AMERICA'S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918 203 (2003); Marco Del Angel, Caroline Fohlin & Marc D. Weidenmier, *Do Global Pandemics Matter for Stock Prices? Lessons from the 1918 Spanish Flu*, NBER Working Paper No. 28356 (2021).

261 Derived from data available at MacroTrends, *Dow Jones - DJIA - 100 Year Historical Chart*, https://www.macrotrends.net/1319/dow-jones-100-year-historical-chart .

262 *Id.*; Efraim Benmelech & Carola Frydman, *The 1918 Influenza Did Not Kill the US Economy*, VOXEU/CEPR, April 29, 2020, https://voxeu.org/article/1918-influenza-did-not-kill-us-economy .

263 Robert J. Shiller, *The Two Pandemics*, Project Syndicate, March 31, 2020, https://www.project-syndicate.org/commentary/how-covid19-pandemic-affects-financial-market-narratives-by-robert-j-shiller-2020-03?barrier=accesspaylog

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Why did stock prices hold up well despite share prices being negatively correlated with the influenza epidemic death toll? Part of the explanation is that "a lot of other stuff was happening then—namely, World War I."[264] In particular, the good news associated with the ending of the conflict in late 1918 likely helped to cancel out the bad news associated with the pandemic.[265] Moreover, with the 1918-19 flu pandemic, "the economic impact was surprisingly mild."[266] Many people could work largely uninterrupted in jobs that did not involve close social contact, such as farming, fishing and forestry.[267] Also, while most major cities imposed bans on large public gatherings,

> "it was exceedingly difficult to get an urban population to stay at home. People needed to work so they could eat; parents wanted their children to go to school; businesses dependent on customers, whether department stores or movie theater operators, did not want to close down."[268]

Investors were similarly phlegmatic in their approach to the influenza pandemic. While there was downward pressure on share prices, not once did stock prices move up or down 2.5% or more in a day due to influenza outbreaks or policy responses to such outbreaks.[269]

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264 Joe Pinsker, *How to Think About the Plummeting Stock Market*, THE ATLANTIC, Feb. 28, 2020, https://www.theatlantic.com/business/archive/2020/02/coronavirus-stock-market/607216/ .

265 Shiller, *supra* note 263.

266 Greg Dougherty & Danny DeBarros, *Lessons for the Coronavirus Crisis From Six Other Disasters*, WALL ST. J., March 20, 2020, https://www.wsj.com/articles/lessons-for-the-coronavirus-crisis-from-six-other-disasters-11584719497 .

267 *Id.*

268 Nancy Tomes, *"Destroyer and Teacher": Managing the Masses During the 1918—1919 Influenza Pandemic*, PUBLIC HEALTH REPORTS, April 2010, at 48, 53, 58.

269 Scott R. Baker *et al.*, *The Unprecedented Stock Market Reaction to COVID-19*, 10 REV. ASSET PRICING STUD. 742, 744-45 (2020).

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Stocks did fall dramatically on either side of the 1918-19 flu pandemic. In 1917, share prices dropped substantially due to the imposition of restrictions on the economy associated with America's entry into World War I.[270] Stock prices also fell in 1920 and much of 1921,[271] with the Dow Jones Industrial Average declining by nearly one-third in 1920 alone.[272] This bear market aligned with trends in the real economy, which experienced perhaps the most severe bout of deflation in American economic history.[273] The stock market did not rally as promptly as it did following the panic of 1907. It would take until the end of 1924 to recover fully from the decline occurring from November 1919 through to August 1921.[274]

The 1920-21 downturn was severe enough to set the scene for some regulatory change at the federal level on the corporate front. The Revenue Act of 1921 substantially relaxed tax rules governing mergers and acquisitions as part of an effort to stimulate corporate reorganizations and thereby foster business activity amidst the economic slump.[275] There also were legislative proposals that foreshadowed the enactment of securities legislation in the 1930s. A 1921 bill introduced to the Senate would have required corporations launching public offerings of securities to register with the FTC and to disclose prescribed information before going public.[276] A 1922 House measure would have fortified state "blue sky" laws governing securities offerings by prohibiting the use of the facilities of interstate commerce

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270 Mishkin & White, *supra* note 245, at 15-16.

271 Shiller, *supra* note 247.

272 Mishkin & White, *supra* note 245, at 16; MacroTrends, *supra* note 258.

273 J.R Vernon, *The 1920-21 Deflation: The Role of Aggregate Supply*, 29 ECON. INQ. 572, 572, 579 (1991).

274 Shiller, *supra* note 247.

275 Revenue Act of 1921, 42 Stat. 227; STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT 136-38 (2010).

276 STEINBERG, *supra* note 132, at 75.

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to sell securities in a state unless there had been compliance with that state's blue sky law.[277] It turned out, though, "the climate…was not yet amenable to widespread support for these laws",[278] so no legislation was enacted. Ultimately, then the regulatory legacy was far too modest for a critical juncture to be involved.

Why? The 1920/21 bear market clearly was painful. It was not associated, however, in any meaningful way with business misconduct. The severe economic contraction[279] – some say depression[280] -- arose instead due to a surge in agricultural production that drove down commodity prices[281] and fiscal and monetary retrenchment following World War I-driven growth in government spending and borrowing.[282] "(I)t would be…folly to portray business in the 1920s as the knight in shining armor,"[283] given that in 1922 the Teapot Dome scandal broke that would ultimately lead to the conviction of the then Secretary of the Department of Interior for bribery in relation to the granting of lucrative rights to federal oil reserves.[284] Nevertheless, the U.S would have to endure the 1929-32 stock market trauma

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277 SELIGMAN, *supra* note 147, at 49-50; Keller & Gehlmann, *supra* note 156, 336.

278 Keller & Gehlmann, *supra* note 156, 336.

279 Romano, *supra* note 1, at 1591 ("the most severe recession in the United States up to that time"); Vernon, *supra* note 273, at 573.

280 JAMES GRANT, THE FORGOTTEN DEPRESSION: 1921: THE CRASH THAT CURED ITSELF (2014).

281 Christina D. Romer, *World War I and the Postwar Depression: A Reinterpretation Based on Alternative Estimates of GNP*, 22 J. MONETARY ECON. 91, 110 (1988). *See* also GRANT, *supra* note 280, 100 (citing a 1921 congressional investigation of the agricultural crisis that concluded "the debacle of 1920-21 was without parallel").

282 Daniel Kuehn, *A Note on America's 1920–21 Depression as an Argument for Austerity*, 36 CAMB. J. ECON. 155, 156 (2012).

283 Robert A. Waller, *Business and the Initiation of the Teapot Dome Investigation*, 36 BUS. HIST. REV. 334, 353 (1962).

284 Tiffany R. Murphy, *Prosecuting the Executive*, 56 SAN DIEGO L. REV. 105, 124-25 (2019).

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before the political equation changed sufficiently to open the way for the enactment of federal securities legislation.

