THE PROBLEM OF SUNSETS

JILL FISCH[*] & STEVEN DAVIDOFF SOLOMON[**]

ABSTRACT

An increasing percentage of corporations are going public with dual class stock in which the shares owned by the founders or other corporate insiders have greater voting rights than the shares sold to public investors. Some commentators have criticized the dual class structure as unfair to public investors by reducing the accountability of insiders; others have defended the value of dual class in encouraging innovation by providing founders with insulation from market pressure that enables them to pursue their idiosyncratic vision.

The debate over whether dual class structures increase or decrease corporate value is, to date, unresolved. Empirical studies have failed to provide conclusive evidence as to the effect of dual class structures, and calls for regulators or stock exchanges to adopt prohibitions banning dual class structures outright have been unsuccessful, although several index providers have banned dual class stock from major indexes such as the S&P 500.

As a result, some commentators have advocated a compromise position permitting corporations to go public with dual class structures but requiring that they include mandatory time-based sunset provisions. The sunset provisions would automatically convert the dual class structure to a single share structure after the passage of a pre-determined period of time. The Council of Institutional Investors has asked the New York Stock Exchange and Nasdaq to refuse to list the shares of dual class firms unless they contain a time-based sunset provision that would convert within seven years.

This Article does not take a position on whether dual class structures are value-enhancing, but it does challenge the proposition that time-based sunsets are an appropriate response to the debate over dual class structures and that they should be imposed through regulation or stock exchange rules. To the extent that dual class structures are problematic, sunsets do not solve that problem. Moreover, time-based sunsets are an arbitrary response to the concern that developments such as the decline in a founder's economic interest or the

[*] Saul A. Fox Distinguished Professor of Business Law at the University of Pennsylvania Law School.

[**] Professor of Law at the University of California Berkeley, School of Law.

We thank Ally Nelson for research assistance and participants at workshops at Boston University School of Law and U.C. Berkeley School of Law for their helpful comments. This Article was also presented as the 2019 Davies Business Law Lecture at Osgoode Hall.

transfer of high-vote shares to third parties may reduce the attractiveness of the dual class structure. In addition, time-based sunsets create potential moral hazard problems. Further, because of their problematic incentives, minority shareholders cannot address the limitations of time-based sunsets through a retention vote.

This Article observes that event-based sunsets, which have received less attention, focus on the specific developments that are likely to erode the potential value of dual class structures, and calls for market participants to explore them further through private ordering. Nonetheless, it argues that, at the present time, investors and policymakers lack sufficient information about either dual class or sunsets to justify using regulation, index requirements, or stock exchange rules to force companies into adopting sunsets. Last, it argues that, rather than relying on compulsory sunsets to evade the difficult policy issues raised by dual class, the debate should encompass a more thorough framing of the role and importance of shareholder voting rights.

CONTENTS

INTRODUCTION

The popularity of dual class voting structures in publicly traded companies has increased dramatically in the past few years. Dual class structures provide that all the shares of the issuer's stock have equal economic rights, but that the shares owned by the founders or other corporate insiders have greater voting rights than the shares sold to public investors. While only a handful of companies went public with dual class structures prior to 2010, the percentage of initial public offerings ("IPOs") involving companies with dual class stock has skyrocketed, increasing to 19% of IPOs in 2017.[1] Currently more than 10% of large companies in the S&P 500 index have publicly traded shares with limited voting power.[2]

The rise of dual class stock has spurred controversy and debate.[3] The Council of Institutional Investors ("CII") has broadly endorsed the principle of "one share, one vote."[4] In response to concerns expressed by CII and a number of institutional investors, several major index providers excluded dual class shares from major stock indexes such as the S&P 500.[5] Scholars argue that dual class creates the opportunity for founders to enjoy private benefits and exacerbates managerial agency costs.[6] In his first speech as Securities and Exchange Commission ("SEC") Commissioner, Robert Jackson compared dual class shares to "corporate royalty."[7]

---

[1] COUNCIL OF INSTITUTIONAL INV'RS, DUAL-CLASS IPO SNAPSHOT: 2017-2018 STATISTICS (2018), https://www.cii.org/files/2018Q3%20IPO%20Stats.pdf [https://perma.cc/6XBR-ML64] (noting that out of 124 IPOs, "23, or 19%, had dual class structures with unequal voting rights").

[2] Madison Marriage, *State Street Asks SEC to Block Non-Voting Shares*, FIN. TIMES: FTFM, June 19, 2017, at 1.

[3] *See, e.g.*, John C. Coffee, Jr., *Dual Class Stock: The Shades of Sunset*, CLS BLUE SKY BLOG (Nov. 19, 2018), http://clsbluesky.law.columbia.edu/2018/11/19/dual-class-stock-the-shades-of-sunset/ [https://perma.cc/DG9C-JDPF] (describing academics and practitioners as "polarized" over appropriateness of dual class structures).

[4] *See Dual-Class Stock*, COUNCIL OF INSTITUTIONAL INV'RS, https://www.cii.org/dualclass_stock [https://perma.cc/XRJ4-S6R5] (last visited Apr. 10, 2019) ("CII's policies endorse the principle of 'one share, one vote': every share of a public company's common stock should have equal voting rights.").

[5] *See, e.g.*, Nicole Bullock, *S&P to Ban Entrants with Multiple Share Classes*, FIN. TIMES, Aug. 2, 2017, at 24 (reporting S&P Dow Jones Indices's decision to prevent companies with multiple share classes from joining S&P 500).

[6] *See, e.g.*, Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1051-54 (2010) (finding that dual class companies have higher agency costs and reduced firm value).

[7] Robert J. Jackson, Jr., Comm'r, U.S. Sec. & Exch. Comm'n, Address at Univ. Cal. Berkeley Sch. of Law: Perpetual Dual-Class Stock: The Case Against Corporate Royalty (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty [https://perma.cc/2FXJ-UU9G].

Despite the criticisms, some commentators defend dual class stock, arguing that it is a valuable tool that allows a founder to realize his or her idiosyncratic vision of the company without being subject to the pressure of activists and other investors for short term returns.[8] In addition, dual class structures may increase the willingness of founders to take their companies public, potentially mitigating the decline in the number of public companies and leading companies that would choose not to do so without the availability of a dual class structure to enter the public markets.[9] Limiting the voting rights of transient public investors may enhance productivity, not just in start-ups, but in established companies too. Indeed, outside the United States, regulators and stock exchanges are modifying their rules to facilitate greater use of dual class voting structures.[10]

The debate over whether dual class structures increase or decrease corporate value is, to date, unresolved. The empirical evidence on the effect of dual class stock on economic value is inconclusive.[11] The results of empirical analysis are also subject to fundamental econometric limitations, including pervasive selection effects. In the absence of definitive empirical evidence, theory and policy have dominated the discourse, and a number of proposals to ban or

[8] *See, e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 590 (2016) (arguing that dual class structures enable entrepreneurs to pursue their idiosyncratic visions but expose minority shareholders to substantial agency costs).

[9] *See* Emily Stewart, *SEC Chair Highlights Need for More Public Companies in First Public Speech*, THESTREET (July 13, 2017, 12:20 AM), https://www.thestreet.com/story/14224963/1/sec-chair-highlights-need-for-more-public-companies-in-first-public-speech.html [https://perma.cc/7FDS-H68L] (quoting SEC Chair Jay Clayton as identifying decline in U.S.-listed public companies as "a serious issue for our markets and the country more general[ly]"). As Professor Jack Coffee observes, "practitioners point to recent examples of dual class IPOs, which in 2018 included Dropbox, Inc., GreenSky, Inc., Pivotal Software, Inc., Pluralsight, Inc., and SmartSheet, Inc., to argue that these issuers would have remained outside the public markets if they could not have used a dual class capitalization." Coffee, Jr., *supra* note 3.

[10] Benjamin Robertson, *Hong Kong Adds Dual-Class Shares, Paving Way for Tech Titans*, BLOOMBERG (Apr. 24, 2018, 6:27 AM), https://www.bloomberg.com/news/articles/2018-04-24/hong-kong-approves-dual-class-shares-paving-way-for-tech-titans (highlighting Hong Kong's approval of dual class shares in IPOs which amounts to "biggest change to its initial public offering rules in two decades"); Angela Tan, *SGX Enters New Era as It Starts Dual-Class Shares for Qualifying IPOs*, BUS. TIMES (June 27, 2018, 5:50 AM), https://www.businesstimes.com.sg/stocks/sgx-enters-new-era-as-it-starts-dual-class-shares-for-qualifying-ipos [https://perma.cc/R7LJ-FVHG] (reporting that Singapore Exchange approved first time companies with dual class structures to seek primary listing). We recognize of course, that this may be a response to market pressures and the global competition for listings. *See* Steven M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. REV. 89, 102-14 (2007) (outlining competition among global stock exchanges for different listings).

[11] *See infra* notes 59-64 and accompanying text.

otherwise circumscribe the effects of dual class stock have emerged in the last few years.[12]

The latest policy proposal—so-called "sunset provisions"—offers a compromise position between an outright prohibition of dual class structures and allowing issuers freely to adopt a "perpetual" dual class structure. Sunset provisions provide that, under stipulated circumstances, an issuer's dual class structure automatically converts into a single class structure in which all shares have equal voting power. The inclusion of sunset provisions in the charters of dual class issuers has been defended as a way of balancing the protection of the founder's ability to innovate with the need to minimize agency costs. As CII explains in defense of its support of sunsets: "Since 2016 CII has supported sunset provisions if necessary to achieve alignment over a reasonable period of time."[13] SEC Commissioner Jackson stated that, unless the higher voting rights had a sunset provision, they were "antithetical to our values as Americans."[14] In support of his position that dual class companies should include sunset provisions, Commissioner Jackson reported the results of preliminary empirical analysis showing that the valuations of dual class IPO companies with sunset provisions diverged from and exceeded the valuations of those companies with perpetual dual class stock, beginning two years after the IPO.[15] Similarly, Professors Lucian Bebchuk and Kobi Kastiel present empirical evidence that the adverse effects of dual class stock increase over time and advocate sunset provisions as a response to this problem.[16]

The debate over sunset provisions has focused primarily on time-based sunset provisions that eliminate higher voting rights after a designated period of time—commonly seven to ten years.[17] Time-based sunsets are appealing, in part because they appear to offer a solution to the empirical findings reported by

[12] *See, e.g.*, Inv'r as Owner Subcomm., *Discussion Draft Re: Dual Class and Other Entrenching Governance Structures in Public Companies*, SEC. & EXCH. COMM'N, https://www.sec.gov/spotlight/investor-advisory-committee-2012/discussion-draft-dual-class-recommendation-iac-120717.pdf [https://perma.cc/TSE4-8H9D] (last visited Apr. 10 2019) (noting "unique" risks posed by dual class structures).

[13] *Dual-Class Stock*, *supra* note 4.

[14] Jackson, Jr., *supra* note 7.

[15] *Id.* ("Seven or more years out from their IPOs, firms with perpetual dual-class stock trade at a significant discount to those with sunset provisions.").

[16] Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 631 (2017).

[17] *See, e.g.*, Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 COLUM. BUS. L. REV. 852, 870 (describing time-based sunsets as "presumably what most institutional investors and proxy advisors are referring to when they insist that dual-class companies must adopt reasonable sunset provisions").

Commissioner Jackson and Professors Bebchuk and Kastiel that the potential advantages of a dual class structure decline over time.[18]

This Article questions whether the current focus on sunset provisions is warranted. If dual class is a valuable tool for early stage corporate growth in some companies, it is unclear how a bright-line time limit that does not reflect company-specific needs makes sense. More generally, much of the discourse around sunset provisions is really about dual class stock itself and whether it is desirable. Time-based sunsets are better understood as a "split the baby" approach[19] to the controversy over whether policymakers should permit dual class structures in public companies. We believe however that, as with many other debates over good corporate governance, a one-size-fits-all approach is overly simplistic. Dual class stock may be desirable for some companies but not others, and the continued value of dual class structures is likely to depend on company-specific factors that vary subsequent to the IPO. The debate about sunset provisions should therefore focus on these factors.

