Emory Law Journal

Volume 68 | Issue 2 Article 3

2018

A Snapshot of Dual-Class Share Structures in the Twenty-First Century: A Solution to Reconcile Shareholder Protections with Founder Autonomy

Zoe Condon

Recommended Citation

Zoe Condon, *A Snapshot of Dual-Class Share Structures in the Twenty-First Century: A Solution to Reconcile Shareholder Protections with Founder Autonomy*, 68 Emory L. Rev. 335 (2018).
Available at: https://scholarlycommons.law.emory.edu/elj/vol68/iss2/3

A SNAPSHOT OF DUAL-CLASS SHARE STRUCTURES IN THE TWENTY-FIRST CENTURY: A SOLUTION TO RECONCILE SHAREHOLDER PROTECTIONS WITH FOUNDER AUTONOMY

ABSTRACT

Dual-class share structures have long been the subject of a hotly contested debate both within the United States and around the world. On one hand, entrepreneurial founders of new-age technology companies want to utilize the dual-class structure to the extent of its limits. These individuals argue that dual-class corporate structures are necessary to protect their budding companies from intense, short-sighted market pressures that public shareholders impose. On the other hand, public shareholders are often silenced by the dual-class structure, left with no ability to vote or let their voice be heard.

Notwithstanding the ongoing debate over the appropriateness of dual-class corporate structures, recent global developments have pushed the debates to new extremes. The intense arguments on both sides have recently been codified in extreme positions on both sides of the debate. Recent initial public offerings, like the one for SNAP Inc., which is the parent company to popular social media app Snapchat, adopted multiple-class share structures that offer public investors non-voting shares. In response, investors in the United States have lobbied various stock indices to persuade them to ban dual-class corporate structures on their indices. However, various jurisdictions are considering removing limitations on the dual-class structure to remain competitive in the global market.

This Comment offers a framework that the United States should adopt to remain competitive in the global market, as more jurisdictions move toward allowing dual-class structures. The proposed framework balances minimal safeguards that protect shareholders from the most egregious failings of the dual-class structure while safeguarding founders' visions for the future of their companies.

INTRODUCTION

Around the world, headlines covered the initial public offering (IPO) of Manchester United, one of the world's most iconic soccer teams.[1] While Manchester United fans were excited by the novelty of the club entering the public market,[2] the club's IPO was notable for reasons other than pure sentimental value. The club considered several different jurisdictions and exchanges to conduct its IPO, and it appeared poised to list on a stock market in Asia.[3] Ultimately, the club listed its public shares on the New York Stock Exchange (NYSE).[4] Though the NYSE listing may seem odd at first, given that an English soccer team, with a strong fan base in Europe and Asia, chose to conduct its IPO in a country not particularly known for its love of soccer, Manchester United was taking advantage of a more permissive business framework available in the United States. Currently, the United States allows financing and corporate governance models that other jurisdictions—such as those in Europe and Asia—have since banned.[5] For Manchester United, the opportunity to use a dual-class share structure helped drive the club's decision to list on the NYSE.[6]

---

1 *See Manchester United Announce Stock Listing in New York*, CNN (Aug. 1, 2012, 3:28 PM), http://edition.cnn.com/2012/07/30/sport/football/manchester-united-stock-football/index.html; *Manchester United Launch New York Stock Exchange Listing*, GUARDIAN (July 30, 2012. 5:08 PM), https://www.theguardian.com/football/2012/jul/30/manchester-united-stock-exchange; Steven Davidoff Solomon, *In Manchester United's I.P.O, a Preference for American Rules*, N.Y. TIMES (July 10, 2012, 2:32 PM), https://dealbook.nytimes.com/2012/07/10/in-manchester-uniteds-i-p-o-a-preference-for-u-s-rules/; Sportsmail Reporter, *With £423m Debts, Glazers Attempt to Raise Funds at United on New York Stock Exchange . . . and Register Club in Tax Haven of Cayman Islands*, DAILY MAIL: ONLINE (July 4, 2012, 1:33 PM), http://www.dailymail.co.uk/sport/football/article-2168544/Manchester-United-listed-New-York-stock-exchange-Glazers.html.