C. The 1970s

With Morningstar's stock market crash pain index, #3 on the list following 1929-32 and 1911-20 was 2000-09, with Morningstar treating the 2000s as being one long bear market with a peak in 2000 and a bottoming out in early 2009.[285] Number 4 was a precipitous stock market decline of 52% occurring between 1972 and 1974 compounded by a gradual recovery that meant stock prices did not reach 1972 levels until 1983.[286] The stock market fell steeply in response to the failure of wage and price controls to control inflation the dismantling of the Bretton Woods system of international monetary management prompted and due to oil price havoc a 1973 embargo by Arab oil producers engendered.[287] Coinciding with the bear market, the economy moved into a recession that lasted until March 1975.[288] *Time* was asking its readers on the cover of a July 1975 issue "Can Capitalism Survive?"[289] Productivity growth, measured in terms of output per hour, was dismal for the remainder of the decade and as the 1970s ended the economy was stuck in a "great stagflation swamp".[290]

While the 1929 stock market crash, the early 2000s dot.com meltdown and the 2008 financial crisis each had a corporate law reform legacy befitting a critical juncture, this was

285 Kaplan, *supra* note 137.

286 *Id*. The recovery was somewhat quicker according to Neufeld, *supra* note 142 (identifying January 1973 as the market peak with a full recovery occurring by July 1980). On the other hand, when inflation and dividend payouts are factored in, the recovery from the 1974 nadir was the slowest on record. *See* Hulbert, *supra* note 142.

287 CHEFFINS, *supra* note 45, at 109; Robert B. Barsky and J. Bradford De Long, *Bull and Bear Markets in the Twentieth Century*, 50 J. ECON. HIST. 265, 278 (1990).

288 Mishkin & White, *supra* note 245, at 26.

289 *Can Capitalism Survive?*, TIME, July 14, 1975.

290 CHEFFINS, *supra* note 45, at 110; Hogan & Doyle, *supra* note 97, at 895.

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not the case with the economic misery of the 1970s. Mainstream corporate law reform did come on to the federal agenda in the latter part of the decade. In 1977 the SEC held multi-city hearings on corporate accountability that amounted to its most far-reaching study of corporate conduct up to that point in time.[291] The following year a blue-ribbon Congressional advisory committee on corporate governance was struck to consider legislative possibilities, with members including the chair of the board of telecommunications colossus AT&T and the chair/CEO of chemicals giant DuPont.[292]

Despite such corporate law reform initiatives and despite the economic tumult, the legislative output was meager. In 1978 the SEC adopted rules requiring issuers to disclose the existence of board level auditing, nomination and compensation committees (if any) and the composition of any such committees.[293] Also, while the Foreign Corrupt Practices Act (FCPA) of 1977 would achieve notoriety primarily as an anti-bribery statute, it amended federal securities law to require publicly traded companies to keep accurate books and records and to have a suitable system of internal accounting controls in place.[294] Broader corporate law initiatives fell by the wayside, however.

Corporate America, accustomed to being grudgingly conciliatory when responding to federal regulatory proposals as the 1970s got underway because business was "a four letter word" in Washington, pushed back forcefully as an anti-government mood started to develop as the decade drew to a close.[295] The SEC, for its part, "put on the back burner most of the

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291 CHEFFINS, *supra* note 45, at 134.

292 *Id.* at 132.

293 *Id.* at 134.

294 P.L. 95-213; 91 Stat. 1494, § 102. See Mark Romaneski, *The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Uncertain Future*, 5 B.C. INT'L & COMP. L. REV. 405, 405-6, 419-21 (1982) (describing the FCPA's anti-bribery rules).

295 CHEFFINS, *supra* note 45, at 135-39.

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fundamental issues" its 1977 hearings raised.[296] Bills introduced to Congress in 1980 that would have mandated an independent director majority on boards of large companies and would have required corporate boards to establish audit and nomination committees comprised entirely of independent directors went nowhere.[297]

Why didn't the travails of the 1970s yield a more substantial regulatory legacy? The economic news was clearly bad enough; certainly worse than the early 2000s and perhaps the late 2000s as well. What appears to have been lacking was the blameworthy conduct on the part of business that helped to foster the "big three" corporate law critical junctures.[298] To be sure, there were mid-decade revelations of illicit corporate political donations and questionable foreign payments that ultimately prompted the enactment of the FCPA.[299] Public outrage, however, rarely featured.[300] As the *New York Times* said in 1975, "the most curious upshot of the recent disclosures has been the public's ambivalent reaction to them."[301]

Why did business escape blame for the woeful economic conditions prevailing during the 1970s? As the decade opened corporate executives found themselves in the cross-hairs of considerable social ferment.[302] Moreover, subsequent criticism of managerial quality was harsh.[303] For instance, according to a 2004 history of "management hooey" in *Fortune* "(b)y

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296 *SEC Acts to Require Disclosures by Firms on Directors, But Delays Other Decisions*, WALL ST. J., June 8, 1978, at 8.

297 CHEFFINS, *supra* note 45, at 135.

298 *See supra* notes 149-55, 187, 189-90, 192-93, 205, 213, 216 and accompanying text.

299 CHEFFINS, *supra* note 45, at 116-18; Romaneski, *supra* note 294, at 407-9.

300 CHEFFINS, *supra* note 45, at 118-19.

301 Michael C. Jensen, *Corporate Corruption is Big Business*, N.Y. TIMES, Sept. 14, 1975, at 173.

302 Brian R. Cheffins, *Stop Blaming Milton Friedman!*, unpublished working paper, 19, (2020), https://ssrn.com/abstract=3552950.

303 CHEFFINS, *supra* note 45, at 108.

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1980 American management hadn't had a good idea in years."[304] By the end of the 1970s serious concerns about the quality of management of American public companies were beginning to emerge.[305] Up to that point in time, however, the economic malaise was blamed on the 1973 oil crisis and government mismanagement of the economy rather than corporate failings.[306] Indeed, growing skepticism of government would foster a deregulatory movement that flourished in the 1980s.[307] As a result, the FCPA aside, the momentum in favor of regulation did not build in the 1970s in the same way as it did in the 1930s, early 2000s or late 2000s.

D. 1987

On the 30th anniversary of a stock trading day that became known as "Black Monday",[308] Robert Shiller described October 19, 1987 as "one of the worst days in stock market history."[309] In the seven weeks prior to Black Monday, the Dow Jones Industrial Average had fallen 17.5% from its then record high.[310] On Black Monday itself the Dow dropped a further 508 points, or almost 23%, the largest one day decline in history up to that point.[311] Newspaper headlines blared "Crash", "Bedlam" and "Panic".[312] Many wondered

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304 Geoffrey Colvin, *A Concise History of Management Hooey*, FORTUNE, June 28, 2004, at 166.

305 CHEFFINS, *supra* note 45, at 110.

306 *Id.* at 109-10.

307 *Id.* at 137-40, 197.

308 CHARLES R. GEISST, WALL STREET: A HISTORY 349 (1997); Donald Bernhardt and Marshall Eckblad, *Stock Market Crash of 1987*, Federal Reserve History, Nov. 22, 2013, https://www.federalreservehistory.org/essays/stock-market-crash-of-1987.

309 Robert J. Shiller, *A Stock Market Panic Like 1987 Could Happen Again*, N.Y. TIMES, October 19, 2017.

310 GIROUX, *supra* note 156, at 568.

311 *Id.* at 568, 570.

312 *Id.* at 569; Bernhardt and Eckblad, *supra* note 308.