In this light, a sunset provision can perhaps better be understood as an insurance policy against a founder whose idiosyncratic vision turns out, in hindsight, to be flawed. But a tool that facilitates the displacement of that founder after seven to ten years—an eternity in the life of an innovative new-economy company—seems an inapposite and potentially costly mechanism. As explained here, an arbitrary time limit that is predetermined at the IPO stage is a noisy proxy for assessing the desirability of retaining the dual class structure. Rather, we identify several particular issuer-specific developments that potentially erode the desirability of dual class. The most important of these developments are substantial dilution of the founder's stake; transfer of high voting stock to a non-founder; and death, incapacitation, or departure of the founder. Obviously, the passage of time increases the potential for these developments but, as argued here, it is these developments, and not time alone, that are critical for the continued effectiveness of dual class. To the extent sunset provisions are warranted, they should incorporate these developments, and any regulatory effort should be similarly focused.

This Article further challenges the claim that the potential downside of mandatory time-based sunsets can be remedied by enabling shareholders to vote to extend the dual class structure beyond the sunset deadline.[20] Although in

[18] *See, e.g.*, Bebchuk & Kastiel, *supra* note 16, at 630 ("[C]ontrollers have perverse incentives to retain dual-class structures even when those structures become substantially inefficient.").

[19] Splitting the baby refers to the Biblical telling of the Judgement of King Solomon. 1 *Kings* 3:16-28.

[20] *See, e.g.*, Letter from Ash Williams, Chair, Council of Institutional Inv'rs, Ken Bertsch, Exec. Dir., Council of Institutional Inv'rs, & Jeff Mahoney, Gen. Counsel, Council of Institutional Inv'rs, to Elizabeth King, Chief Regulatory Officer, Intercontinental Exch. Inc. 5 (Oct. 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf [https://perm

theory shareholders should vote to retain dual class structures in situations in which enhanced founder control is value-enhancing, this Article questions whether the institutional investors who would control such a voting decision would have the appropriate incentives to vote to retain the dual class structure. It similarly highlights the perverse incentives that a time-based sunset creates for those who hold high vote stock.

This Article attempts to reorder the debate over dual class stock, positing that dual class stock responds to the evolving reality of capital market structure in the United States and the world. In certain circumstances, dual class stock may be appropriate for certain companies, particularly at the IPO stage, but in others it is not. As the private capital markets have expanded, new companies are no longer compelled to seek capital from public investors. The reduced market power of public investors requires them, in some cases, to accept a diminished voice in exchange for a broader range of investment opportunities. Sunsets reflect our discomfort with this shift in the balance of power, but it is unclear that, given the current ownership structure of public companies,[21] sunsets are the right tool to address dual class concerns. Instead, we should better frame what is at stake in the debate over voting rights.

I. Background

A. *Dual Class and Its Variants*

Dual class stock refers to a capital structure in which shares of an issuer's common stock with equal economic rights differ with respect to their relative voting power. The common stock[22] in a dual class company is divided into two or more classes, in which the shares with more voting power are typically described as high vote stock, and the shares with less voting power are described as low vote stock. The precise ratio of voting power varies, but it is common for high vote shares to have ten times the voting power of low vote shares.[23] Some

a.cc/5TCV-FY7M] (proposing that issuers with dual class structure be required to have a mandatory sunset provision of seven years or less, but that issuers be permitted to allow shareholders to vote to retain dual class structure).

[21] *See* Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *Passive Investors* 17 (European Corp. Governance Inst., Research Paper No. 414, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192069 [https://perma.cc/7DAT-GCZX] (identifying increasingly concentrated ownership of public companies by passive investors and potential consequences of this concentration).

[22] Dual class common stock is a different capital structure than having both preferred and common stock. Common stock has different economic rights from preferred stock, as well as different voting rights. Preferred stockholders typically have reduced or nonexistent voting rights and instead have greater rights with respect to dividend payments or liquidation preferences.

[23] *Dual-Class Stock*, *supra* at note 4 ("The ratio most frequently employed is 10 votes per superior share to one vote per inferior share.").

issuers may have a third class of stock with no voting rights at all.[24] Due to stock exchange restrictions, dual class structures must be implemented at the IPO stage and midstream adoptions are prohibited.[25]

Founders or other early stage investors use dual class stock to retain control of the firm. At the time of the IPO, the founders or other early stage investors retain high vote shares, and the low vote shares are issued to public investors.[26] The key advantage offered by the dual class structure is that it enables those who own the high vote shares to divest a substantial portion of their economic stake without losing voting control. Dual class stock thus cements control of the firm with a core group of investors for an extended, and historically an indeterminate period of time.

B. *The Rise of Dual Class*

The modern use of dual class stock dates back to 1976. In that year, Wang Laboratories listed using dual class on the American Stock Exchange ("AMEX").[27] The listing was controversial, and at the time barred by the New York Stock Exchange ("NYSE").[28] AMEX allowed the listing, but only under

---

[24] *See* Ken Bertsch, Council of Institutional Inv'rs, *Snap and the Rise of No-Vote Common Shares*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 26, 2017), https://corpgov.law.harvard.edu/2017/05/26/snap-and-the-rise-of-no-vote-common-shares/ [https://perma.cc/P6Q4-QKTJ] ("With NYSE-listed Snap's arrival with 'zero' rights for public shareholders, perhaps the bottom has been reached."); Eric Jhonsa, *Zillow Plans To Issue Non-Voting Class C Shares*, SEEKING ALPHA (July 21, 2015, 9:54 PM), https://seekingalpha.com/news/2643935-zillow-plans-to-issue-non-voting-class-c-shares [https://perma.cc/W9E5-N82F] (reporting that Zillow created "Class C shares that carry no voting rights"); Floyd Norris, *The Many Classes of Google Stock*, N.Y. TIMES: ECONOMIX (Apr. 2, 2014, 6:03 PM), https://economix.blogs.nytimes.com/2014/04/02/the-many-classes-of-google-stock/ [https://perma.cc/5PTX-TEU6] (describing issuance of Class C shares in Google that have no voting rights).

[25] *See* Michael A. Hiltzik, *NYSE Decides to End Its One-Share, One-Vote Standard*, L.A. TIMES, July 4, 1986, at BUS1.

[26] Although dual class can be used in private companies, venture capital ("VC")-funded issuers are more likely to use capital structures in which different classes of securities have varying economic rights. It does appear, however, that some VC-funded companies are adopting dual class structures prior to the IPO. *See, e.g.*, Julia Boorstin, *Facebook's New Dual Class Structure - Slow Steps to an IPO*, CNBC (Mar. 18, 2010, 12:19 AM), https://www.cnbc.com/id/34134917 [https://perma.cc/7H77-T53N] (citing Facebook and Google's adoption of dual class structures prior to their IPOs). In addition, some significant private companies have eliminated dual class structures—Uber is the most notable example. *See* Mike Issac, *Uber Shareholders Including Kalanick Loosen Grip With Sales of Stock*, N.Y. TIMES, Jan 15, 2018, at B2 (explaining Uber's plan to eliminate its "super voting shares").

[27] Winden, *supra* note 17, at 864-65.

[28] Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 699 (1986) (reporting that NYSE banned dual class stocks entirely in 1940); Winden, *supra* note 17, at 864 (noting that NYSE generally prohibited dual class structures from mid-1920s until mid-1980s).

terms designed to ameliorate the impact of the high vote stock.[29] These terms included a requirement that the low vote holders be permitted to elect 25% of the company's directors to the board.[30] The Wang Laboratories IPO triggered a spate of dual class listings at the IPO stage that continued until the 2000s.[31]

In 1986, in response to an effort by General Motors to retain a dual class structure—a structure that was then-barred under the listing requirements of the NYSE—in connection with its acquisitions of Electronic Data Systems and Hughes Aircraft, the NYSE voted to eliminate a sixty-year old rule that imposed a one-share/one-vote standard on all listed companies.[32] The NYSE rule change required SEC approval and, in 1988, rather than approving the proposed rule change, the SEC adopted Rule 19c-4 which, for the most part, prohibited the creation of dual class voting structures.[33] The Court of Appeals for the D.C. Circuit struck down the rule as beyond the scope of the SEC's rulemaking authority.[34]

In the wake of the court's decision, the stock exchanges adopted rules that allowed dual class stock, but only if it was issued at the IPO stage.[35] For a number of years following these rule changes, use of dual class structures was limited to "businesses, media companies seeking to ensure their publications could maintain journalistic editorial independence, or other companies led by a strong group of insiders."[36]

---

[29] *Id.* (explaining that these terms became known as "the Wang Formula").

[30] *Id.*

[31] *Id.* at 865 ("At least twenty-two other companies followed the Wang formula with initial public offerings on the AMEX and seven more recapitalized into dual-class structures according to the Wang formula.").

[32] Hiltzik, *supra* note 25 (reporting that NYSE rule change was intended to allow NYSE to compete with exchanges with more relaxed rules).

[33] Voting Rights Listing Standards; Disenfranchisement Rule, 17 C.F.R. § 240.19c-4 (1990). The rule contained variations exemptions and did not apply to existing issues. *See* Robert D. Hershey, Jr., *U.S. Court Overturns S.E.C. Rule*, N.Y. TIMES, June 13, 1990, at D1 (describing SEC's response to General Motors's request).

[34] Bus. Roundtable v. Sec. Exch. Comm'n, 905 F.2d 406, 409-16 (D.C. Cir. 1990). *See generally* Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, 69 WASH. U. L. REV. 565 (1991); Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CAL. L. REV. 1, 69-75 (1988).

[35] *See* Proposed Rule Changes by NYSE, AMEX and National Association of Security Dealers, Inc., Relating to the Exchanges' and Association's Rules Regarding Shareholder Voting Rights, 59 Fed. Reg. 42,614 (Aug. 11, 1994). Technically, the rule prohibits mid-stream issuances that have the effect of reducing the voting rights of existing shareholders.

[36] David J. Berger & Laurie Simon Hodrick, *Are Dual-Class Companies Harmful to Stockholders? A Preliminary Review of the Evidence*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 15, 2018), https://corpgov.law.harvard.edu/2018/04/15/are-dual-class-companies-harmful-to-stockholders-a-preliminary-review-of-the-evidence/ [https://perma.cc/R59V-8PLH].

The recent boom in dual class stock began with the 2004 IPO of Google. Google went public using a high vote (ten votes to one) common share option designed to preserve control with the founders Sergey Brin and Larry Paige.[37] The rationale provided at the time was spelled out in a letter to shareholders. Brin and Paige wrote that:

> In the transition to public ownership, we have set up a corporate structure that will make it harder for outside parties to take over or influence Google. This structure will also make it easier for our management team to follow the long term, innovative approach . . . .
>
> . . . .
>
> Google has prospered as a private company. We believe a dual class voting structure will enable Google, as a public company, to retain many of the positive aspects of being private.[38]

The Google founders specifically noted that dual class stock was rarely used in technology companies at the time.[39] But Google opened the floodgates, and thereafter, dual class stock has become a norm for technology companies.[40]

[37] Google Inc., Registration Statement (Amend. No. 9 to Form S-1), at 1 (Aug. 18, 2004).

[38] *Id.* at 29-30.

[39] *See id.* at 30.

[40] *See* Berger & Hodrick, *supra* note 36 ("Since 2010, there have been an increasing number of technology companies going public with dual-class (or multi-class) share structures.").

Figure 1. Number of Dual Class Listings as a Percentage of U.S. IPOs (five year moving average).[41]

Facebook, Linkedin, and Snap have all undertaken IPOs with dual class listings.[42] And, so far in early 2019, IPOs of technology companies Lyft, Pinterest and Zoom have gone public with dual class stock.[43] In all, about half of dual class share listings since the Google IPO are of technology companies.[44] Indeed, so common is dual class stock that when Twitter went public without it,

[41] Figure 1 sets forth figures compiled by Professor Jay Ritter on the rise of dual class stock in IPOs. Inv'r as Owner Subcomm., *supra* note 12, at 1 (citing Jay R. Ritter, *IPOs from 1980 – 2016 with Multiple Share Classes Outstanding*, WARRINGTON C. BUS., https://site.warrington.ufl.edu/ritter/files/2017/01/IPOs-from-1980-2016-with-Multiple-Share-Classes-Outstanding.pdf [https://perma.cc/9QWB-Y2F9] (last visited Apr. 10, 2019)).