2 At the time of its initial offering, Manchester United was rated as the world's most highly valued sports team. Kurt Badenhausen, *Manchester United Tops the World's 50 Most Valuable Sports Teams*, FORBES (July 16, 2012, 12:01 PM), https://www.forbes.com/sites/kurtbadenhausen/2012/07/16/manchester-united-tops-the-worlds-50-most-valuable-sports-teams/. While the team certainly had a large following, many professional sports franchises have avoided becoming publicly traded corporations for a variety of reasons. For a discussion of the difficulties of publicly traded sports franchises, see generally Ian A. McLin, *Going . . . Going . . . Public? Taking a United States Professional Sports League Public*, 8 WM. & MARY BUS. L. REV. 545 (2017).

3 *See, e.g.*, Daniel Stanton & Fiona Lau, *Exclusive: Manchester United Drops Asia IPO for U.S.*, REUTERS (June 13, 2012, 8:26 AM), https://www.reuters.com/article/us-singapore-us-ipo-manchester-united-if-idUSBRE85C0MO20120613; Solomon, *supra* note 1.

4 *See, e.g.*, Stanton & Lau, *supra* note 3; Solomon, *supra* note 1.

5 *See* Lucian Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 599–600 (2017).

6 *See id.*; *see also* Solomon, *supra* note 1.

Dual-class structures have been a driving factor behind the entrance of several major international companies into U.S. markets.[7] For example, Alibaba, the multi-billion-dollar online commerce company,[8] listed on the NYSE in September 2014.[9] Similar to Manchester United, Alibaba considered several jurisdictions before ultimately choosing the NYSE. Without context, it is curious to see a company which handles more than 80% of e-retail transactions in China choose a U.S. exchange to conduct its IPO. The Chinese e-commerce giant initially attempted to list on the Hong Kong Stock Exchange (HKEx).[10] Alibaba's dual-class corporate structure violated HKEx regulations.[11] The HKEx for decades had banned these dual-class share structures.[12] Dual-class structures have similarly been outlawed in many jurisdictions that host some of the world's largest and well-developed stock exchanges.[13]

Critics of dual-class structures saw their concerns take shape in American markets as recently as February 2017. In its IPO, SNAP Inc., the parent company of the popular social media app Snapchat, stunned observers of the global economy by offering the public a new class of stock—one with no voting rights.[14] Although arguably successful, raising $3.4 billion and selling over 200

---

[7] This Comment uses the phrase "dual-class corporate structure" to refer to capital structures with two or more classes of shares, and does not necessarily refer to a structure with only two classes.

[8] In 2013, Alibaba facilitated over $248 billion in transaction revenue, a figure which is more than eBay's and Amazon's transactions combined. *What Is Alibaba?*, WALL STREET J., http://projects.wsj.com/alibaba/ (last visited Oct. 20, 2018).

[9] *See NYSE*, INTERCONTINENTAL EXCHANGE, https://www.nyse.com/network/article/Alibaba-Lists-on-the-NYSE (last visited Oct. 20, 2018) ("On September 19th, 2014 history was made. The largest IPO of all time opened on the New York Stock Exchange. When Alibaba Group . . . listed on the NYSE, it was a moment emblematic of the truly global nature of capital markets. . . . At Alibaba's headquarters in Hangzhou, China and on the floor of the NYSE, cheers erupted when the first trade bell rang. The moment simultaneously marked the culmination of many years of hard work and the beginning of a new phase in the relationship between Alibaba and the New York Stock Exchange . . . .").

[10] *See* Enoch Yiu, *Pain of Alibaba Loss Prompts HKEX to Examine New Measures*, SOUTH CHINA MORNING POST (Sept. 1, 2016, 10:56 PM), http://www.scmp.com/business/companies/article/2012339/pain-alibaba-loss-prompts-HKEx-examine-new-measures.