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whether the same kind of economic depression that followed the 1929 stock market crash was in the offing,[313] fuelled by a sense that a day of reckoning was due given supposed excesses of the 1980s.[314]

The New York Stock Exchange responded to Black Monday by amending its rules to put in "circuit breakers" authorizing it to halt trading in response to sharp stock price declines.[315] In general terms, though, "Black Monday didn't lead to any meaningful reforms."[316] The immediate market aftermath does much to explain why. The day after Black Monday, Federal Reserve chair Alan Greenspan affirmed the Fed's readiness to serve as a source of liquidity to support the economic and financial system and the Fed followed up by encouraging banks to lend on normal terms.[317] The markets reacted favorably, with the Dow gaining back 57% of the Black Monday losses in two trading sessions.[318] Neither a banking crisis nor an economic recession ensued.[319]

While Black Monday was a shock, by the following year markets were back on a sufficiently even keel for a presidential task force investigating matters to characterize

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313 MAGGIE MAHAR, BULL: A HISTORY OF THE BOOM, 1982-1999 69 (2003); Gary S. Becker, *Why a Depression Isn't in the Cards*, BUS. WK., Nov. 9, 1987, 22 (acknowledging fears of a depression but arguing they were unjustified).

314 Randall W. Forsyth, *Year of the Deal*, BARRON'S, Jan. 2, 1989, at 20.

315 Bernhardt and Eckblad, *supra* note 308; Shiller, *supra* note 309.

316 Diana B. Henriques, *Those Who Don't Learn From Financial Crises Are Doomed to Repeat Them*, ATLANTIC.COM, Sept. 19, 2017, https://www.theatlantic.com/business/archive/2017/09/financial-crisis-black-monday/539859/ . *See* also GIROUX, *supra* note 156, 570 ("no major regulatory changes made").

317 Bernhardt and Eckblad, *supra* note 308. *See* also GIROUX, *supra* note 156, at 570 ("Greenspan flooded the market with cash").

318 Bernhardt and Eckblad, *supra* note 308. *Cf.* MAHAR, *supra* note 310, at 66 (indicating traders were still dazed by the end of the week).

319 Bernhardt and Eckblad, *supra* note 308.

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October 19, 1987 as a "market break" rather than a crash or collapse.[320] Less than two years after Black Monday, U.S. stock markets had rallied fully and were hitting new highs.[321] Due in substantial part to this prompt rebound, Morningstar only ranked Black Monday tenth in its 2020 ranking of bear market "pain".[322] This transitory market disruption in turn proved to be insufficiently traumatic to serve as a critical juncture for corporate and securities law. As we will see in the next Part of the paper, there were some important state-level changes to U.S. corporate law in the 1980s. They were unrelated, however, to Black Monday.

VI. STATE CORPORATE LAW AND THE CRITICAL JUNCTURES MODEL

Our analysis of corporate law critical junctures has focused thus far on federal reforms. This might seem surprising, given that firms incorporate under state law.[323] We begin this part of the paper, which focuses on the state law angle, by explaining why the states do not provide a promising context for the sort of sudden, substantial reform associated with critical junctures. We then consider two instances where change did occur rapidly at the state law level unrelated to a stock market crash but maintain that because of their narrow focus these were no more than "mini" critical junctures. We consider in this context the statutory authorization of inclusion of provisions in corporate charters displacing directors' personal liability for negligence and the promulgation of state anti-takeover laws.

A. Delaware General Corporation Law/Model Business Corporations Act

Again, a critical juncture involves "structural fluidity" and "an enduring legacy" with the changes being proximate in time to the trigger for "heightened contingency".[324] It is

320 GEISST, *supra* note 308, at 352.

321 Bernhardt and Eckblad, *supra* note 308.

322 Kaplan, *supra* note 137.

323 *See supra* notes 33, 126 and accompanying text.

324 *See supra* notes 90, 93, 99 and accompanying text.

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possible for major change to occur as part of "concentrated" or "extended" episodes but only the former can involve a critical juncture.[325] With state corporate law, change seems destined to be too piecemeal and incremental for full-scale critical junctures to occur. Roberta Romano's research on the adoption of six statutory measures thought to be hallmarks of modern state corporate law illustrates the prevalence of gradual, interstitial adjustment in this context. She reports that the interval over which these key provisions spread throughout the states after initial adoption ranged from 14 to 96 years.[326]

The incremental pattern is evident with the two most obvious potential agents of critical juncture-style change in the state corporate law universe, namely the Model Business Corporations Act (MBCA) and the Delaware General Corporation Law (DGCL). The MBCA is a model statute promulgated by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association that states can adopt substantially in its entirety.[327] The DGCL is Delaware's corporate law statute.[328]

The MBCA and the DGCL are the two most influential corporate law statutes in the United States.[329] The MBCA is crucial because more than 30 states have a corporations statute that implements the MBCA in substantial measure,[330] meaning it is "the backbone of U.S. statutory corporate law."[331] In contrast, only three states (Kansas, Nevada and

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325 *See supra* notes 123-24 and accompanying text.

326 Romano, *supra* note 36, at 216-17.

327 MODEL BUS. CORP. ACT. ANN., intro. ix (AM. BAR ASS'N. 2009).

328 DEL. CODE ANN. tit. 8.

329 Michael P. Dooley & Michael D. Goldman, *Some Comparisons between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 737 (2001).

330 Cheffins, Bank & Wells, *supra* note 33, at 705.

331 Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations, from Japan and the United States*, 150 U. PA. L. REV. 527, 548 (2001).

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Oklahoma) have a statute clearly modelled on the DGCL.[332] The DGCL, however, is by far the most popular corporate legislation amongst America's largest companies, with Delaware being the home of over 60% of Fortune 500 companies.[333]

The MBCA is poorly suited to operate as a transmission mechanism for corporate law critical junctures. Leo Strine, former Chief Justice of the Delaware Supreme Court, has characterized the MBCA as a "refiner" and cited the MBCA's protracted amendment protocol in a 2011 co-authored article in making the point:

> "The MBCA's drawn-out, formal process (three formal 'readings' and publication of an exposure draft following the second reading) is not conducive to nimble adaptation, but promotes the clarity of drafting and internal coherence suitable to a model statute."[334]

The MBCA's history accords with the present-day emphasis on patience and deliberation. The ABA's Committee on Business Corporations began preparing the first MBCA, issued in 1950,[335] a decade beforehand,[336] and drew heavily on a statute that was nearly a decade old (the Illinois Business Corporation Act of 1933) in so doing.[337] Moreover, the MBCA hardly turned the world of corporate law statutes upside down in the manner that would be expected

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332 Dooley & Goldman, *supra* note 329, at 738.

333 Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Questioning 'Law and Finance': U.S. Stock Market Development, 1930-70*, 55 BUS. HIST. 598, 605 (2013).

334 Jeffrey M. Gorris, Lawrence A. Hamermesh & Leo E. Strine Jr., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 LAW & CONTEMP. PROBS. 107, 116 (2011) (footnote omitted).

335 Cheffins, Bank & Wells, *supra* note 33, at 705.

336 Ray Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW. [vii], [vii] (1950); Ray Garrett, *Model Business Corporation Act*, 4 BAYLOR L. REV. 412, 423-24 (1952).

337 Cheffins, Bank & Wells, *supra* note 33, at 705; Garrett, *Model*, *supra* note 336, at 424.

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if a critical juncture were involved. While over 30 states currently have corporate laws modelled after the MBCA, only four states had adopted the MBCA as of 1952 [338] increasing to a modest total of 15 by 1961.[339]

The DGCL similarly has not served as the medium for wholesale, sudden change on the corporate law front. Strine, in his 2011 co-authored article, cited nine DCGL amendments occurring between 1983 and 2009 that were subsequently introduced to the MBCA to make the point that Delaware was "a more prolific source of innovation in statutory corporate law" than the ABA's Committee on Corporate Laws.[340] A streamlined amendment process involving substantial delegation to experts helps to explain the pattern. Delaware's state legislature relies heavily on the Corporate Law Section of the Delaware Bar Association to recommend, review and draft amendments to Delaware's corporate statute and amendments proposed in this way typically pass overwhelmingly without debate or amendment.[341]

While statutory tweaking can happen readily in Delaware, the sort of sweeping alterations associated with critical junctures have never been a hallmark of Delaware's approach to corporate law. This is by design. Delaware has dominated the state-oriented market for corporations in part by having reliably manager-friendly corporate law.[342] Delaware's state constitution mandates that revisions of the state's corporation code be

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338 Garrett, *Model*, *supra* note 336, at 425.