[42] Benjamin Robertson & Andrea Tan, *Dual Class Shares: Second-Class Investors?*, BLOOMBERG (Jan. 14, 2019, 9:25 PM), https://www.bloomberg.com/quicktake/dual-class-shares (noting that Facebook, LinkedIn, and Snap, among others, have all gone public with dual class structures).

[43] *See* Rani Molla, *More Tech Companies Are Selling Stock That Keeps Their Founders in Power*, RECODE (Apr. 11, 2019, 10:14 AM), https://www.recode.net/2019/4/11/18302102/ipo-voting-multi-dual-stock-lyft-pinterest.

[44] Steven Davidoff Solomon, *Shareholders Vote with Their Dollars to Have Less of a Say*, N.Y. TIMES: DEALBOOK (Nov. 4, 2015), https://www.nytimes.com/2015/11/05/business/dealbook/shareholders-vote-with-their-dollars-to-have-less-of-a-say.html ("More than 13.5 percent of the 133 companies listing shares on United States exchanges in 2015 have set up a dual-class structure . . . . About half the companies choosing the structure were in the technology industry.").

a front page news article in the business section of the *New York Times* explicitly highlighted it.[45] More recently, CII reports that, in 2017, 19% of IPO companies had dual class structures.[46] Dual class structures are also common outside the United States.[47]

The reasons postulated for the increasing use of dual class stock vary. They include protection of the founder's vision from divergent, less capable interests; simple entrenchment;[48] the need for technology companies to respond to greater information asymmetries;[49] and the desire to stem short-termist interests in the capital markets.[50] While the reasons vary, they are often summarized as the Google founders did—as a tool to insulate the founder and the board from people (i.e., investors) who will question, critique, or impede the founder's vision.[51] Dual class is most commonly defended as providing thick insulation of the company from outside, perhaps value-destructive, interests.

Whatever the reason, today dual class structures are not just the purview of technology companies. The media industry has long utilized a dual class structure to protect themselves from investors who might limit their journalistic integrity.[52] And as dual class has become more common, it has been utilized by clothing manufacturers, grocery stores, hamburger chains, and various other

---

[45] Steven Davidoff Solomon, *In Twitter's I.P.O. Filing, Signs of a Start-Up That Has Matured*, N.Y. TIMES: DEALBOOK (Oct. 8, 2013, 4:33 PM), https://dealbook.nytimes.com/2013/10/08/in-twitters-i-p-o-filing-signs-of-a-start-up-that-has-matured/ ("Twitter surprised many by electing to maintain a more traditional corporate governance structure, spurning the dual-class shares that are in favor with technology companies because they give the founders control of the company.").

[46] COUNCIL OF INSTITUTIONAL INV'RS, *supra* note 1, at 1.

[47] *See, e.g.*, Renée Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 REV. FIN. 51, 55 (2008) ("Multiple-voting shares are common in Sweden (59%), France (58%) and the Netherlands (41%) . . . ."); Anita Anand, *Governance Complexities in Firms with Dual Class Shares*, 3 ANNALS OF CORP. GOVERNANCE 184, 190 (2018) ("In Canada, the list of DCS firms includes icons of the Canadian corporate establishment: Bombardier, Power Corp., Rogers Communications, Onex and Canadian Tire.").

[48] *See, e.g.*, Winden, *supra* note 17, at 903 (identifying potential of dual class structures to "entrench the entrepreneur in control of the company").

[49] *Id.* at 890, 891 n.103 (observing that "entrepreneurs naturally have information about their businesses that they are not able to make public for competitive reasons").

[50] Warren E. Buffett, *Chairman's Letter*, BERKSHIRE HATHAWAY INC. (Feb. 28, 1997), http://www.berkshirehathaway.com/letters/1996.html [https://perma.cc/VC9D-TTN2] (explaining that creation of Class B stock was to prevent "a speculative bubble in [Berkshire Hathaway] stock").

[51] *See* Larry Page & Sergey Brin, *2004 Founders' IPO Letter*, ALPHABET (2004), https://abc.xyz/investor/founders-letters/2004/ipo-letter.html [https://perma.cc/LK3W-A8VN] ("We have implemented a corporate structure that is designed to protect Google's ability to innovate and retain its most distinctive characteristics.").

[52] *See, e.g.*, Ava Seave, *45 Media Companies Where Investors Are Flying Second Class*, FORBES (Oct. 21, 2013, 5:02 AM), https://www.forbes.com/sites/avaseave/2013/10/21/45-media-companies-where-investors-are-flying-second-class/ [https://perma.cc/6AQ9-3U6L].

companies across industries.[53] Figure 1 shows that from 2005 to 2015, the number of IPOs employing dual class stock rose by 44%. Dual class has also spread to other countries. A 2017 study found that 24% of companies in a sample involving sixteen European countries had a dual class structure.[54]

C. *The Debate over Dual Class*

The widespread use of dual class stock in a variety of different industries has sparked a furious debate over its efficacy. This debate has been carried out both in academia and public forums and has been shaped by a developing, yet to date inconclusive, body of empirical evidence.[55]

1. Empirical Evidence

As an initial matter, some academics have argued that the IPO market offers a sufficient constraint on the inefficient use of the dual class structure. Under a traditional law and economics analysis, rational investors will take into account the potential costs and benefits of dual class at the time of the IPO.[56] In this scenario, investors will pay less for the stock at the time of the IPO if they deem dual class harmful. Alternatively, if they view it as beneficial they will pay more. In either case, because dual class stock is "priced," policy prescriptions are unneeded. And while companies may change situations over time, in a diversified market some will do better than others, meaning shareholders will earn a market return. Indeed, if market participants effectively price the potential costs associated with dual class at the IPO stage, dual class stock should be impervious to empirical analysis.

This argument assumes that markets are efficient at the IPO stage in pricing dual class stock, an assumption that is controversial. An extensive literature argues that the IPO market is not efficient in pricing governance terms.[57] Moreover, this argument ignores any externalized effects of dual class stock. For

---

[53] COUNCIL OF INSTITUTIONAL INV'RS, DUAL CLASS COMPANIES LIST (2018), https://www.cii.org/files/Board%20Accountability/Dual%20Class%20Company%20List%202018.pdf [https://perma.cc/LGF4-5FKW].

[54] SHEARMAN & STERLING LLP, INSTITUTIONAL S'HOLDER SERVS. & EUROPEAN CORP. GOVERNANCE INST., REPORT ON THE PROPORTIONALITY PRINCIPLE IN THE EUROPEAN UNION 15, 26-27 (2007). *See generally* Morten Bennedsen & Kasper Meisner Nielsen, *Incentive and Entrenchment Effects in European Ownership*, 34 J. BANKING & FIN. 2212 (2010).

[55] *See, e.g.*, Goshen & Hamdani, *supra* note 8 (discussing tradeoff between minority protection and controller rights in adopting concentrated ownership structures).

[56] *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 17-19 (1991) (claiming that terms in corporate governance "are fully priced in transactions among the interested parties").

[57] *See, e.g.*, Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 J.L. ECON. & ORG. 83, 86-113 (2001) (questioning efficiency of IPO market in pricing governance terms); Fisch, Hamdani & Davidoff Solomon, *supra* note 21, at 42-43 (identifying limitations of IPO market in pricing governance terms).

example, the chaos at Viacom over control of the company harmed employees, suppliers, and other non-shareholder constituents.[58] Even if the IPO market were efficient, this harm would go unpriced.

The uncertain theoretical basis for valuing dual class stock is matched by unclear evidence on the effect of dual class on value.[59] A number of studies of dual class firms in the era prior to Google found that dual class stock was value-decreasing.[60] These studies relied on basic agency theory as articulated by Professors Adolf Berle and Gardiner Means concerning the separation of ownership and control[61] and the theoretical motivation of a controller to take advantage of its differential voting and economic position to extract private benefits.[62] Numerous studies outside the dual class context provide further theoretical justification that firm value and stock market returns decrease as the divergence between voting and cash flow rights increases.[63] Notably, however, these studies focused primarily on family-owned and media companies, which are very different from the technology companies that have adopted dual class structures more recently.[64]

[58] *See, e.g.*, Anthony Noto, *Viacom Continues to Cut Costs, Lays Off Employees*, N.Y. BUS. J. (Feb. 6, 2018, 4:04 PM), https://www.bizjournals.com/newyork/news/2018/02/06/viacom-continues-to-cut-costs-lays-off-employees.html (reporting that Viacom laid off 1% of its total staff).

[59] *See generally* Anand, *supra* note 47, at 203-07 (summarizing empirical literature on effects of dual class structures).

[60] *See, e.g.*, Henry DeAngelo & Linda DeAngelo, *Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock*, 14 J. FIN. ECON. 33 (1985); Ronald C. Lease, John J. McConnell & Wayne H. Mikkelson, *The Market of Control in Publicly-Traded Corporations*, 11 J. FIN. ECON. 439 (1983); Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. FIN. ECON. 325 (2003); Luigi Zingales, *Insider Ownership and the Decision to Go Public*, 62 REV. ECON. STUD. 425 (1995).

[61] *See generally* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[62] *See, e.g.*, Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537, 540 (2004) ("The use of a company's money to pay for perquisites is the most visible but not the most important way in which corporate resources can be used to the sole (or main) advantage of the controlling party.").

[63] *See, e.g.*, Gompers, Ishii & Metrick, *supra* note 6, at 1084 (finding that firm value is "negatively associated with the wedge between [insiders' cash-flow rights and voting rights]"); Michael L. Lemmon & Karl V. Lins, *Ownership Structure, Corporate Governance, and Firm Value: Evidence from the East Asian Financial Crisis*, 53 J. FIN. 1445, 1447 (2003) (finding lower stock returns in firm in which managers have "separated their control and cash flow ownership"); Karl V. Lins, *Equity Ownership and Firm Value in Emerging Markets*, 38 J. FIN. & QUANTITATIVE ANALYSIS 159, 181 (2003) (finding lower firm values "[w]hen managers have control rights that exceed their proportional ownership").

[64] Google Inc., *supra* note 37, at 30 ("[S]imilar [dual class] structures are common in the media business and has had a profound importance there. The New York Times Company,

Another conflicting strand of research has identified potential value-increasing attributes to the dual class structure.[65] This literature attributes value to dual class in certain circumstances, including when there is information asymmetry between shareholders[66] or shareholders with a short term focus.[67] Others have found that dual class allows firms to cement long term relationships with other constituencies and to make long-term investments.[68] David Berger, a prominent litigator at the Silicon Valley law firm Wilson Sonsini Goodrich & Rosati, defended the increasing use of dual class stock stating that "it really was developed to respond to the changing nature of our corporate republic."[69] Other academics have also supported dual class structures. Professor Dorothy Shapiro Lund argues that no-vote shares can "lessen agency and transaction costs" by reducing inefficiencies.[70] Many shareholders do not exercise their voting rights, so Lund argues that allowing "rationally apathetic investors" to sell their voting rights would distribute voting rights more optimally.[71] Professor Bernard Sharfman also argues that dual class shares allow private ordering to increase value through bargaining.[72]

Empirical research has documented that, at least in the early years following an IPO, dual class firms may outperform firms with a single class of stock.

the Washington Post Company and Dow Jones, the publisher of *The Wall Street Journal*, all have similar dual class ownership structures.").

[65] *See* Lucian Arye Bebchuk, *Why Firms Adopt Antitakeover Arrangements*, 152 U. PA. L. REV. 713, 714-17 (2003) (identifying theories as to how dual class structures may increase firm value).

[66] Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 783 (1972).

[67] Jeremy C. Stein, *Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior*, 104 Q.J. ECON. 655, 661-65 (1989); Jeremy C. Stein, *Takeover Threats and Managerial Myopia*, 96 J. POL. ECON. 61, 61-64 (1988).