[11] *Id.* Alibaba's share structure is conceptually similar to Manchester United's because both have multiple classes of shares, which do not carry equal voting rights.

[12] *See* Bebchuk & Kastiel, *supra* note 5, at 599.

[13] *Id.* at 624.

[14] *See, e.g.*, James Rufus Koren & Paresh Dave, *Snap Won't Give Shareholders Voting Rights. For that, It's Being Shunned by a Major Stock Index*, L.A. TIMES (July 28, 2017, 10:40 AM), http://www.latimes.com/business/la-fi-snap-russell-indices-20170727-story.html. Other companies, like Facebook, have offered shares without voting rights to investors as a way to raise capital in subsequent offerings, though no company had previously only offered non-voting shares to the public in an IPO. James Moloney et al., *Non-Voting Shares Make Their Public Debut and Generate some Governance Concerns, but How Will Courts View the Structure When First Presented?*, GIBSON DUNN: SEC. REG. & CORP. GOVERNANCE MONITOR (Mar. 12, 2017), https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=288. In SNAP's IPO, even if investors had wanted to purchase voting shares, none were made available to the public. *See* Annie Palmer, *What Snap's*

million of the non-voting class shares, some capital markets investors were outraged.[15] In response, several U.S. index providers declared they would no longer allow companies with dual-class structures to be included in their indices.[16] The Standard & Poor's 500 Index (S&P 500) announcement came in July 2017, stating that "[c]ompanies with multiple share class structures tend to have corporate governance structures that treat different shareholder classes unequally with respect to voting rights and other governance issues."[17] This announcement came a week after another index provider, FTSE Russell, announced that it would require companies to offer at least 5% voting rights to investors.[18] Arguably, SNAP's IPO passed the limit on what U.S. indices were comfortable with offering to potential investors, functionally ending dual-class structure listings like SNAP.

Despite the fallout from SNAP's IPO, all hope is not lost for companies that remain interested in dual-class structure IPOs. While various stock indices have announced partial or complete prohibitions on further listings of dual-class companies, some jurisdictions have moved in the opposite direction. Specifically, several other countries with existing complete or partial bans on dual-class structures have taken advantage of new opportunities in the market, and are now focused on making their regulations favorable to dual-class structured companies.[19] For example, Hong Kong's stock exchange has

---

Unusual Structure Says: 'I'm a Genius and Leave Me Alone to Let Me Be a Genius', STREET (June 6, 2017, 8:23 AM), https://www.thestreet.com/story/14164121/1/snap-s-non-voting-shares-highlight-debate-on-corporate-governance.html.

15 *See supra* note 14 and accompanying text.

16 *See* Trevor Hunnicutt, *S&P 500 to Exclude SNAP After Voting Rights Debate*, REUTERS (July 31, 2017, 9:44 PM), https://www.reuters.com/article/us-SNAP-s-p/sp-500-to-exclude-SNAP-after-voting-rights-debate-idUSKBN1AH2RV. By way of background, a stock index is a small sample of a market, which can be considered representative of the whole. *See* Andrew W. Lo, *What Is an Index?*, J. PORTFOLIO MGMT. 21, 21 (2016). Investors can use an index to track the general performance of a market, rather than tracking every single security in the United States. *Id.* at 25. Many investors choose to invest in indices in a practice called index investing. *Id.* at 21. This is a passive investment strategy, where the investor's investment theoretically is invested in all of the companies that are listed on the index, without investors having to choose particular companies in which they wish to invest. *Id.*

17 *Id.*

18 Nicole Bullock, *Companies with Multiple Share Classes Blocked from Joining S&P 500*, FIN. TIMES (July 31, 2017), https://www.ft.com/content/993e4c11-8729-3168-a280-69e1d400b1bc. This regulation effectively prohibits other companies from offering non-voting shares in their IPOs.