339 Jule E. Stocker, *Model Business Corporation Act Annotated*, 16 BUS. LAW. 748, 750 (1961).

340 Gorris, Hamermesh & Strine, *supra* note 334, at 112-14.

341 Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 896-901, 916 (1990); William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1435 (2020).

342 Armour, Black & Cheffins, *supra* note 20, at 1348-49 (mentioning other factors as well).

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supported by a two-thirds supermajority vote of both houses of the state legislature. Romano has said "this provision makes it extraordinarily difficult to refashion fundamentally the corporation code's flexible posture -- only a critical election that revolutionized state politics could do so."[343] No such "critical election" has happened. When the Delaware legislature passed an act in 1963 to create a committee to review Delaware's corporations statute, the legislative preamble specifically acknowledged that there had "been no comprehensive revision of the Delaware Corporation Law since its enactment in 1898."[344] That review resulted in the enactment of a new statute in 1967, but there has not been a wholesale revision since then.[345]

What about the 1967 revision? The preamble for the 1963 legislation identified the catalyst for the review Delaware wanted to undertake, namely a concern that "many States have enacted new corporation laws in recent years in an effort to compete with Delaware for corporation business."[346] So, there was no dramatic motivating event of the type associated with critical junctures. Moreover, the Delaware General Corporation Law of 1967 was not meant to be a game-changer. Ernest Folk, whose report to the committee tasked with reviewing Delaware's corporation law did much to shape the 1967 statute,[347] said the new legislation "was not the wholesale rewriting of the statute that some may think it was."[348]

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343 Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225, 241 (1985).

344 S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 14 (1976).

345 Cheffins, Bank & Wells, *supra* note 33, at 758.

346 Arsht, *supra* note 344, at 14. *See* also Ernest L. Folk II, *State Statutes: Their Role in Prescribing Norms of Responsible Management Conduct*, 31 BUS. LAW. 1031, 1055 (1976) ("This desire to remain in the forefront of corporation law -- a desire which largely prompted the 1967 revision itself.…).

347 Arsht, *supra* note 344, at 15.

348 Folk, *supra* note 346, at 1055, n. 92.

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Instead, according to Folk, the committee to which he reported "made an early decision to change only where necessary, and also to keep as much of the original language as possible, especially where it had a heavy gloss of case-law. The policy of the pre-1967 and the 1967 statutes is identical."[349] Hence, the sort of sweeping change and lasting consequences associated with critical junctures have been absent in Delaware, at least in relation to its corporate statute.

B. *Smith v. Van Gorkom*

Even if statutory reforms in Delaware have not risen to the level of a corporate critical juncture, perhaps such a change could have occurred in the Delaware courts. Legislatures are generally much better positioned to execute sweeping change than the judiciary.[350] On the other hand, Jill Fisch has suggested that "the process by which Delaware courts make corporate law resembles legislation in some ways."[351] Given this, a specific episode in Delaware corporate law history involving a 1985 Delaware Supreme Court decision that elicited substantial change to the personal liability of directors merits analysis as a possible critical juncture.

The Delaware Supreme Court held in *Smith v. Van Gorkom* that outside directors of a public company were liable to the corporation for breaching duties they owed because they failed to scrutinize sufficiently diligently a merger proposal the company's CEO had negotiated.[352] Up to that point, instances where directors of business corporations had been held personally accountable for breach of duty without engaging in self-dealing had been

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349 *Id*.

350 *See supra* note 104 and accompanying text.

351 Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000).

352 488 A.2d 858 (1985).

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"few and far between."[353] As a result, *Smith v. Van Gorkom* "exploded a bomb"[354] that "shook the foundations of the corporate world."[355] The case fostered an immediate re-evaluation of the personal risks of board service and reports of directors resigning and individuals declining invitations to serve on boards abounded.[356] The decision also reinforced uncertainty in a D&O insurance market where premiums were already increasing rapidly, coverage on offer was shrinking and policy deductibles were on the rise.[357]

Indiana responded to the growing concerns about director liability *Smith v. Van Gorkom* fostered by amending its corporate law statute in April 1986 to lower the standard of care for directors from negligence to wilful misconduct or recklessness.[358] Delaware went next in July.[359] It took a different approach, authorizing corporations to include a provision in their charters precluding director liability for monetary damages for breaches of duty not involving the duty of loyalty, a failure to act in good faith, intentional misconduct, and a

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353 Joseph Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1095 (1968); see also Krishnan Chuttur, *The Corporate Director's Standard of Care: Past, Present and Future*, 10 J. CORP. L. 505, 505, 512 (1985).

354 Bayless Manning, *Reflections and Personal Tips on Life in the Boardroom After* Van Gorkom, 41 BUS. LAW. 1, 1 (1985).

355 Sarah Helene Duggin and Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. UNIV. L. REV. 211, 231 (2006).

356 *Roundtable: The Legacy of* Smith v. Van Gorkom, DIRECTORS & BOARDS, Spring 2000, at 28, 28; Roberta Romano, *What Went Wrong with Directors' and Officers' Liability Insurance*, 14 DEL. J. CORP. L. 1, 1-2 (1989).

357 *Roundtable, supra* note 356, at 34; Romano, *supra* note 356, at 1-2.

358 Romano, *supra* note 36, at 221; 1986 Ind. Acts 1430.

359 Michael Bradley and Cindy A. Schipani, *The Economic Importance of the Business Judgment Rule: An Empirical Analysis of the Trans Union Decision and Subsequent Delaware Legislation* in THE BATTLE FOR CORPORATE CONTROL: SHAREHOLDER RIGHTS, STAKEHOLDER INTERESTS, AND MANAGERIAL RESPONSIBILITIES 105, 114 (Arnold W. Sametz, ed., 1991).

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transaction involving an improper personal benefit.[360] By the end of 1987, 29 states had followed Delaware in permitting charter amendments eliminating or limiting directors' personal liability risk for negligence.[361] The MBCA followed suit in 1990, by which point 36 states had adopted Delaware's approach.[362] As of the early 2000s, the number had increased to 45 states; all others had followed Indiana's approach.[363]

Delaware's response to the perceived director liability crisis was not merely widely imitated by other states. It also proved popular with corporations. Virtually every public company incorporated in Delaware quickly adopted an exculpatory provision in its charter and the pattern was similar with large companies incorporated elsewhere.[364]

With respect to directorial liability, *Smith v. Van Gorkom* likely qualifies as a "mini" critical juncture. The Delaware Supreme Court's decision caught most observers off guard,[365] thereby creating the sort of "moment of openness"[366] associated with critical junctures. According to a motion for a rehearing by the defendant directors the decision "shocked the corporate world in its unprecedented holding that knowledgeable

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360 65 Del. Laws. 544 (1986), codified at DEL. CODE ANN. tit. 8, § 102(b)(7).

361 Romano, *supra* note 356, at 30. On what § 102(b)(7) does despite a complicated drafting style *see* Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1091, n. 127 (2006).