[68] DeAngelo & DeAngelo, *supra* note 60, at 35 (suggesting that reduced exposure to competition may encourage investments in innovation); Jean-Jacques Laffont & Jean Tirole, *Repeated Auctions of Incentive Contracts, Investment and Bidding Parity, with an Application to Takeovers*, 19 RAND J. ECON. 516, 530-31 (1988) (identifying potential efficiency justifications for defensive tactics, including dual class structures); *cf.* Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33, 40-41 (Alan J. Auerbach ed., 1988) (noting that incumbent managers are successful because they build relationships of trust with stakeholders).

[69] David Berger, Wilson Sonsini Goodrich & Rosati, *Why Dual-Class Stock: A Brief Response to Commissioners Jackson and Stein*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 22, 2018), https://corpgov.law.harvard.edu/2018/02/22/why-dual-class-stock-a-brief-response-to-commissioners-jackson-and-stein/#1 [https://perma.cc/ZKY5-43GU].

[70] Dorothy Shapiro Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. (forthcoming 2019) (manuscript at 4) (emphasis omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028173 [https://perma.cc/8HMK-7LY8].

[71] *Id.* (manuscript at 5-6).

[72] Bernard S. Sharfman, *A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs*, 63 VILL. L. REV. 1, 7 (2018).

Professors Martijn Cremers, Beni Lauterbach, and Anete Pajuste, for example, find that dual class firms outperform their single class counterparts for seven to eight years after an IPO.[73] Professors Lindsay Baran, Arno Forst, and Tony Via find that insider control at multi-class firms has a positive effect on innovation, at least in the early years following an IPO.[74] Similarly, Professors Hyunseob Kim and Roni Michaely find that firms with multi-class structures outperform single class firms for eleven years following the IPO.[75] Most recently, an MSCI study found that issuers with unequal voting rights outperformed the market over a ten year period.[76]

These studies are not only conflicting but in many cases suffer from econometric limitations. The primary issue with finance studies of dual class stock is selection effects—namely that the companies that select into dual class structures differ in important ways from companies that adopt single class structures.[77] More specifically, companies with value decreasing corporate governance or those otherwise prone to poor performance may select into dual class structures in order to insulate the board and executives from their poor performance. If this is the case, dual class stock is merely a symptom of poor governance or performance and not itself value reducing. And companies are able to implement these structures at the IPO stage due to inefficiencies in the IPO process itself. Relatedly, companies with strong governance and value creation mechanisms may prefer this structure in order to cement ties with other constituencies and truly plan for the long term. In either case, no finance study has to date adequately disentangled these effects and addressed this selection issue.

---

[73] Martijn Cremers, Beni Lauterbach & Anete Pajuste, *The Life-Cycle of Dual Class Firms* 1, 27 (European Corp. Governance Inst., Finance Working Paper No. 550, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062895 [https://perma.cc/PMD9-ZHLL].

[74] Lindsay Baran, Arno Forst & M. Tony Via, Dual Class Share Structure and Innovation 4 (Dec. 21, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183517 [https://perma.cc/A5Q4-ZQB7] (finding that "[d]ual class structures enhance firms' innovative outputs").

[75] Hyunseob Kim & Roni Michaely, *Sticking Around Too Long? Dynamics of the Benefits of Dual Class Structures* 19 (European Corp. Governance Inst., Finance Working Paper No. 590, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3145209 [https://perma.cc/XHD4-4KBL].

[76] Dimitris Melas, *Putting the Spotlight on Spotify: Why Have Stocks with Unequal Voting Rights Outperformed?*, MSCI (Apr. 3, 2018), https://www.msci.com/www/blog-posts/putting-the-spotlight-on/0898078592 [https://perma.cc/WMF6-A2LQ] (reporting research showing that "unequal voting stocks in aggregate outperformed the market over the period from November 2007 to August 2017, and that excluding them from market indexes would have reduced the indexes' total returns by approximately 30 basis points per year over our sample period").

[77] *See, e.g.*, Cremers, Lauterbach & Pajuste, *supra* note 73, at 31-32 (discussing problem of selection effects in study of dual class firms).

A second issue is time. Companies with dual class stock may have life spans as long as public firms. Dual class stock may create value in the early years when the company is implementing its long-term agenda. However, dual class companies may suffer in later years as the founders become distracted or future generations take control of the company. A recent example is Viacom, where the controller, Sumner Redstone, refused to give up control of the company despite being incapacitated and unable to speak.[78]

In their paper, Cremers, Lauterbach, and Pajuste analyze this issue. The authors find that in a sample of dual class firms matched with a single class sample from 1980-2015, dual class firms on average have a higher valuation at the IPO stage than single class firms, a premium which disappears over time.[79] These findings generally align with another study of the matter by Professors Kim and Michaely, who also find that, in the early years, dual class firms have higher valuations but in later years are less agile and dynamic.[80]

These studies address the time issue, but they too suffer from econometric issues. More specifically, in both studies the authors rely on matched pair analysis to address selection effects. In a matched pair analysis, a dual class company is matched with a similar non-dual class company to compare performance.[81] This yields a sample of comparable firms that can then be compared on an average basis. This is an accepted technique in econometrics,[82] however the quality and scope of the match always creates uncertainty. In the case of the Cremers and Kim papers we simply do not know the quality and fit of the match, particularly due to the selection issue. In addition, most studies of time-based effects focus on firms prior to the Google IPO, out of necessity. The Google IPO, however, changed the mix and character of dual class stock. Post-Google, dual class became more wide-spread in growth companies in the technology industry but also in other industries.[83] Yet, most of the growth in dual class companies has occurred in the last several years, making the long term effect of these structures impossible to evaluate empirically.[84] For example, the

[78] Bebchuk & Kastiel, *supra* note 16, at 587-88 (discussing that ninety-three year old Redstone refused to give up control despite "profound physical and mental illness").

[79] Cremers, Lauterbach & Pajuste, *supra* note 73, at 5.

[80] Kim & Michaely, *supra* note 75, at 19. Both this study and that of Cremers, Lauterbach and Pajuste use matched-pair analysis to attempt to address selection effects.

[81] Cremers, Lauterbach & Pajuste, *supra* note 73, at 15-16 (describing matching of dual class and single class firms based on IPO year and "several key characteristics").

[82] *See generally* Elizabeth A. Stuart, *Matching Methods for Causal Inference: A Review and a Look Forward*, 25 STAT. SCI. 1 (2010) (providing overview of matching methodologies in empirical research).

[83] *See supra* notes 37-46 and accompanying text.

[84] *See, e.g.*, Rob Kalb & Rob Yates, Institutional S'holder Servs., Inc., *Snap, Inc. Reportedly to IPO with Unprecedented Non-Voting Shares for Public*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 7, 2017), https://corpgov.law.harvard.edu/2017/02/07/snap-inc-reportedly-to-ipo-with-unprecedented-non-voting-shares-for-public/

Kim and Michaely study finds a turning point in the value of multi-class structures eleven years after the IPO,[85] but the vast majority of technology companies with dual class structures went public less than eleven years ago. Even if the econometric issues could be addressed, the use of dual class among modern companies and its widespread growth have yet to be fully examined.

2. The Policy Debate

The uncertain empirical evidence has fueled an increasingly heated policy debate over the use of dual class stock. As previously noted, Commissioner Jackson called out dual class stock for perpetuating "corporate royalty."[86] Similarly, SEC Commissioner Kara Stein stated that these structures are "inherently undemocratic, disconnecting the interests of a company's controlling shareholders from its other shareholders."[87]

Commissioner Jackson's arguments against dual class stock reflect a policy debate within stock markets. Shareholder-rights advocates such as CII have led the charge against dual class stock, asserting that stock with differential voting should be barred and "every share of a public company's common stock should have equal voting rights."[88] The proxy advisory services, such as Institutional Shareholder Services ("ISS"), have also denounced dual class stock.[89] These organizations have been joined by BlackRock, State Street Corporation, and T. Rowe Price in calling for the elimination of stock with unequal voting rights.[90]

[https://perma.cc/464F-V8DV] (documenting fact that twenty Russell 3000 companies with dual class structure held their first annual meeting in 2016, as opposed to only ten in 2015).

[85] Kim & Michaely, *supra* note 75, at 18.

[86] Jackson, Jr., *supra* note 7.

[87] Kara M. Stein., Comm'r, Sec. & Exch. Comm'n, Remarks at Stanford University: Mutualism: Reimagining the Role of Shareholders in Modern Corporate Governance (Feb. 13, 2018), https://www.sec.gov/news/speech/speech-stein-021318#_ednref45 [https://perma.cc/E6Z6-LSNS].

[88] *Dual-Class Stock*, *supra* note 4.

[89] *See* INSTITUTIONAL S'HOLDER SERVS., U.S. PROXY VOTING GUIDELINES 32 (2018), https://www.issgovernance.com/file/policy/latest/americas/US-Voting-Guidelines.pdf [https://perma.cc/J2X4-R6X7] (reporting that ISS's policy is generally to vote against creation of dual class structures unless, inter alia, "[t]he company discloses a compelling rationale for the dual-class capital structure"); Blair Nicholas & Brandon Marsh, Bernstein Litowitz Berger & Grossmann LLP, *Dual-Class: The Consequences of Depriving Institutions of Corporate Voting Rights*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 17, 2017), https://corpgov.law.harvard.edu/2017/05/17/dual-class-the-consequences-of-depriving-institutional-investors-of-corporate-voting-rights/ [https://perma.cc/AA35-LSRA].

[90] *See* Marriage, *supra* note 2 (stating that State Street "urged" SEC to block dual class structures); Elzio Barreto & Sumeet Chatterjee, *Blackrock Pitches for Shareholder Protections as Asia Bourses Weigh Dual-Class Listings*, REUTERS (Sept. 25, 2017, 2:19 AM), https://uk.reuters.com/article/us-summit-regulation-blackrock/blackrock-pitches-for-shareholder-protection-as-asia-bourses-weigh-dual-class-listings-idUKKCN1C10KD [https://perma.cc/9BTF-FD7Y]; Nicholas & Marsh, *supra* note 89 (noting that BlackRock,

In 2017, a new front opened in the war on dual class stock—several major index providers decided to limit the inclusion of issuers with dual class voting structures. The Financial Times Stock Exchange ("FTSE") Russell decided to exclude all firms in which the public shareholders hold less than 5% of the firm's voting power.[91] S&P Dow Jones, which administers the S&P 500, among other popular indexes, excluded all new dual class firms.[92] MSCI decided to retain dual class issuers in its major indexes but to create a series of new benchmarks that contain voting rights in their eligibility criteria.[93] The index providers made this change at the behest of some index funds who did not feel that the dual class governance structure was appropriate.[94] At the time, in light of stock exchange inaction, some commentators viewed the change as a back-door action.[95] Notably, not all passive investors supported this decision. BlackRock, for example, although publicly opposed to the dual class structure, expressed concern that excluding dual class companies from the index would deprive its index-based clients of "opportunities for returns."[96]

The movement against dual class in the United States has been rejected by international markets, which are seeing a trend towards allowing greater use of dual class stock. In response to Alibaba's decision to list in the United States in

State Street, and T. Rowe Price helped launch stewardship code that discourages dual class shares).

[91] FTSE RUSSELL, FTSE RUSSELL VOTING RIGHTS CONSULTATION – NEXT STEPS 2 (2017), https://www.ftse.com/products/downloads/FTSE_Russell_Voting_Rights_Consultation_Next_Steps.pdf [https://perma.cc/5WGP-HFFZ].

[92] Press Release, S&P Dow Jones Indices, S&P Dow Jones Indices Announces Decision on Multi-Class Shares and Voting Rules (July 31, 2017), https://www.spice-indices.com/idpfiles/spice-assets/resources/public/documents/561162_spdjimulti-classsharesandvotingrulesannouncement7.31.17.pdf [https://perma.cc/3ATA-JJZF].