19 *See* Kishore Eechambadi, *The Dual-Class Voting Structure, Associated Agency Issues, and a Path Forward*, 13 N.Y.U. J.L. & BUS. 503, 512–13 (2017) (showing how Hong Kong has shown an interest in modifying its regulations in order to attract companies with a preference for dual-class structures); Douglas Appell, *Singapore's Stock Exchange Gives Dual-Class Shares a Secondary Listing Toehold*, PENSIONS & INV. (July 31, 2017, 10:31 AM), http://www.pionline.com/article/20170731/ONLINE/170739996/singapores-stock-exchange-gives-dual-class-shares-a-secondary-listing-toehold.

proposed listing a third decisional board, designed to attract technology firms.[20] Similarly, Singapore's stock exchange recently allowed dual-class structure companies with primary listings on a developed market exchange to list secondarily in Singapore.[21] As the global market begins to shift in response changing dual-class regulations, it is imperative to reexamine both the dual-class structure and relevant U.S. laws.

This Comment seeks to provide a broad overview of the global market that currently hosts extremes on both sides of the dual-class argument. While there is a trend among stock indices to prohibit dual-class companies, many companies considering going public with a dual-class corporate structure are simply looking to list in whichever jurisdiction offers the most favorable corporate governance regulations. Keeping the global markets in mind, this Comment proposes the proper approach the United States should take to find a balance between permissibility and prohibition. Ultimately, this Comment argues dual-class structures should continue to be permissible in the United States, though the government or exchanges should impose basic safeguards upon the structure. These safeguards are designed to ensure that the integrity of the dual-class structure is maintained while providing some degree of protection to shareholders.

This Comment is organized into four main Parts. Part I explains the significance of dual-class corporate structures and demonstrates its role in the marketplace, giving a general background on how U.S. courts and lawmakers have treated dual-class structures in the past.

Part II outlines the policy debate surrounding dual-class structures, considering both the benefits of and the problems with dual-class structure governance. Part II also describes the inherent tension between shareholders and management, providing a useful background to gauge why particular entrepreneurs may like dual-class corporate structures over other corporate organization forms.

Part III discusses current regulations regarding dual-class stock on various stock exchanges around the world. These stock exchanges all operate under the laws of the jurisdiction in which they primarily operate. Although most

---

[20] *See Hong Kong's Stock Exchange Proposes a Controversial Reform*, ECONOMIST (June 22, 2017), https://www.economist.com/news/finance-and-economics/21723854-new-board-aimed-tech-upstarts-and-chinese-firms-would-have-laxer/ (this board, being separate from the first two on the exchange, would list "new economy" technology companies only). For a discussion of why HKEx has targeted technology firms specifically, see *infra* Section I.C.

[21] *See* Appell, *supra* note 19.

jurisdictions contain generally permissible laws regarding dual-class corporations, how the exchanges themselves choose to interpret those laws, as well as how exchanges promulgate their own rules, can have implications for how dual-class corporate structures are treated. As the global economy shifts, some of these countries have altered their stance on dual-class structures, giving context to the present legal landscape over those structures in major economies across the world.

Finally, Part IV argues that the United States must reconsider its current stance on dual-class structures to remain competitive in the global marketplace. Given changing market realities, the United States can ensure it remains dominant and attractive for corporate IPOs while placing basic safeguards on the structure to protect against the complete elimination of shareholders' voting rights.

I. BACKGROUND

This Part provides a basic overview of dual-class corporate structures, and shows the utility of dual-class structures in the marketplace. Section A offers a general background of the structure, and explains basic terminology useful in the corporate governance sphere. Next, section B explains the history of dual-class structures in the United States, and highlights how U.S. regulatory bodies have limited dual-class structures in the past. Section C demonstrates the current role of dual-class structures in the U.S. marketplace, explaining which industries tend to favor dual-class structures. Finally, section D focuses on modern stock index backlash against the structure in the United States.