362 Romano, *supra* note 36, at 223.

363 *Id.* After the MBCA was amended, states typically adopted its provision rather than Delaware's: Black, Cheffins & Klausner, *supra* note 361, at 1091, n. 128.

364 Black, Cheffins & Klausner, *supra* note 361, at 1090-91; Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160-61 (1990); Lawrence A. Hamermesh, *Why I Do Not Teach* Van Gorkom, 34 GA. L. REV. 477, 490, 497-503 (2000).

365 Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 41 (2015); Richard M. Leisner, *Boardroom Jitters: A Landmark Court Decision Upsets Corporate Directors*, BARRON'S, April 22, 1985 (*Van Gorkom* "hurled a thunderbolt into the nation's boardrooms").

366 *Supra* note 94 and text following.

Electronic copy available at: https://ssrn.com/abstract=3877329

directors…may be exposed to catastrophic liability…where there were no charges or proof of fraud, bad faith or self-dealing."[367] In turn, the rapid promulgation of statutory measures authorizing the adoption of exculpatory provisions was the sort of concentrated episode of change associated with critical junctures. And reform was consequential. Giving corporations the option to circumscribe monetary liability for breach of duty by directors "was a very big change"[368] that arguably ameliorated materially liability risk directors faced.[369]

While *Smith v. Van Gorkom* fostered significant changes to directors' duties, the case does not qualify as a fully fledged corporate law critical juncture. Director liability obviously is an important aspect of corporate law. However, it is just one facet of a much larger legal tapestry. The changes that followed on from *Smith v. Van Gorkom* correspondingly are not of sufficient general relevance to add the case to the big three of 1930s federal securities law, Sarbanes-Oxley and Dodd-Frank. As we will see next, the same pattern arose at the same time when there was "an epidemic-like character to the spread of state anti-takeover legislation."[370]

C. *CTS Corp. v. Dynamics Corp. of America*

In corporate America, the 1980s was "the Deal Decade."[371] Takeover-related activities preoccupied executives, commentators and the public to an unprecedented extent.[372]

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367 ARTHUR FLEISCHER, GEOFFREY C. HAZARD & MIRIAM Z. KLIPPER, BOARD GAMES: THE CHANGING SHAPE OF CORPORATE POWER 15 (1988).

368 *Roundtable, supra* note 356, at 36.

369 Hamermesh, *supra* note 364, at 490-91.

370 John C. Coffee, *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, [1988] WIS. L. REV. 435, 436.

371 MARGARET M. BLAIR, THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE (1993).

372 CHEFFINS, *supra* note 45, at 155.

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The hostile takeover, involving an uninvited and at least initially unwelcome approach, was at the center of discussion.[373] "(F)ear and anxiety" were "lurking in executive suites all over the U.S."[374] At least with Delaware companies, by virtue of a series of landmark 1985 Delaware Supreme Court decisions, unless the sale of a target company was inevitable board adoption of defensive measures was protected from judicial review by the business judgment rule if the directors showed there were reasonable grounds for believing that there was a danger to corporate policy and effectiveness and the defensive tactic was reasonable in relation to the threat posed.[375] Nevertheless, corporate executives sought legislative assistance, lobbying states to enact measures designed to curb hostile takeovers.[376] This approach yielded substantial dividends following the Supreme Court's 1987 ruling in *CTS Corp. v. Dynamics Corp. of America*.[377] The case correspondingly merits consideration as a possible corporate law critical juncture.

A 1982 Supreme Court decision that struck down an Illinois anti-takeover law discouraged states from enacting statutory measures designed to restrict bids for in-state companies,[378] despite an ongoing flurry of controversial takeover offers.[379] Indiana was an

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373 *Id.* at 162.

374 *More Than Ever, It's Management for the Short Term*, BUS. WK., Nov. 24, 1986, at 92.

375 Cheffins, *supra* note 365, 51-53, discussing Unocal Corp. v. Mesa Petroleum, 493 A.2d 946 (Del. 1985); Moran v. Household International Inc., 500 A.2d 1346 (Del. 1985); Revlon Inc. v. MacAndrew & Forbes Holdings, Inc. 506 A. 2d 173 (Del. 1986). The *Revlon* decision was issued orally November 1, 1985 and in writing March 13, 1986.

376 Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987) (primarily discussing lobbying efforts in Connecticut); *Is Delaware About to Harpoon the Sharks?*, BUS. WK., Jan. 25, 1988, at 34 (discussing lobbying efforts in Delaware); MICHAEL USEEM, EXECUTIVE DEFENSE: SHAREHOLDER POWER AND CORPORATE REORGANIZATION 173-77 (1993).

377 CTS Corp. v. Dynamics Corp. of America, 481 US 69, 72 (1987).

378 Edgar v. MITE Corp. 457 US 624 (1982); USEEM, *supra* note 376, at 171.

379 CHEFFINS, *supra* note 45, at 163-64.

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exception. In 1986, it enacted a law providing that when an entity acquired "control shares" by purchasing a large equity stake in an Indiana-incorporated public company that entity could not vote its shares unless the corporation's pre-existing disinterested shareholders approved.[380]

In *CTS Corp. v. Dynamics Corp. of America* the Supreme Court upheld Indiana's new anti-takeover law.[381] The "change of heart"[382] as compared with the court's 1982 ruling was "a surprise."[383] According to law professor Dale Oesterle, "(i)t appears that no one, nary a lower federal court nor a commentator, was even close to foreseeing the result in the CTS case."[384] States wasted little time accepting the Supreme Court's unexpected *CTS* invitation to promulgate an antitakeover statute that would survive constitutional challenge.[385] Before 1987 drew to a close, 13 had amended or enacted anti-takeover laws, often responding to lobbying from local companies facing takeover threats in so doing.[386] Within two years of the *CTS* ruling, that number had increased to 37.[387] Delaware fell into line in 1988.[388]

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380 CTS Corp. v. Dynamics Corp. of America, 481 US 69, 73 (1987).

381 481 US 69 (1987).

382 Donald Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96, 97 (1987).

383 Alan R. Palmiter, *The CTS Gambit: Stanching the Federalization of Corporate Law*, 69 WASH. UNIV. L.Q. 445, 486 (1991).

384 Dale Oesterle, *Delaware's Takeover Statute: Of Chills, Pills, Standstills and Who Gets Iced*, 13 DEL. J. CORP. L. 879, 933 (1988).

385 Guhan Subramanian, Steven Herscovici & Brian Barbetta, *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988-2008*, 65 BUS. LAW. 685, 694 (2010).

386 Paul M. Barrett, *Delaware Moves Closer to Adopting Law to Deter Hostile Takeovers*, WALL ST. J., Dec. 9, 1987, at 41.

387 USEEM, *supra* note 376, at 171.

388 DEL. CODE ANN. tit. 8, § 203.

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Many felt the new anti-takeover laws "dramatically shifted the balance of power between corporate hunters and their prey."[389] The new measures in fact were not "absolute show-stoppers" with a hostile takeover bid but they did help to bring the Deal Decade to a close.[390] The Delaware case law that afforded incumbent management substantial latitude to fend off unwelcome takeover bids and "a sudden disappearance of money" due to debt markets tightening also contributed to the demise of the Deal Decade.[391]

With respect to takeovers, *CTS Corp. v. Dynamics Corp. of America* plausibly qualifies as a "mini" critical juncture akin to *Smith v. Van Gorkom* with directorial liability.[392] The unanticipated change of direction by the Supreme Court created the structural fluidity that features with critical junctures. Also, the ensuing "epidemic-like" enactment of state anti-takeover legislation fits the critical junctures pattern. Nevertheless, *CTS* was not a critical juncture for corporate law generally. As with the statutory provisions that reduced liability risk for directors in the wake of *Smith v. Van Gorkom*, the anti-takeover measures enacted as the 1980s drew to a close were only one cog in a much larger corporate law wheel. The changes 1930s federal securities law, SOX and Dodd-Frank made, in contrast, took effect across a sufficiently wide range of topics to mean they qualified as fully-fledged corporate law critical junctures.