[93] *See* Rachel Evans, *MSCI Rejects Calls to Ban Dual-Class Stocks from Its Indexes*, BLOOMBERG (Oct. 30, 2018, 5:05 PM), https://www.bloomberg.com/news/articles/2018-10-30/msci-rejects-calls-to-ban-dual-class-stocks-from-its-indexes.

[94] *See* Letter from Kenneth A. Bertsch, Exec. Dir., Council of Institutional Inv'rs, to Members of the MSCI Equity Index Comm. (Aug. 3, 2017), https://www.cii.org/files/issues_and_advocacy/correspondence/8-3-17%20CII%20response%20to%20MSCI%20Consutation.pdf [https://perma.cc/YX2C-D3RT] ("CII's membership includes strong supporters of passive index strategies, and we believe that major index providers have a critical role to play in preventing non-voting and multi-class equity structures from gaining unstoppable momentum.").

[95] *See* Matt Levine, *Listing Standards and Dividend Shares*, BLOOMBERG (Apr. 13, 2017, 9:25 AM), https://www.bloomberg.com/opinion/articles/2017-04-13/listing-standards-and-dividend-shares (stating that actions of indexes put them in "weird role" and transgressed "long tradition of corporate governance standards being imposed by stock exchanges as 'listing standards'").

[96] Ning Chiu, *BlackRock Wants Equal Voting Rights but Opposes Exclusion from Indexes*, DAVIS POLK BRIEFING: GOVERNANCE (Oct. 23, 2017), https://www.briefinggovernance.com/2017/10/blackrock-wants-equal-voting-rights-but-opposes-exclusion-from-indexes/ [https://perma.cc/VK3S-W7HC].

order to use a form of dual class stock, the Singapore and Hong Kong exchanges amended their rules to eliminate their prohibitions on dual class stock.[97] In Europe there has been a strong move towards tenure voting, also known as loyalty shares.[98] Loyalty shares confer greater voting rights on shareholders who hold their stock for a specified period of time and are frequently defended on the basis that, by increasing the voting power of long-term shareholders, they facilitate managing the corporation with a long-term perspective.[99]

Some commentators have argued that loyalty shares offer an intermediate approach to the policy debate over dual class for two key reasons.[100] First, because loyalty shares confer higher voting rights on any shareholder who meets the required holding period, they do not privilege the founder over public shareholders.[101] Second, the structure of loyalty shares makes founder control increasingly contestable, as the founder's economic stake decreases relative to the holdings of outside investors.[102] As a result, public shareholders are likely to have greater power in situations in which the agency costs associated with founder or managerial entrenchment are likely to be greatest.

Recent empirical work by Professors Paul Edelman, Wei Jiang, and Randall Thomas supports this proposition.[103] Edelman, Jiang, and Thomas model the relative voting power of founders/managers and institutional investors under various assumptions, and then, using these assumptions, run a series of simulations seeking to evaluate the extent to which control is contestable.[104]

---

[97] *Hong Kong and Singapore Succumb to the Lure of Dual-Class Shares*, ECONOMIST (Mar. 1, 2018), https://www.economist.com/finance-and-economics/2018/03/01/hong-kong-and-singapore-succumb-to-the-lure-of-dual-class-shares.

[98] France, which changed its law in 2014, and Belgium, which is currently considering a draft law, provide double voting rights for shareholders who have held shares for at least two years. *Changes to French Takeover Rules*, ALLEN & OVERY (Apr. 9, 2014), http://www.allenovery.com/publications/en-gb/Pages/Changes-to-French-takeover-rules.aspx [https://perma.cc/2FF8-DLRT]; Matthieu Duplat, Thomas Flament & Aurélie Cautaerts, *Loyalty Shares for Belgian Listed Companies: Fundamental Change on the Way*, JONES DAY (June 2018), https://www.jonesday.com/Loyalty-Shares-for-Belgian-Listed-Companies-Fundamental-Change-on-the-Way-06-25-2018/.

[99] *See* Paul Edelman, Wei Jiang & Randall S. Thomas, *Will Tenure Voting Give Corporate Managers Lifetime Tenure?* 48-49 (European Corp. Governance Inst., Working Paper No. 384, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3107225 [https://perma.cc/R8MT-MT87] (describing and empirically analyzing effect of tenure voting on management's ability to retain control).

[100] *See, e.g.*, David J. Berger, Steven Davidoff Solomon & Aaron J. Benjamin, *Tenure Voting and the U.S. Public Company*, 72 BUS. LAW. 295, 297 (2017) (describing tenure voting as "an alternate capital structure that may curb perceived short-termism").

[101] *See id.* ("By design, tenure voting rewards all shareholders who hold their shares for an extended period.").

[102] *See id.* at 310.

[103] Edelman, Jiang & Thomas, *supra* note 99, at 2.

[104] *Id.*

They show that, although loyalty shares effectively preserve founder control when the founder retains a 20-30% economic stake, when the founder's ownership declines to as little as 3%, outside investors obtain a meaningful opportunity to challenge founder control.[105]

In sum, the shifting policy debate over dual class mimics the conflicting empirical evidence: no definitive and known truth has yet emerged as to whether and when dual class stock is desirable.[106]

II. THE ROLE OF SUNSETS

Perhaps in response to the continuing debate over the efficacy of dual class structures, critics have shifted to a more nuanced approach. Rather than advocating an outright ban of dual class structures, these commentators increasingly argue that if a company adopts a dual class structure, that structure should be subject to a sunset provision. A sunset provision provides that, upon some pre-specified date or event, the high vote stock converts to low vote stock, effectively extinguishing the dual class structure.

Proponents of sunsets argue that they blunt the impact of the undemocratic nature of dual class.[107] Commissioner Jackson, for example, has focused his opposition to dual class stock on the "perpetual dual-class" aspect.[108] In a landmark speech, he criticized perpetual dual class stock on the grounds that it "raises the prospect that control over our public companies, and ultimately of Main Street's retirement savings, will be forever held by a small, elite group of corporate insiders—who will pass that power down to their heirs."[109] He called for exchanges to require, as a condition of listing, issuers with dual class to give their shareholders the opportunity to eliminate the dual class structure at some point in the future.[110] Commissioner Jackson supported his position with empirical evidence compiled by the SEC showing value-decreasing effects of companies with perpetual dual class stock, as opposed to companies with dual class that adopted sunset provisions.[111] Commissioner Jackson also cited long-held American beliefs based on President Thomas Jefferson's work against

---

[105] *Id.* at 45-48.

[106] *See, e.g.*, Anand, *supra* note 47, at 205 ("[F]or virtually every study noting a problem with DCS firms, there is a study either finding a benefit or a neutral effect of DCS on firm value.").

[107] This Article questions the proposition that an inappropriate governance structure can somehow be made acceptable if it is limited in duration, although it recognizes that this principle has been accepted in other contexts. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 341-43 (2003) (observing that, although race-based admissions procedures may violate Fourteenth Amendment, they may be permissible as long as they are limited in duration).

[108] Jackson, Jr., *supra* note 7.

[109] *Id.*

[110] *Id.*

[111] *Id.*

"pseudo-aristocracy" and the idea that "[i]n America, we don't inherit power, and we don't hold power forever."[112]

Sunset provisions appear to be a middle ground argument designed to blunt the impact of dual class stock. However, these arguments have focused on sunsetting in general, and proponents of sunsets have focused primarily on time-based sunsets. We analyze both those positions in further detail.

A. *Time-Based Sunset Provisions*

The type of sunset that has received the most widespread support is the time-based sunset.[113] A time-based sunset requires that the dual class stock expire at a pre-specified date, typically one that is established in the charter of the company at the time of the IPO.[114] The concept behind a time-based sunset is that it provides a period of time for the founder to realize his idiosyncratic vision. When the pre-set date arrives, share capital of the company converts to a single class.[115]

1. The Rationale for Time-Based Sunsets

Time-based sunsets are based on the proposition that, although a dual class structure may initially enhance firm value, the utility of the structure declines over time following the IPO. Several academic studies provide evidence of this decline. For example, Professors Lucian Bebchuk and Kobi Kastiel show that "as time passes, the potential costs of a dual-class structure tend to increase while the potential benefits tend to erode."[116] Cremers, Lauterbach, and Pajuste find similar trends, demonstrating that, although dual class firms are generally valued more highly at the time of the IPO, that valuation premium is eroded in about six to nine years post IPO.[117] They further find that, over that time period, the difference between voting power and equity stakes of the controlling shareholders grows significantly.[118] Kim and Michaely find that, as dual class

[112] *Id.*

[113] *See, e.g.*, CFA INST., DUAL CLASS SHARES AND THE NEED FOR SAFEGUARDS 4 (2018), https://www.cfainstitute.org/-/media/documents/survey/dual-class-shares-survey-report.ashx [https://perma.cc/D27M-JXEF] (reporting that, in survey of CFA members in Asia Pacific, ninety-four percent supported time-based sunset provisions as appropriate safeguard for companies with dual class structures); Anand, *supra* note 47, at 234-37 (describing case for fixed-time sunsets).

[114] *See, e.g.*, Press Release, Council for Institutional Inv'rs, Investors Petition NYSE, Nasdaq to Curb Listings of IPO Dual-Class Share Companies (Oct. 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20Release%20Oct%2024,%202018.pdf [https://perma.cc/23QX-GJ6H] (defining time-based sunsets).

[115] *Id.*

[116] Bebchuk & Kastiel, *supra* note 16, at 590.

[117] Cremers, Lauterbach & Pajuste, *supra* note 73, at 5-6.

[118] *Id.* at 10.

companies mature, their operating margins and labor productivity fall more and the pace of innovation declines faster than single class companies.[119]

CII, which has long opposed dual class structures altogether, has taken the position that, to the extent dual class structures are permitted, all dual class companies should contain a mandatory time-based sunset provision. On October 24, 2018, CII submitted letters to NASDAQ and the NYSE asking them to amend their listing standards to require newly listed companies with dual class structures to include mandatory sunset provisions.[120] According to CII, such a provision should have the effect of converting the issuer's high vote stock to one-share, one-vote "no more than seven years after IPO date."[121] Similarly, the Canadian Coalition for Good Governance ("CCGG") has not advocated a specific time limit but has stated that the dual class structure "should collapse at an appropriate time . . . if practicable, as set out in the DCS company's articles."[122]

Issuers have responded to the demand for time-based sunsetting. According to a study by Andrew Winden, of a sample of 139 companies with dual class stock, only two companies had time-based sunset provisions prior to 2010, but currently 18% have time-based sunsets.[123] For companies that went public in 2010 or after, 32% of dual class companies have a time-based sunset.[124]

2. The Arbitrary Nature of Time-Based Sunsets

One challenge with sunsets is identifying the appropriate length of time before the sunset is triggered. Among existing public companies with time-based sunsets, the time period varies substantially from as short as three years, to as long as twenty years in the case of the 2012 Workday IPO.[125] Groupon has a five year sunset, Yelp has a seven year sunset, and Fitbit has a twelve year sunset.[126] EVO Payments filed to go public with a three year sunset.[127] This issue persists into 2019, with Zoom adopting a 15-year sunset and Pinterest adopting a seven-year sunset that is triggered only when a holder's ownership goes below 50% of

[119] Kim & Michaely, *supra* note 75, at 2.

[120] Letter from Ash Williams, *supra* note 20, at 1.

[121] *Id.* The CII proposal would allow shareholders to vote to retain the dual class structure at the end of the sunset period, a proposition that is explored further below.

[122] CANADIAN COAL. FOR GOOD GOVERNANCE, DUAL CLASS SHARE POLICY 10 (2013), https://admin.yourwebdepartment.com/site/ccgg/assets/pdf/Dual_Class_Share_Policy.pdf [https://perma.cc/HW2F-82SF]. The CCGG principles authorize the holders of the low vote shares to extend the dual class structure, but provide that any such extension "should remain in effect for five years or such shorter period of time as is approved at the shareholder meeting." *Id.*

[123] Winden, *supra* note 17, at 950-51.

[124] *Id.*

[125] Workday, Inc., Registration Statement (Form S-1), at 31 (Aug. 30, 2012).