A. What Are Dual-Class Voting Structures and Why Do They Matter?

Simply put, "dual-class" describes a capital structure that contains two or more classes of shares. In a two-class model, typically one class of shares will hold significantly more voting power than the other.[22] This structure is distinct from the single class structure, where all stock carries equal equity and voting power.[23] In a single class structure, for example, shareholder A's ten shares will have the same voting rights as shareholder B's ten shares.[24] Public shareholders

---

[22] *See Dual-Class Stock*, COUNCIL INSTITUTIONAL INV., https://www.cii.org/dualclass_stock (last visited Oct. 20, 2018).

[23] *Id.*

[24] *See* Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy,* 54 GEO. WASH. L. REV. 687, 687 (1986).

typically receive shares with one vote per share.[25] A dual-class corporate structure on the other hand, has different voting rights associated with different classes of shares.

While shareholders have several rights,[26] the right to vote is significant because it gives shareholders some degree of control over the corporation they own.[27] Chief among the right to vote is the right to elect directors.[28] Although states[29] may differ on what other matters shareholders have the right to vote on, common examples include the right to vote on mergers,[30] charter amendments,[31] and unilateral bylaw amendments.[32] In the single-class structure example, where shareholder A holds ten shares and shareholder B holds ten shares, both A and B will have their voice heard equally when called upon to vote on a corporate matter. On the other hand, in a dual-class system, if shareholder A holds ten shares of a preferred stock class carrying twice the weight of common stock, then shareholder A's ten shares will outweigh shareholder B's ten shares of common stock by a factor of two.

The dual-class structure is popular with companies in various sectors because the ability to limit classes of shareholder votes is a useful defensive measure that protects against takeovers.[33] This model can be especially useful to founders of emerging companies, because it keeps them in control of how they run their business. On the other hand, dual-class corporate structures present problems for public investors who may find themselves largely without a voice or vote. Issuing a secondary (common) class of stock dilutes the interest of the primary (preferred) class of stock.[34] Members of the preferred class typically

---

[25] *Id.*

[26] For further discussion of shareholder rights, see Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 413 (2006).

[27] *See id.* at 416.

[28] *See* DEL. CODE ANN. tit. 8, § 211(b) (West 2018); MODEL BUS. CORP. ACT § 7.28(a) (AM. BAR. ASS'N, amended 2016).

[29] Corporate law is largely state law. *See* Robert W. Hamilton, *The State of State Corporation Law: 1986*, 11 DEL. J. CORP. L. 3, 12–16 (1986). The tension between federal and state regulation of corporate governance structures is discussed further in Part IV below.

[30] DEL. CODE ANN. tit. 8, § 251(b)–(c) (West 2018); MODEL BUS. CORP. ACT § 11.04(a), (d)–(e) (AM. BAR. ASS'N, amended 2016).

[31] DEL. CODE ANN. tit. 8, § 242(a)–(b) (West 2018); MODEL BUS. CORP. ACT § 10.03(a)–(b), (e) (AM. BAR. ASS'N, amended 2016).

[32] DEL. CODE ANN. tit. 8, § 109(a) (West 2018); MODEL BUS. CORP. ACT § 10.20(a)–(b) (AM. BAR. ASS'N, amended 2016).

[33] *See* Tian Wen, Comment, *You Can't Sell Your Firm and Own It Too: Disallowing Dual-Stock Companies from Listing on the Securities Exchanges*, 162 U. PA. L. REV. 1495, 1496 (2014).