VII. THE COVID-19 PANDEMIC AS A CRITICAL JUNCTURE

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389 David Rosenthal, *Erecting Bastions Against Buyouts*, BALT. SUN, March 29, 1989, at C1.

390 Mark J. Roe, *Takeover Politics* in THE DEAL DECADE, *supra* note 368, at 321, 339.

391 *See supra* note 375 and accompanying text; Cheffins, *supra* note 365, at 61-63; JOHN WEIR CLOSE, A GIANT COW-TIPPING BY SAVAGES: THE BOOM, BUST AND BOOM CULTURE OF M&A 163 (2013) (on debt markets).

392 *See supra* note 365 and accompanying text.

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Up to this point, we have relied on history to explore the extent to which a critical junctures framework provides insights regarding the evolution of corporate law. We have seen that critical junctures analysis builds productively on previous efforts to explain major changes to corporate law by reference to a "crash-then-law" account and the notion of punctuated equilibrium. In this part of the paper we switch to the present day, drawing on the analysis and evidence Parts IV to VI have canvassed to consider whether the COVID-19 pandemic is likely to provide the catalyst for a corporate law critical juncture.

A. Is it Too Early to use Critical Junctures Analysis to Evaluate COVID-19?

COVID-19, perhaps the biggest news story ever,[393] has been cited as a historical turning point.[394] *USA Today* has said "this global crisis has mushroomed into a national defining moment with as yet untallied cultural and economic repercussions. No one questions whether we will be talking about this for generations. If there is debate, it is over the proper historical comparison."[395] Larry Summers, a Harvard economist, concurs, saying "the coronavirus crisis will still be considered a seminal event generations from now….We are living through not just dramatic events but what may be well be a hinge in history."[396] Legislative reform could be one legacy. The *Economist* suggested in the spring of 2020 as pandemic-driven job losses mounted that the trend "will surely facilitate more change than America's choked political system would otherwise have allowed."[397] Corporate governance

393 *The Biggest Story Ever?*, ECONOMIST, Dec. 19, 2020, at 133.

394 John Gray, *The Crisis is a Turning Point in History*, NEW STATESMAN, Apr. 3, 2020, at 24.

395 Marco della Cava, *Life May Change for Us All*, USA TODAY, March 31, 2020, at A1.

396 Larry Summers, *Coronavirus is a Hinge in History*, FIN. TIMES, May 15, 2020, at 23.

397 *Joe Biden's Good Pandemic*, ECONOMIST, May 23, 2020, at 32.

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changes could be another; it has been predicted "that COVID-19 will have a lasting effect on corporate governance around the world."[398]

Given that critical junctures analysis focuses on turning points[399] and given its academic prominence, it might have been anticipated that the critical junctures framework would have been deployed with some regularity to assess the implications of the COVID-19 pandemic. In fact, there has been little reliance on critical junctures theory thus far.[400] A possible explanation is uncertain predictive capabilities.

The fact that lasting consequences help to define a critical juncture is the primary reason why using a critical junctures framework to look forward is potentially problematic. Collier and Munck said in the 2017 article where they mapped out a methodology for studying critical junctures "(a) key claim in the critical juncture framework is that this major episode of institutional innovation generates an enduring legacy. In short: no legacy, no critical juncture."[401] Correspondingly, they maintained, critical juncture scholars must "focus on factors that yield a self-reinforcing outcome over a longer time horizon."[402] This implies critical junctures analysis is "entirely postdictive", available only to scrutinize "formative moments…retrospectively."[403]

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398 Gelter & Puaschunder, *supra* note 32, at 2; see also at 6 ("COVID-19 may trigger leaps around the world that set the corporate governance trajectory for the long run.")

399 García-Montoya & Mahoney, *supra* note 77, at 2-3 (equating turning points and critical junctures).

400 For exceptions see Twigg, *supra* note 114; Duncan Green, *Covid-19 as a Critical Juncture and the Implications for Advocacy*, GLOBAL POLICY, April 2020, at 1.

401 Collier & Munck, *supra* note 17, at 6.

402 *Id.*

403 Hogan & Doyle, *supra* note 97, at 886 (offering the assessment but disagreeing with it).

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Other critical juncture scholars are prepared to deploy the framework more liberally than Collier and Munck, such as in the midst of a turning point-type of event. Hogan and Doyle maintain a critical junctures model can incorporate a predictive element, thereby broadening the applicability of the critical juncture concept and contributing "to a better understanding of policy change."[404] Taylor Boas suggests similarly that "even without a strong basis for arguing that a definitive legacy has emerged, there are still productive ways of using the critical juncture framework."[405] He argues that critical junctures analysis can be deployed "even before the 'dust had settled'…rather than waiting one or more decades to justify delving into questions of a 'new critical juncture'."[406] Boas suggests it should be possible in the short to medium term "to debate alternative explanations about antecedent conditions and constant causes, and to look for evidence of both reactive and self-reinforcing sequences."[407] Such work, he reasons, "will surely lay the groundwork for subsequent, more conclusive research on critical junctures and their legacies."[408] It is in this spirit that we consider whether we are in the midst of a COVID-19-driven corporate law critical juncture. Corporate governance, after all, appears to be an area where "one way to forecast the future is to analyze the past."[409]

B. Corporate Law Critical Junctures Patterns

To assess whether the COVID-19 pandemic is likely to foster a corporate law critical juncture, it is instructive to recall the insights this paper has provided thus far. The crash-

404 *Id.* at 905.

405 Boas, *supra* note 111, at 20.

406 *Id.*

407 *Id.*

408 *Id.*

409 André Baladi, *Quo Vadis Corporate Governance?*, ISS, 25FOR25: OBSERVATIONS ON THE PAST, PRESENT, AND FUTURE OF CORPORATE GOVERNANCE IN CELEBRATION OF ISS' 25TH ANNIVERSARY 16, 16 (2011).

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then-law account that Stuart Banner and Frank Partnoy advanced nearly a quarter-century ago treated a sharp decline in share prices as the most obvious explanation for the occurrence of substantial reform.[410] This paper's critical juncture-oriented analysis of corporate law tallies with this insight. Part IV indicates that with the introduction of federal securities law in the 1930s and with the enactment of SOX in 2002 and Dodd-Frank in 2010 a harsh bear market acted as a catalyst for regulatory reform substantial enough to mean a corporate law critical juncture was involved. Part VI makes the point that change on the scale of the bear market-driven "big three" critical junctures has been absent at state level, regardless of market conditions.

Why is a substantial stock market downturn so crucial for a full-blown corporate law critical juncture? Due to an amendment process inimical to major, sudden change state law can be set to one side off the bat.[411] At the federal level, in the absence of market turmoil, neither investors nor the public at large have an obvious reason to press for major change. Moreover, incumbent financial and business interests should be sufficiently well-positioned to fend off unwelcome proposals for thoroughgoing reform.[412]

While a substantial bear market may be a necessary condition for a corporate law reform wave it is not a sufficient one. Part V canvassed a series of noteworthy stock market declines that failed to yield a meaningful corporate and securities law legacy. These instances suggest two elements in addition to a sharp drop in stock prices need to be present for there to be a critical junctures-style turning point. First, the downward pressure on stocks will need to endure over a sustained period. A quick rally likely will undercut whatever regulatory momentum the initial market shock might have created. With the introduction of

410 *See supra* notes 42-44, 48 and accompanying text.