[126] Winden, *supra* note 17, at 950-51.

[127] EVO Payments, Inc., Registration Statement (Form S-1), at 17 (Apr. 25, 2018).

his IPO holdings.[128] Lyft has no time-based sunset.[129] According to Winden, the most common period for a time-based sunset is seven or ten years.[130] In CII's data of twenty-four companies that have gone public with time-based sunset provisions, there is little consistency in the sunset period—10.5% of sunsets were five years; 31.6% were seven years; 36.8% were ten years; and 21.1% were longer than ten years.[131]

There is nothing inherently problematic about issuer-specific variation in the sunset length. Theoretically, each firm should be picking the time period best suited to its founder. But there is no evidence that this is the case. Rather, the sunset lengths chosen by individual firms do not appear to be tied to characteristics of the firms and their founders. For example, Workday went public in 2012 with a twenty-year sunset provision.[132] At the time of its IPO, its founders were seventy-one and forty-six years old, meaning that they will be ninety-one and sixty-six when the sunset is triggered.[133]

More problematic than the variation is the fact that the length of the sunset period appears to be arbitrary and does not seem to correlate with any theory about the length of time necessary for a founder to implement his or her vision. If a founder's strategic vision is flawed or the founder is otherwise inclined to exploit private benefits, the insulation conferred by even a relatively short sunset may be unwarranted. Commentators have noted, for example, that many dual class issuers struggle financially even in the first few years after their IPO, suggesting that, at least for these companies, a five or seven year sunset is much too long.[134] On the other hand, the benefits from the founder's innovative vision need not be limited to the initial years following the IPO. For example, the founders of Facebook and Google are still at the helm of their companies and appear to be creating value, despite being public for six and fourteen years respectively.[135]

[128] *See* Pinterest, Inc., Amended Registration Statement (Form S-1/A), at 182 (Apr. 8, 2019); Zoom Video Communications, Inc., Amended Registration Statement (Form S-1/A), at 127 (Apr. 16, 2019).

[129] *See* Lyft, Inc., Amended Registration Statement (Form S-1/A), at 204 (Mar. 27, 2019).

[130] Winden, *supra* note 17, at 950-51.

[131] COUNCIL OF INSTITUTIONAL INV'RS, *supra* note 1, at 1.

[132] Workday, Inc., *supra* note 125, at 31.

[133] *Id.*

[134] *See, e.g.*, Sam McBride, *Snapchat Shows the Problems with "Visionary" Founders and Dual Class Share Structures*, NEW CONSTRUCTS (Sept. 13, 2018), https://www.newconstructs.com/snapchat-shows-the-problems-with-visionary-founders-and-dual-class-share-structures/ [https://perma.cc/8WLF-UF8M] (reporting on Snap's poor financial performance post-IPO and observing that Domo, Dropbox, and Green Sky have also performed poorly).

[135] Facebook, Inc., Prospectus, at 1 (May 17, 2012) (showing Facebook went public on May 18, 2012); Google, Inc., Final Prospectus, at 1 (Aug. 18, 2004) (showing Google went public on August 18, 2004).

For similar reasons, a one-size-fits-all approach to sunsets—like those proposed by CII or adopted by index providers—does not make sense. The timeframe necessary for realizing a company's goals is likely to vary depending on the company, based on factors like the company's maturity at the IPO stage, the duration of its business model, and the time required to develop its products or services and bring them to market.[136]

It is also uncertain whether any time-based sunset at the IPO stage can successfully align founder vision with control. People change, as do firms. An example of such a change is Sumner Redstone, who is ninety-five and in declining health, but controls CBS through his ownership of National Amusements.[137] It may very well be that a founder's vision is aligned with the firm's at the IPO level, but that, for a variety of reasons, including personal ones, this diverges at some point. Predicting the point of this divergence purely by passage of time is an impossible task.

Currently, the market has limited experience with the effect on an issuer when a sunset provision is triggered. CII records only three companies in which the dual class structure was terminated due to the effectiveness of a time-based sunset provision: Groupon, MaxLinear, and Texas Roadhouse.[138] All three sunsets were triggered fairly recently.[139] We therefore have little insight into how these provisions will function in reality. Put differently, we lack sufficient experience to determine whether the sunsets eliminate valuable protection for a founder to implement his or her vision. Moreover, although some analysts have observed that the elimination of the dual class structure may facilitate an issuer's

---

[136] *See, e.g.*, Vinay Prasad & Sham Mailankody, *Research and Development Spending to Bring a Single Cancer Drug to Market and Revenues After Approval*, 177 JAMA INTERNAL MED. 1569, 1573 (2017) (finding that issuers in its study took average of six to fifteen years to bring cancer drug to market).

[137] Jessica Toonkel & Liana B. Baker, *CBS Weighs Share Options for Post-Redstone Era*, REUTERS (Apr. 28, 2016, 5:58 PM), https://www.reuters.com/article/us-cbs-votingshares-exclusive/exclusive-cbs-weighs-share-options-for-post-redstone-era-sources-idUSKCN0XP31J [https://perma.cc/8CBY-8QZ8] ("CBS and Viacom both have dual-class share structures with 80 percent of their voting shares owned by National Amusements . . . ."). Because of these developments, National Amusements is effectively controlled by Sumner's daughter, Shari Redstone.

[138] COUNCIL OF INSTITUTIONAL INV'RS, TIME-BASED SUNSET APPROACHES TO DUAL-CLASS STOCK (2018), https://www.cii.org/files/Board%20Accountability/7-13-18%20Time-based%20Sunsets.pdf [https://perma.cc/6CN5-UP4Y]. Yelp's dual class structure also converted in 2016 due to a decline in the percentage of stock held by the founders. *See* Jason Aycock, *Yelp Caught in M&A Chatter, Up 2.6%; Ends Dual-Class Shares*, SEEKING ALPHA (Sept. 23, 2016, 3:11 PM), https://seekingalpha.com/news/3210618-yelp-caught-m-chatter-2_6-percent-ends-dual-class-shares [https://perma.cc/Y29R-8XQ7] ("The conversion was automatic as outstanding class B stock represented [less] than 10% of outstanding shares.").

[139] *See* COUNCIL OF INSTITUTIONAL INV'RS, *supra* note 138 (stating that three sunsets were converted between 2009 and 2018).

acquisition, a result that could potentially increase firm value, buyouts of companies in this limited sample have failed to materialize.[140]

3. The Moral Hazard Problem

Not only is it unclear that a time-based sunset can accurately predict what duration of dual class is likely to maximize firm value, sunsets also create problematic incentive structures. Time-based sunsets identify a specific date at which a founder will lose control. This date, which Professor Jack Coffee describes as a "sharp cliff," increases the incentive for founders to use control, while they have it, to maximize their personal economic position, even if their actions sacrifice value for the minority shareholders.[141] These incentives increase as the expiration date for the dual class structure draws closer. For example, the knowledge that the founder's control is drawing to an end can cause the founder to engage in short-termist behavior such as excessive risk-taking or conservatism, self-dealing, or opportunistic behavior with other ventures. Founders may seek to divert valuable opportunities to other firms, or to reduce the degree to which they invest energy and innovative ideas in an issuer at which they will soon lose control. A particular risk is that founders will enter into transactions that enable them to sell their control block at a premium or that provide them with other private benefits.[142]

[140] *See, e.g.*, Bryan Finnigan, *End Of Yelp's Dual-Class Share Structure Could Provide Catalyst for Takeout*, BENZINGA (Sept. 26, 2016, 11:14 AM), https://www.benzinga.com/analyst-ratings/analyst-color/16/09/8495111/end-of-yelps-dual-class-share-structure-could-provide-ca [https://perma.cc/74AZ-K6YB] (observing that Yelp's elimination of dual class makes it more attractive acquisition target); Will Healy, *Yelp Inc Is a Buyout Target Masquerading As a Growth Company*, INVESTORPLACE (Feb. 8, 2018, 12:15 PM), https://investorplace.com/2018/02/yelp-inc-yelp-stock-buyout-target-growth/ [https://perma.cc/S5PM-288E] (observing that buyout of Yelp "remains far from certain").

[141] Coffee, Jr., *supra* note 3.

[142] Although corporate law allows a controlling stockholder to obtain a control premium upon the sale of the control block, it is unclear what legal standard courts would apply in evaluating such a transaction. One legal response is to require dual class issuers to provide takeover protective provisons ("coatails") that ensure that minority shareholders can participate in a change of control transaction on the same terms as the holders of high vote stock. *See* TORONTO STOCK EXCHANGE, TSX COMPANY MANUAL § 624(l), http://tmx.complinet.com/en/display/display_main.html?rbid=2072&element_id=299 [https://perma.cc/S49X-TERX] (last visited Apr. 10, 2019) (describing coatails and requiring listed dual class issuers to include coatails, terms of which are pre-approved by TSX). A controlling stockholder may have other options such as entering into a position in which he or she has other options including an acquisition in which the founder obtains a management position in the acquiring company. For example, MuleSoft founder Greg Schott retained control of MuleSoft, which was to be operated as a separate division upon MuleSoft's acquisition by Salesforce. *See* Phil Wainewright, *How MuleSoft Will Change the Way Salesforce Connects Its Clouds*, DIGINOMICA (June 22, 2018), https://diginomica.com/2018/06/22/how-mulesoft-will-change-the-way-salesforce-connects-its-clouds/ [https://perma.cc/4MEK-T7B7]

Conversely, the controller may attempt to prolong the time of the dual class stock. Companies without sunset provisions have already engaged in similar transactions. For example, Google and Zillow have issued Class C non-voting shares that allow the controller to further dilute its interests without giving up control.[143] Facebook also attempted this maneuver but withdrew the proposal in light of litigation.[144]

4. Shareholder Retention Voting

Supporters of mandatory sunset provisions have attempted to respond to the argument that the automatic trigger of a time-based sunset provision may not align with the time period appropriate for the founder to engage in value-creating behavior by coupling a time-based sunset with an optional shareholder retention vote. Such a vote would enable existing shareholders, voting on a one-share/one-vote basis, to retain or extend the dual class structure prior to its expiration.[145] For example, the CII proposal would allow shareholders of dual class issuers to vote on a one-share/one-vote basis to extend the dual class structure.[146] Similarly, the dual class principles issued by the CCGG allow the minority shareholders to vote to extend the dual class structure for a maximum of five years beyond its termination date.[147]

The retention vote would have the effect of providing minority shareholders with an option. If, in their view, the founder's control is continuing to enhance firm value, the minority shareholders can vote to retain it. If, however, the insulation has outlived its usefulness or generates excessive agency costs, the shareholders can vote against retention, at which point the shares will convert automatically to a single class structure.

Commentators have devoted little attention to analyzing the operation of such a shareholder vote, however. Any expectation that a vote of existing minority shareholders will function efficiently to identify situations in which there is value to retaining a dual class structure is highly problematic. First, existing minority shareholders will invariably benefit from eliminating dual class, as the effect of the sunset will be to transfer control from the founders to the public

("MuleSoft will remain an independent business unit within Salesforce under the leadership of its existing CEO Greg Schott . . . .").

[143] Jhonsa, *supra* note 24; Norris, *supra* note 24.

[144] *See* Alex Heath, *A Power Struggle Between Facebook and Investors Just Ended with Facebook Dropping Plans to Issue Non-Voting Shares*, BUS. INSIDER (Sept. 22, 2017, 2:37 PM), https://www.businessinsider.com/facebook-settled-lawsuit-non-voting-shares-zuckerberg-testify-2017-9.

[145] *See* Letter from Ash Williams, *supra* note 20, at 1 (calling for mandatory sunset provisions "subject to extension by additional terms of no more than seven years each, by vote of a majority of outstanding shares of each share class, voting separately, on a one-share, one-vote basis").

[146] *Dual-Class Stock*, *supra* note 4.

[147] CANADIAN COAL. FOR GOOD GOVERNANCE, *supra* note 122, at 10.

shareholders. As the courts have recognized in other contexts, the value of this control is substantial.[148] Accordingly, public shareholders will be conflicted in evaluating the voting decision as they will have to weigh the value of obtaining control against the potential value of extending the dual class structure.