[34] *Id.*; *see also* Steven Davidoff Solomon, *New Share Class Gives Google Founders Tighter Control*, N.Y. TIMES (Apr. 13, 2012, 9:17 AM), https://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-

ensure their voting power outweighs that of the common class, thus keeping the holders of preferred class stock in control and largely unchecked by public shareholders, who often make up the bulk of common shareholders.[35]

Dual-class structures have recently been used by founders of emerging technology companies,[36] though have historically been used in other industries as well, including the newspaper and media sectors.[37] Examples of dual-class companies include Google's parent company Alphabet, the Ford Motor Company, and Facebook.[38] The structure seems to have resonated especially with technology firms, possibly because tech entrepreneurs have special skills that others cannot replicate.[39] For example, Google's founders have argued they want to "focus on the long term," which they believe cannot be achieved "with the short-term sway of shareholders who are more worried about quarterly profits."[40] By granting shareholders only minimal voting power, founders can gain access to public markets and better focus on their corporate vision.

While the tension between shareholders and corporate management is felt by companies who offer public shareholders minimal voting rights, SNAP has taken the dual-class model a step further. SNAP has three classes of stock, each with differing voting rights.[41] SNAP's primary class of stock is called Class C, and each share of Class C stock holds ten votes.[42] The second class of stock is Class B, which holds the traditional one vote per share. SNAP's third class of

---

founders-tighter-control/ (noting dilution of Google's founder's stock interest due to issuing multiple stock classes).

35 *See* Wen, *supra* note 33, at 1497–98; *see, e.g.*, Solomon, *supra* note 33.

36 *See, e.g.*, Wen, *supra* note 33, at 1497 n.10 (citing to a series of corporate documents reflecting dual-class structures).

37 *See* Bebchuk & Kastiel, *supra* note 5, at 595 ("Major companies with dual-class structures operating in [non-technology] sectors include AMC, Berkshire Hathaway, Cablevision, CBS, Comcast, Estée Lauder, Ford, Hershey, News Corp., Nike, Ralph Lauren, Tyson Foods, and Viacom.").

38 *Dual Class Companies List*, COUNCIL INSTITUTIONAL INV., http://www.cii.org/files/3_17_17_List_of_DC_for_Website(1).pdf (last visited Oct. 20, 2018).

39 *See* Bebchuk & Kastiel, *supra* note 5, at 589 ("Public investors may be content with having [the founders] securely at the helm in the years following [SNAP's IPO]. After all, [the founders] might be viewed by investors as responsible for the creation and success of a company that went public at a valuation of nearly $24 billion."); Solomon, *supra* note 34.

40 Solomon, *supra* note 34.

41 *See* Snap Inc., Amendment No. 1 to Form S-1 to Registration Statement (Form S-1/A) 4 (Feb. 9, 2017) ("We have three classes of common stock: Class A, Class B, and Class C. Holders of our Class A common stock . . . are entitled to no vote on matters submitted to our stockholders. Holders of our Class B common stock are entitled to one vote per share. And holders of Class C common stock are entitled to ten votes per share. Holders of shares of Class B common stock and Class C common stock will vote together as a single class on all matters (including the election of directors) submitted to a vote of stockholders.").

42 *Id.*

stock is called Class A, and notably does not hold any votes per share.[43] SNAP's structure, like many other dual-class structures, keeps its founders securely in their position, as holders of Classes A and B will likely never muster enough votes to outweigh how Class C holders vote: the two holders of SNAP's Class C stock[44] hold 88.5% of the company's total voting power.[45]

To emphasize the importance of dual-class structures, consider this statement from SNAP's Registration Statement after its public filing:

> This concentrated control[46] could delay, defer, or prevent a change of control, merger, consolidation, or sale of all or substantially all of our assets that our other stockholders support. Conversely, this concentrated control could allow our co-founders to consummate a transaction that our other stockholders do not support. In addition, our co-founders may make long-term strategic investment decisions and take risks that may not be successful and may seriously harm our business.[47]

The tension highlighted by SNAP in its Registration Statement shows that the interests of shareholders and founders are often incongruous, and may demand a middle-ground solution.