411 *See supra* notes 326, 334, 343-45 and accompanying text.

412 *See supra* notes 21, 63 and text following.

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federal securities law, SOX and Dodd-Frank, the pain with each of the bear markets that served as the catalyst for reform was lengthy.

Second, the market turmoil will need to be intertwined with a sense of public outrage arising from perceived corporate misconduct. Under such circumstances, reform becomes thought of as essential to correct the market's faults and discredited vested interests will be deprived of at least some of the political clout that otherwise might thwart reform.[413] The "moment of openness" that paves the way for substantial regulatory change therefore comes into being. The necessary discontent was prevalent in the early 1930s, fuelled by the Pecora hearings, in 2001/02 as a result of corporate scandals (e.g. Enron and WorldCom) and in 2008 due to alleged banker malfeasance.

Part V drew attention to three instances where short-lived bear markets failed to yield a meaningful corporate law reform legacy: 1907, 1917 and 1987. In 1907 and 1987 Wall Street was badly shaken by market turmoil. In both cases, however, the stock market immediately began to recover and lost ground was recovered promptly. The 1917 stock market swoon was cancelled out by a rally that occurred despite the 1918-19 influenza pandemic.

This leaves two stock market crashes unaccounted for, 1920-21 and 1972-74. On both occasions, there was an appreciable delay before the market recovered fully. Indeed, the entire 1970s was dismal. In both cases, though, the crash-related public outrage toward business that appears to be necessary for corporate law critical junctures was absent. The 1920/21 bear market was twinned with a harsh recession where the downturn was associated with the dismantling of the wartime economy, fiscal and monetary retrenchment and

413 *See supra* notes 21, 61-63, 66, 147 and accompanying text.

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declining agricultural prices rather than problematic business behavior.[414] Similarly, with economic woes the United States endured during the 1970s governmental mismanagement and a sharp increase in oil prices overshadowed whatever corporate misfeasance that was occurring.[415]

An alternative way of distinguishing between bear markets as regulatory catalysts that merits consideration is to separate out those where a stock price bubble has "burst" from market downturns where this has not happened. Law professor Stephen Bainbridge subscribes to this logic, as he treats the existence of such a bubble as a pre-condition for substantial regulatory interventions in the corporate realm.[416] The 2008 financial crisis cannot be squared readily with this reasoning, however. While there was a substantial stock price crash in the fall of 2008, no bubble was evident. That summer stock prices were below record levels and markets seemed to be "stable and almost seemed to be neutral."[417]

More generally, emphasizing the policymaking significance of bubbles is problematic because it is difficult, if not impossible, to identify a bubble in real time.[418] For instance, according to Bainbridge's reasoning the absence of a significant regulatory legacy following on from Black Monday in October 1987 implies there was no bursting of a stock market

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414 *See supra* notes 281-82 and accompanying text.

415 *See supra* notes 287, 306 and related discussion.

416 *See supra* note 59.

417 CHEFFINS, *supra* note 45, at 302; FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT 292 (2012) (quoting Morgan Stanley's treasurer). While Professor Bainbridge treats "Dodd Frank as a classic example of a bubble law" in the corporate governance context the only mid-2000s bubble he cites is the housing market. See *supra* note 59, at 1782, 1815, 1819.

418 *How Can You Tell If There's an Economic Bubble?*, NYU DISPATCH, May 14, 2020, https://wp.nyu.edu/dispatch/2020/05/14/how-can-you-tell-if-theres-an-economic-bubble/ ; Michael Mackenzie, *Take a Lesson from History — Beware the Madness of Markets*, FIN. TIMES, Feb. 6, 2021, FT Money, at 6 ("Frustratingly, a bubble only becomes clear in retrospect when it has burst and warnings of excess often arrive on the early side").

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bubble. Various contemporaries, however, suggested that this was exactly what had happened.[419] Hence, while it is clear that not all stock market crashes set the scene for a corporate law critical juncture, a prolonged bear market is a better predictor than a putative stock price bubble.

C. COVID-19

The pattern underlying America's past corporate law critical junctures suggests that a repeat is unlikely with the COVID-19 pandemic. To reiterate, the hallmarks of past critical junctures in this area have been 1) a stock market decline occurring over a sustained period 2) blameworthy business conduct. Both elements thus far are lacking with COVID-19.

In early 2020, a bear market of the sort associated with corporate law critical junctures became a very real possibility. Between February 19 and March 23, the S&P 500 fell nearly 34%, the fastest ever 30+% decline from all-time highs in stock market history.[420] Although the stock market rallied quickly after hitting bottom, increasing 18% in just three days,[421] it still seemed a fraught time for investors. Robert Shiller wrote in the *New York Times* in early April 2020:

> "But the world has never seen an event quite like this before — a new pandemic that is being aggressively throttled by draconian shutdowns of whole industries, and by confining millions of people to their homes. The tools of statistical analysis and

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419 George Melloan, *Fund Managers Were Edgy Long Before Crash*, WALL ST. J., Nov. 10, 1987, at 37 ("The bubble burst, of course, on Oct. 19"); Lindley H. Clark, *Some Thoughts on the Stock Bubble of '87*, WALL ST. J., Dec. 11, 1987, at 24; Bill Barnhart, *"Crash of '87" Brings Home Vulnerability of Markets*, CHI. TRIB., Dec. 30, 1987, at H1 ("the bubble burst Oct. 19").

420 Ben Carlson, *Is the Stock Market Experiencing the Dreaded "Dead Cat Bounce"?*, FORTUNE.COM, May 16, 2020, https://fortune.com/2020/05/16/coronavirus-stock-market-dead-cat-bounce/.

421 *Id.*

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> machine learning, powerful as they are, can't adequately assess what the world is experiencing. There isn't *any* stock market experience that is entirely analogous…."[422]

Despite the COVID-19 related apprehension, the news for investors would soon get better and better. The sharp drop in share prices turned out to be a "'blink and you will miss it' bear market."[423] April 2020 was the best month for the stock market in decades,[424] despite unemployment rates hitting a post-World War II high of 14.7%.[425] As a result, the COVID-19 bear market only lasted 33 days, the shortest on record.[426] Share prices continued to rally even though the U.S. experienced its steepest quarterly drop in economic output on record -- 9.1% -- in the second quarter of 2020.[427] When in 2021 Morningstar issued a revised version of the bear market "pain index" it initially generated in 2020[428] and added the COVID-19 stock market decline to its previous list of seventeen bear markets, it noted that the COVID-19 bear market was by some distance the least painful due to the rapid rebound.[429]

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422 Robert J. Shiller, *Amid the Turmoil, Focus on Common Sense*, N.Y. TIMES, April 5, 2020, Money & Business, at 3.

423 Mackenzie, *supra* note 418.

424 *US Stocks Have Their Best Month Since 1987*, N.Y. TIMES, May 1, 2020.

425 Congressional Research Service, *Unemployment Rates During the COVID-19 Pandemic: In Brief*, Nov. 6, 2020, https://fas.org/sgp/crs/misc/R46554.pdf .