Second, the need of dual class is based on the proposition that market forces are not sufficient to enable public shareholders to evaluate the founder's vision and the firm's long-term business plan adequately and will, as a result, imprudently sacrifice long-term firm value. Therefore, defenders of dual class argue that it is necessary to insulate the founder from short-termist market pressure.[149] To the extent that market forces are not sufficient to enable public shareholders to evaluate and price sunset provisions accurately at the IPO stage, it is unclear why their ability to do so midstream will be superior. As a result, the theory that public shareholders can properly evaluate whether to retain dual class at the time of the retention vote seems inconsistent with the basic premise of the dual class structure.

One possible response is that, at the time of the retention vote, shareholders have better information with which to evaluate the value of dual class. When voting on whether to retain the dual class structure, public shareholders have the benefit of knowing how the firm has performed subsequent to the IPO, and they have the enhanced transparency of that performance afforded by the public reporting process. Although this observation is fair, it does not meaningfully distinguish the retention vote from the IPO stage or the role of market discipline during the initial pre-sunset period. The rationale for dual class in either case is that shareholders are limited in their ability to evaluate and appreciate the founder's long-term vision going forward and that, on net, insulation from market discipline will promote innovation and increase firm value. Many recent dual class IPOs involved issuers of substantial size that relied on the private capital markets to operate for a number of years. If dual class structures are appropriate, it is because investors cannot reliably evaluate and protect the future innovative behavior of those issuers. Similar information asymmetries are likely to limit public shareholders' ability to evaluate an issuer's potential for further innovation in the context of a sunset retention vote.

Similarly, although the shareholder retention vote can also be understood as providing a form of insurance against a founder implementing the dual class stock in a value destructive manner, this Article rejects that justification as a basis for requiring a time-based sunset. The insurance argument highlights the substantial potential costs in terms of a misapplication of the sunset period and

[148] *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 47 (Del. 1994) ("The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of 'minority' stock." (quoting Paramount Commc'ns Inc. v. Time Inc., No. 10,866, 1989 WL 79880, at *23 (Del. Ch. July 14, 1989))); *In re* Books-A-Million, Inc. S'holders Litig., No. 11343, 2016 WL 5874974, at *13 (Del. Ch. Oct. 10, 2016) ("Financial markets in widely traded corporate stock accord a premium to a block of stock that can assure corporate control.").

[149] *See, e.g.*, Goshen & Hamdani, *supra* note 8, at 580-81.

the potential for founder misconduct prior thereto. While quantifying these costs is impossible, they could easily outweigh the benefits of this insurance. In short, the insurance claim proves too much—if insurance is truly warranted, it is because of the potential costs of the dual class structure.

B. *Alternative Sunset Provisions*

As explained in the preceding Section, the mere passage of time is a poor proxy for evaluating whether the utility of a dual class structure has evaporated. To the extent that sunsets are an appropriate response to a decline in the value of dual class structures, they should focus more precisely on objective events that are more likely to result in the founder losing track of his or her mission or being overly incentivized to favor his or her own interests. This Article terms such provisions "event-based sunsets."

This Section identifies several events in this category such as dilution of the founder's interest, the founder's death or departure from the issuer, and the transfer of voting rights to third parties such as heirs. Issuers have adopted event-based sunsets in varying degrees,[150] but they have received far less investor attention than time-based sunsets. This Article concludes that, although the market has not focused carefully on structuring event-based sunsets appropriately, they offer a more promising approach. As of yet, however, the costs and benefits of event-based sunsets are untested, and it is equally unclear whether they can be designed in a way to overcome the limitations of time-based sunsets discussed above. As a result, while this Article does not advocate the imposition of mandatory event-based sunsets, it encourages investors and commentators to develop event-based sunset provisions through private ordering.

1. Dilution of the Founder's Interest

Bebchuk and Kastiel argued that part of the problem with dual class is an increasing gap between the founder's voting power and his or her economic interest—they term this gap the "wedge."[151] They find that an increase in the size of the wedge is correlated with a decrease in firm value, and they reason that as the economic stake of the founder is reduced while voting control remains the same, the founder is incentivized to reap private benefits from the firm.[152] This incentive problem can manifest through wealth transfers from the firm to the individual or favored interests, or through the founder's decision to push the firm in directions that satisfy his or her non-economic idiosyncratic visions. An increased wedge can also reduce the founder's engagement in operations.

---

[150] *See* Winden, *supra* note 17, at 950-51 (presenting data on issuer use of various forms of event-based sunsets).

[151] Bebchuk & Kastiel, *supra* note 16, at 603.

[152] *Id.*

These and other incentive problems theoretically justify sunsets keyed to dilution, and such sunsets are relatively common. According to Winden there are forty-eight companies in his sample with dilution-based sunsets.[153] The level of dilution required to trigger the sunset ranges from 5% to 25% with 54% of companies having a 10% dilution trigger.[154] Again, this threshold seems arbitrary, and there is evidence of issuers gravitating to a one-size-fits-all approach. In contrast to time-based sunsets, however, the rationale of the dilution sunset is to ensure that the founder retains a meaningful economic interest in the issuer, and there is a plausible argument that once the founder's interest drops below 10%, his or her economic interest is no longer sufficiently aligned with the interests of the issuer. Moreover, to the extent that the founder wants to avoid triggering the sunset, the solution is to retain a sufficient stake in the firm which will benefit all shareholders by reducing the size of the wedge and maintaining the alignment of interest between the founder and the firm.

As of the time this Article was written, the dual class structure of at least one issuer, Yelp, has been terminated due to the triggering of a dilution-based sunset.[155] Yelp went public in 2012 with a dual class structure containing a provision that it would be automatically converted into a single share structure once the founders' economic stake dropped below 10%.[156] This occurred on September 23, 2016 and in the wake of this declassification, Yelp stock rose 2.6%.[157] The conversion would have occurred much later if Yelp had adopted a standard time-based sunset.

This Article does not claim that dilution-based sunsets address all the limitations of time-based sunsets, and further refinement of their operation is likely necessary to make them sufficiently responsive to the concern described above. In particular, because of the founder's higher voting rights, the threshold for triggering the sunset under dilution-based sunsets as currently structured may be too low. At the time of its IPO, Zynga's dual class stock, for example, gave its founder, Mark Pincus, seventy votes per share, meaning that Pincus could retain control with an economic interest of less than 3% of the company.[158] Universal Health Services' Class C common stock gives founder Alan Miller

[153] Winden, *supra* note 17, at 872.

[154] *Id.* at 872-73. The dilution may also be based upon a sale of a specific percentage of the founders' stock, but the same principles apply.

[155] Aycock, *supra* note 138.

[156] *Id.*

[157] *Id.* On that day the S&P 500 fell by 12 points. Harvey S. Katz, William G. Ferguson & Adam Rosner, *Stock Market Today: September 23, 2016*, VALUE LINE (Sept. 23, 2016), http://www.valueline.com/Markets/Daily_Updates/Stock_Market_Today__September_23,_2016.aspx#.XEYzefx7lmA [https://perma.cc/J22L-CGJD].

[158] *See* Austen Hufford, *Zynga Moves to Single-Class Share Structure*, WALL STREET J. (May 2, 2018, 4:39 PM), https://www.wsj.com/articles/zynga-moves-to-single-class-share-structure-1525293576.

one hundred votes per share.[159] Concededly, it is likely impossible to measure the right level of dilution or the effect of this divergence of interest in dual class stocks.[160]

Theoretically, however, dilution-based sunsets offer a response better tailored to the concern that, as the founder's economic interest is reduced, his or her incentives become misaligned sufficiently to create a risk of rent-seeking or other value-destroying actions. Further, dilution-based sunsets do not create the same perverse incentives as time-based sunsets because the founder can avoid the trigger by retaining a sufficiently large economic stake.

2. Transfer of the Founder's Interest

Dual class stock sometimes allows the holders of high vote shares to transfer the higher voting rights together with a transfer of the shares by sale, gift, or inheritance. The most infamous example is Facebook which permits Mark Zuckerberg to transfer his high vote stock to his heirs.[161] Snap also allows for transfers to heirs.[162] Provisions that permit founders to transfer high vote stock to their heirs would appear to conflict directly with the justification for dual class of protecting the founder's ability to achieve his or her idiosyncratic vision. Although an argument could be made that the founder's successors will continue to pursue the founder's vision, there is little reason to expect that the founder's heirs have any advantage in doing so. Indeed, asset destruction through intergenerational transfer is well-documented.[163] Allowing a founder to retain high voting rights, even upon the transfer of the stock, instead enables the founder's heirs to convert a control right that is designed to maximize firm value into a private benefit.

[159] Universal Health Servs., Inc., Annual Report (Form 10-K), at 23-24 (Feb. 28, 2017).

[160] Pinterest, at the time of its IPO, had three founders with high vote (20-1) stock. Its sunset provision is triggered if, after a seven-year period from the IPO, a founder sells more than 50% of his interest. We question the logic of combining a dilution sunset with a time-based sunset. Moreover, Bebchuk and Kastiel calculate that two of the founders would still control "50% of the company's voting power with approximately 4.76% of the company's outstanding equity capital." Lucian Bebchuk & Kobi Kastiel, *The Perils of Pinterest's Dual-Class Structure*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 10, 2019), https://corpgov.law.harvard.edu/2019/04/10/the-perils-of-pinterests-dual-class-structure/ [https://perma.cc/GQ69-MWK3].

[161] Facebook, Inc., *supra* note 135. The package of charter amendments that proposed the issuance of class C shares would have eliminated Mr. Zuckerberg's ability to transfer his shares to his heirs, but that package was never adopted. *See* Facebook, Inc., Proxy Statement 56 (June 2, 2016).

[162] Snap Inc., Bylaws of Snap Inc., at 22 (amended June 30, 2013).

[163] *See, e.g.*, George Stalk & Henry Foley, *Avoid the Traps That Can Destroy Family Businesses*, HARV. BUS. REV., Jan.-Feb. 2012, at 25, 25 (describing "the propensity of family-owned enterprises to fail by the time the founder's grandchildren have taken charge").

As a result, sunset provisions that convert high vote stock to one-share/one-vote when the founder bequeaths or gifts that stock appear to be common sense. The observation that the founder may transfer high vote stock to third parties who do not warrant the insulation of the dual class structure is not limited to situations such as inheritance, however. Investors might have similar concerns when the holder of high vote stock sells in a market transaction. Notably, dual class stock differs from tenure voting in that many dual class structures do not automatically convert the high vote stock when it is sold or transferred, even though the transfer presumably removes control from the founder whose vision the structure was designed to protect and vests that power in someone else.

Transfers of high vote stock have broader potential to erode value from the firm and the public shareholders. For example, as noted above, Delaware law currently allows controlling shareholders to sell their interest for a premium.[164] The ability of a controlling shareholder to do so could, in the case of dual class, lead to a wealth transfer from the public shareholders to the controller. Such a wealth-transfer is particularly problematic in situations in which the sale is designed to avoid the effects of a mandatory conversion. A number of dual class issuers have responded to this problem by including equal treatment provisions in their charters.[165] These provisions prevent high vote shareholders from selling their stock at a premium over the price that is available to low vote shareholders.[166] In *In re Delphi Financial Group Shareholder Litigation*,[167] Delphi had a charter providing that both its high and low voting stock would receive the same consideration in any merger, and founder Robert Rosenkranz attempted to use his high vote shares to amend the charter and remove that provision. The court concluded that Rosenkrantz's effort to do so was coercive.[168]

3. Death, Incapacitation, or Departure of the Founder

The death, incapacitation, or departure of the founder raises similar issues to those posed by transfers. The effect may be compounded however by the fact that when a founder dies or is incapacitated but retains voting control, the company can be left without leadership or direction.

As previously mentioned, a paradigmatic example is Sumner Redstone and the two companies he controls: CBS and Viacom. Redstone is now ninety-five

---

[164] *See* Abraham v. Emerson Radio Corp., 901 A.2d 751, 753 (Del. Ch. 2006) ("Under Delaware law, a controller remains free to sell its stock for a premium not shared with the other stockholders except in very narrow circumstances.").

[165] *See* Kirby Smith, *The Agency Costs of Equal Treatment Clauses*, 127 YALE L.J. FORUM 543, 561 (2017).

[166] Even without such a charter provision, a controller's premium can be reviewed and benchmarked against the market of similar sales. *Id.* at 562.

[167] No. 7144-VCG, 2012 WL 729232 (Del. Ch. Mar. 6, 2012).

[168] *Id.* at *17.

and reportedly is unable to speak coherently or move about.[169] His incapacitation has led to litigious corporate governance battles at both Viacom and CBS between Mr. Redstone's daughter, Shari Redstone, and the boards of each company.[170] In each case, the companies attempted to defy Mrs. Redstone's attempts to assert her father's voting power. This resulted in costly battles that ended in the departure of both firms' CEOs and a restructuring of each company's board.[171]

Sunsets to prevent this situation can take several forms. A sunset can be triggered by the founder's death or incapacitation.[172] For example, a sunset that converts high vote shares to single vote shares can be triggered when the founder is no longer chief executive officer of the company or no longer involved in the day-to-day operations. Again, if dual class is designed to insulate the founder's idiosyncratic vision, that insulation is no longer warranted when the founder is not making operational decisions.

Of course, issuers can voluntarily eliminate their dual class structure upon the occurrence of this type of event. For example, Zynga, which was heavily criticized for its seventy-to-one dual class structure, converted to a single class structure after founder Mark Pincus left as CEO and it was announced he was transitioning from chairman of the board to non-executive chairman.[173] Zynga's shares rose 1.4% in trading upon this announcement.[174] Pincus's conversion decision was voluntary, however. A departure-based sunset would provide predictability. In addition, a departure-based sunset is particularly useful if the founder's departure is due to medical reasons or an intra-corporate dispute.

One might expect sunsets of this type to be commonplace given the foreseeable nature of these events, but they are not. Winden documents that only forty-eight dual class companies have this type of provision, while ninety-one do not.[175] It is unclear why these provisions are not more common, but it may be a function of the inefficiencies of the IPO market. Given the relatively recent growth in the number of issuers that go public with dual class structures, the

[169] Bebchuk & Kastiel, *supra* note 16, at 587-88 (citing Emily Steel, *Viacom Chiefs Take Trust Battle to Court*, N.Y. TIMES, May 24, 2016, at B1).

[170] *Id.* at 588.

[171] *See, e.g.*, James B. Stewart, *How Dauman Lost the Battle for Viacom*, N.Y. TIMES, Aug. 25, 2016, at B1 (describing changes at Viacom); Cynthia Littleton, *CBS at Crossroads: Board Considers Options That Will Influence Decision on Next CEO*, VARIETY (Nov. 6, 2018, 4:06 PM), https://variety.com/2018/tv/news/cbs-board-redstone-moonves-viacom-1203021104/ [https://perma.cc/U48H-XBEH] (noting departures of CBS CEO Leslie Moonves and other senior executives and challenges facing new board).

[172] Andrew Winden takes the reasonable position that "[d]eath and incapacity sunsets should be included in all dual-class charters." Winden, *supra* note 17, at 924.

[173] Hufford, *supra* note 158 (reporting that Pincus "would convert his extra shares into Class A shares").

[174] *Id.*

[175] Winden, *supra* note 17, at 946.

death or incapacitation of a founder may have limited salience to investors. More specifically, the inclusion of these provisions may depend upon the law firm utilized at the IPO stage as well as the idiosyncrasies of the founder.

Moreover, in the case of incapacity, the sunset is often based on the total disability of the holder. Lyft for example defines "disability" as:

> the permanent and total disability of such Founder such that such Founder is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death within 12 months or which has lasted or can be expected to last for a continuous period of not less than 12 months as determined by a licensed medical practitioner . . . .[176]

This broad definition preserves the founders' ability to retain their shares even if they are no longer engaged (or able to be engaged) in the operation of the company.

4. Other Sunsets

The foregoing discussion identifies several types of event-based sunset provisions that are more closely tied to developments that undercut the original justification for a dual class structure than time-based sunsets. The list offered is illustrative, not exhaustive; other situations may raise similar concerns and warrant treatment through a sunset provision. For example, one could imagine creating a dual class structure with a sunset that is triggered by a founder's misconduct, such as a breach of fiduciary duty, although the authors are not aware of any issuers that have adopted such a provision.[177]

III. MOVING FORWARD

This analysis of sunsets and dual class stock has a number of implications. First, and perhaps most important, the debate over sunsets should be separated from the debate over the efficacy and desirability of dual class voting structures. Commentators appear to be supporting sunsets as a compromise on the merits of dual class, but the value of dual class stock should be debated on its own merits. The inclusion or omission of a sunset provision does not resolve the question of whether dual class structures are problematic. Instead, policy responses to dual class stock should focus on the economic value and social welfare effects of dual class.

In the short term, empirical studies are unlikely to resolve the debate over dual class definitively. That feature does not distinguish dual class from many other

---

[176] Lyft, Inc., Amendment No. 2 to Form S-1 Registration Statement, Exhibit 3.2 Restated Certificate of Incorporation of Lyft, Inc. at 2 (Mar. 27, 2019).

[177] Winden reports that, in his sample, no issuers have a sunset for breach of fiduciary duties. *Id.* at 852 n.150.

corporate governance provisions, such as staggered boards and poison pills.[178] It may be the case that the value of governance provisions is firm-specific and that a particular provision is value-enhancing for some firms and value-decreasing for others.[179] Alternatively, further experience with dual class structures may clarify the extent to which they add value by solidifying control with a visionary and value-creating entrepreneur,[180] or whether they counterproductively entrench that control in circumstances in which the vision of the entrepreneur declines or is lost.[181]

In this scenario, sunsets should not be understood as a regulatorily imposed fix to minimize the duration of a problematic governance structure, but as a feature that offers the potential to align the use of dual class stock with value creation. In this regard, there should be more thorough and rigorous thinking, both about the use of sunsets and about the form that such sunsets should take.

In particular, this Article argues that the growing effort to force dual class issuers to adopt time-based sunsets is inappropriate. Time-based sunsets should not be a necessary precondition for the use of dual class stock, and calls for the imposition of such a requirement through regulation, exchange listing requirements, or restrictions on index inclusion are misguided. Although time-based sunsets appear to reflect a compromise position, as this Article demonstrates they are poorly tailored to addressing the potential limitations of the dual class structure. At the same time, time-based sunsets may lead to complacency about dual class structures and encourage investors and the markets to accept dual class where its potential value is questionable.

To date, however, this Article's analysis suggests that investors and the market do not know enough about either dual class or sunsets to use regulation, index requirements, or stock exchange rules to force companies into time-based sunsets. Instead, we should allow private ordering, but encourage greater attention to the specific developments that are likely to erode the potential value of dual class, such as dilution, transfer, disability, and departure. There is particular value to market participants working to develop norms and standards around the types of sunsets that the market should demand of dual class issuers. This Article calls for lawyers to be more capacious in drafting sunset provisions and for institutional investors to pay greater attention to the specific features of sunset provisions as well as the manner in which they operate in the context of a specific firm. Finally, to the extent that issuers adopt retention votes as a

[178] *See, e.g.*, Lucian Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 409 (2005) (reporting that firms with staggered boards have lower values); K.J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Firm Value, Revisited*, 126 J. FIN. ECON. 422, 422 (2017) (concluding that staggered boards can, in appropriate circumstances, increase long-term firm value).

[179] *See, e.g.*, Matthew D. Cain et al., *How Corporate Governance Is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649, 697 (2016) (finding evidence that "governance provisions have heterogeneous effects depending upon firm-specific characteristics").

[180] Kim & Michaely, *supra* note 75, at 5-6.

[181] Bebchuk & Kastiel, *supra* note 16, at 602.

component of their dual class structures, proxy advisory firms, such as Institutional Shareholder Services, need to develop principles by which to evaluate whether retention or termination of a dual class structure is warranted.

Finally, to an extent, the debate over dual class and sunsets has a tendency to overlook broader questions about the role and purpose of voting rights in publicly traded companies. By increasing the relative voting power of the founder, dual class structures operate to limit the voting power of public shareholders. As such, they raise questions about the importance of voting rights, the issues on which shareholders can and should exercise voting authority, and the viability of alternatives to voting—such as exit, litigation, and engagement—for limiting the power of controlling shareholders.[182]

Examination of these issues is critical as the composition of the investor base continues to evolve. Large institutional investors, many of which rely primarily on index-based investment strategies, own an increasing percentage of publicly traded securities.[183] Commentators debate the incentives of these investors,[184] the extent to which they engage in informed voting decisions,[185] and the degree to which their investment objectives are subject to short-termism.[186] The policies and procedures by which these investors exercise their voting power may vary depending on the subject matter of the vote.

In a stylized world, the effect of dual class on issuer control can be modeled in terms of voting outcomes.[187] In the real world, the impact of dual class is less clear. By way of example, after a series of scandals involving Uber, commentators warned that shareholders lacked the power to restrain or remove then-CEO Travis Kalanick because of the voting power he held by virtue of Uber's dual class structure.[188] Nonetheless, in the face of pressure from Uber's major investors, Kalanick resigned, and Uber's board subsequently removed the

[182] *See, e.g.*, Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration*, 98 TEX L. REV. (forthcoming 2020) (manuscript at 54-55), http://ssrn.com/abstract_id=3227113 [https://perma.cc/55ZE-M6ZS] (arguing that shareholder collaboration has largely supplanted competition between shareholders and managers for control).

[183] *See, e.g.*, Fisch, Hamdani & Solomon, *supra* note 21, at 1 (describing increasing institutional ownership of public equity markets).

[184] *Id.* (arguing that passive investors have incentives to support governance changes that reduce risk of underperformance).

[185] *See, e.g.*, Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 493 (2018) (claiming that passive investors make uninformed voting decisions).

[186] *See, e.g.*, Robert Anderson IV, *The Long and Short of Corporate Governance*, 23 GEO. MASON L. REV. 19, 26-27 (2015) (describing academic and media debate over time horizons of institutional investors).

[187] *See* Edelman, Jiang & Thomas, *supra* note 99, at 48-49 (providing example of this approach).

[188] *See, e.g.*, Jessi Hempel, *Why Uber Won't Fire Its CEO*, WIRED (Apr. 4, 2017, 12:00 AM), https://www.wired.com/2017/04/why-uber-wont-fire-its-ceo/ (observing that Uber's dual class structure limited shareholders' ability to restrain Kalanick's exercise of power).

dual class structure.[189] Uber's dual class structure did not, in the end, prevent the company from responding to a founder who was limiting corporate value.[190]

CONCLUSION

The increasing adoption of dual class structures has generated concern. In response, some commentators have called for the adoption of sunset provisions to limit the duration of the dual class structure. This Article argues that compulsory sunsets, and time-based sunsets in particular, are an inappropriate response to the potential problems of dual class stock. Although sunsets tied to particular events that are likely to reduce the value of dual class—such as dilution, transfer, or departure of the founder—may prove valuable, experience with such sunsets is limited to date. Consequently, although this Article encourages issuers and investors to experiment with the development and use of event-based sunsets, it suggests, at present, that experimentation take place through private ordering.

[189] *Uber 'Dual' Comes to an End*, AUSTRALIAN INST. OF CO. DIRS. (Oct. 11, 2017), https://aicd.companydirectors.com.au/membership/the-boardroom-report/volume-15-issue-10/uber-dual-comes-to-an-end [https://perma.cc/R8X2-7SGD].

[190] Uber may be an exception. Anecdotally, the authors have been informed that there was a "loophole" in Uber's dual class structure that allowed a particular venture capital investor to convert a preferred instrument to dilute Kalanick below 50% control of the dual class and force a successful conversion vote. Investors used this leverage to obtain Kalanick's agreement to the conversion.