426 Sergei Klebnikov, *Stocks Had Their Best Month In 33 Years, But Here's Why Experts Are Skeptical*, FORBES.COM, May 1, 2020, https://www.forbes.com/sites/sergeiklebnikov/2020/05/01/stocks-had-their-best-month-in-33-years-but-heres-why-experts-are-skeptical/#4788974a49cb.

427 Lauren Bauer, Kristen E. Broady, Wendy Edelberg & Jimmy O'Donnell, *Ten Facts about COVID-19 and the U.S. Economy*, BROOKINGS INSTITUTE, Sept. 17, 2020, https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/ .

428 Kaplan, *supra* note 137.

429 Paul Kaplan, *In Long History of Market Crashes, Coronavirus Crash Was the Shortest*, March 9, 2021, https://www.morningstar.com/articles/1028407/in-long-history-of-market-crashes-coronavirus-crash-was-the-shortest.

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"The most remarkable bull run in financial history"[430] continued throughout 2020. A year after the COVID-19 stock market swoon, there was even talk of a stock market bubble.[431] For present purposes, the key point is that, if history is any guide, the 2020 bear market was reversed far too quickly to act as the catalyst for a corporate law critical juncture.

Even if the COVID-19 stock market turmoil had proved to be more enduring, a corporate law critical juncture was unlikely to ensue. Again, a crash will probably not suffice in isolation. Instead, blameworthy business conduct probably must accompany the falling share prices. That has been lacking with COVID-19, thus far at least.

While perceptions of corporate and financial skulduggery helped to set the scene for the enactment of federal securities legislation in the mid-1930s, SOX and Dodd-Frank, thus far circumstances are much different with the current pandemic. COVID-19, as a natural phenomenon, was an exogenous shock for the corporate sector unrelated to business behavior.[432] As the chief economist at a large bank said as the pandemic first spread globally "(w)hat we're seeing is caused by something external to the economy."[433] Former Rep. Barney Frank, co-sponsor of the Dodd-Frank Act of 2010, made the same point when contrasting COVID-19 with the 2008 financial crisis. He said "This one is scarier to me, because we knew how to handle the other one….The other one was a result of human error

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430 Robin Wigglesworth, *Welcome to the Everything Rally*, FIN. TIMES, Dec. 3, 2020, at 23; Josue Cox, Daniel L. Greenwald & Sydney C. Ludvigson, *What Explains the COVID-19 Stock Market?*, NBER Working Paper 27784 (2020) (offering an empirical analysis of the impact of Federal Reserve announcements on share prices).

431 Matt Phillips, *Bull Market, Or a Bubble In Disguise?*, N.Y. TIMES, March 24, 2021, B1.

432 Gelter & Puaschunder, *supra* note 32, at 8.

433 Li Zhou and Ella Nilsen, *"This One is Scarier": Obama-era Officials Say Current Economic Crisis is Fundamentally Different From 2008*, VOX.COM, March 30, 2020, https://www.vox.com/2020/3/30/21191352/coronavirus-economic-crisis-2008-obama-administration .

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and bad decisions. This is different."[434] Or as a CNBC contributor indicated when engaging in the same exercise, "In 2008, the banks were the source of the problem for financial markets….Banks weren't the culprit in this latest downturn."[435]

While the economic havoc COVID-19 initially wrought could not be blamed on America's corporate sector, problematic business conduct could yet emerge akin to that associated with corporate law critical junctures. For instance, the pandemic could be a catalyst for dubious financial engineering. As the *Economist* has said, "(w)hen economic survival is threatened, the line separating what is acceptable and unacceptable when booking revenues or making market disclosures can be blurred."[436] Executive pay could become another flash point. *Employee Benefit News* said of the pandemic in spring 2020 "as the pain grows for ordinary workers, executive pay — a divisive issue in an age of extraordinary inequality — has come to the fore once again."[437] Given that CEO pay hit record levels in 2020 as many companies adjusted incentive plans in response to COVID-19 in ways that yielded higher executive pay,[438] not surprisingly there is some evidence of dissatisfaction.[439]

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434 *Id.*

435 Osterland, *supra* note 201.

436 *Who's Lost Their Trunks?*, ECONOMIST, April 18, 2020, at 49.

437 Anders Melin, *As CEOs Cut Millions of Jobs, Their Bonuses Get Paid Out*, EBN.COM, May 20, 2020, https://www.benefitnews.com/articles/as-ceos-cut-millions-of-jobs-their-bonuses-get-paid-out .

438 Theo Francis & Kristin Broughton, *CEO Pay Climbs in Year of Vast Upheaval*, WALL ST. J., April 12, 2021, A1.

439 Laura Weiss, Investors Object to CEO Pay in Judgment about Pandemic Response, Roll Call, May 20, 2021, https://www.rollcall.com/2021/05/20/investors-object-to-ceo-pay-in-judgment-on-pandemic-response/ (citing hearings called by Senate Banking Committee chair Sherrod Brown and a tax bill introduced by Senator Bernie Sanders); Joanne Sammer, Executive Pay Growth During the Pandemic Faces Scrutiny, SHRM Newsletter, June 4, 2021, https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/executive-pay-growth-during-the-pandemic-faces-scrutiny.aspx (reporting that say-on-pay vote failures increased from 1.9 percent to 3.3 percent and that pro-management recommendations from Institutional Shareholder Services dropped from 89 percent to 77 percent).

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Still, while the possibility that corporate America will ultimately suffer a reputational black eye due to the COVID-19 pandemic cannot be discounted, as matters stand the culpability that has accompanied previous corporate law critical junctures is absent.

VIII. CONCLUSION

What prompts significant changes in corporate law? The intellectual tools available to engage with this important question are currently rudimentary. Major changes to corporate law have been explained primarily in terms of a "crash-then-law" logic and the related notion of punctuated equilibrium. These analytical approaches do provide insights, as they account plausibly for three key reform episodes – the introduction of federal securities law in the 1930s, the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010. However, the crash-then-law and punctuated equilibrium accounts leave open as many questions as they answer. For instance, can major changes to corporate law occur in short order without a stock market crash? Is a substantial bear market both a necessary and sufficient condition for significant reform? If not all crashes prompt a major legislative overhaul, what kind of crashes are most likely to do so?

This paper has engaged with these important questions. It has done so by drawing upon an analytical framework that has gained a firm intellectual foothold in the social sciences but has yet to make a meaningful mark on legal scholarship, namely critical junctures. We have deployed the critical junctures framework to identify factors likely to yield major changes to corporate law. In so doing, we have extended our investigation beyond the "big three" of 1930s federal securities law, SOX and Dodd-Frank. We have examined the regulatory legacy of other instances of market turmoil, such as the Wall Street panic of 1907, the flu pandemic of 1918-19 and 1987's "Black Monday." We have also taken into account state law, drawing attention to barriers to change that preclude quickly executed multi-themed alterations. We conclude that the federally oriented "big three"

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continue to stand out as the only true corporate law "critical junctures" and that future such episodes are unlikely to occur without a combination of a prolonged stock market slump and public outrage toward business.

The COVID-19 pandemic understandably is preoccupying everyone right now. Correspondingly, while we are aware that prediction is a hazardous game, we have relied on critical junctures analysis to assess whether the pandemic is likely to elicit major regulatory change. We suggest that, as matters stand, the corporate law "big three" will remain the "big three." This exercise in prediction, however, ultimately is a sideshow in a larger project. We have turned to an intellectual framework legal scholars have yet to deploy systematically– critical junctures – to build fruitfully on existing theorizing about corporate law reform. We provide in so doing a historically oriented analysis that can be drawn on productively by those who follow corporate law developments as well as those interested generally in how law evolves.

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