B. The History of Dual-Class Structures in the United States

Although dual-class structures have made recent financial headlines, the structure has been around for quite some time. In U.S. business history, variations on the dual-class structure were actually the norm.[48] Limitations on shareholder voting in the United States were initially seen in individual corporate charters granted by state legislatures, prior to the adoption of general incorporation statutes.[49] These corporate charters had share structures that ranged from providing one vote per shareholder,[50] to one vote per share, with

---

[43] *Id.*

[44] Specifically, CEO Evan Spiegel and CTO Bobby Murphy. *Id.*

[45] *See* Kurt Wagner, *One Way Snapchat's IPO Will Be Unique: The Shares Won't Come with Voting Rights*, RECODE (Feb. 21, 2017, 8:30 AM), https://www.recode.net/2017/2/21/14670314/SNAP-I.P.O.-stock-voting-structure.

[46] This likely refers to the 88.5% ownership stake Evan Spiegel and Bobby Murphy hold in the company. *See supra* notes 40–44 (footnote not in original).

[47] Snap, Inc., *supra* note 41, at 5.

[48] Contrary to popular belief, the "one-share, one-vote structure" has not been the historical norm. *See Bainbridge*, *infra* note 49.

[49] *See* Stephen Bainbridge, *Understanding Dual Class Stock Part I: An Historical Perspective* (Sept. 9, 2017), http://www.professorbainbridge.com/professorbainbridgecom/2017/09/understanding-dual-class-stock-part-i-an-historical-perspective.html#_ftn9.

[50] This is regardless of the number of shares owned.

various voting structures in between.[51] Since these early corporate charters, the permissibility of these varying types of shareholder voting structures has fluctuated.

Because reform efforts were almost invariably led by corporations—apparently under pressure from large shareholders—it may be assumed that one factor pushing toward reform was a desire to encourage large-scale capital investment.[52] Professor Bainbridge, an authority in corporate governance scholarship, argues that while corporations appeared to adhere to shareholder demands, many shareholders and corporations undermined restrictive one-vote-per-share structures.[53] Shareholders could simply transfer their shares to strawmen, who would vote how the "true" owner directed.[54]

While early statutory standards defaulted to one-share-per-vote, contemporary corporate law gives corporations the ability to adopt alternative share arrangements.[55] Additionally, few limiting regulations have come from states over the years,[56] as state law has long permitted general flexibility in corporate voting structures.[57] State-level courts have also been friendly to dual-class structures, routinely upholding them against challenges.[58]

In addition to individual shareholders, most of the challenges against disparate voting rights tend to come from self-regulatory organizations (SROs) like the NYSE.[59] SROs have an ever-changing relationship with dual-class structured companies, evidenced primarily by the NYSE's initial ban on the structure in 1926.[60] In the 1920s, a group of companies went public or

---

[51] *See* David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"*, 56 CORNELL L. REV. 1, 8–11 (1970).

[52] *See* Bainbridge, *supra* note 49.

[53] *Id.*

[54] *Id.* at n.9 ("This practice is noted, for example, in the preamble to an English act of 1766. Nonetheless, it apparently was (or became) lawful. The same practice arose in the United States, the Maryland legislature going so far as to require each voting shareholder to swear an oath that the shares he was voting were his property and had not been acquired with the intent of increasing the number of votes to which the shares were entitled.")

[55] *See* DEL. CODE ANN. tit. 8, §§ 151, 212(a) (West Supp. 2018); MODEL BUS. CORP. ACT § 6.01(a)–(b) (AM. BAR ASS'N, amended 2016).

[56] Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, 69 WASH. U.L.Q. 565, 574 n.42 (1991).

[57] *Id.* at 574–75.

[58] *Id.*

[59] *See generally* Onnig H. Dombalagian, *Self and Self-Regulation: Resolving the SRO Identity Crisis*, 1 BROOK. J. CORP. FIN. & COM. L. 317 (2007) (explaining that SROs enforce compliance of their own policies and federal regulations).

[60] *See* Louis Lowenstein, *Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gilson*, 89 COLUM. L. REV. 979, 979–85 (1989).

reorganized with non-voting shares, much to the dismay of the public, Congress, and President Calvin Coolidge.[61] Fearing federal intervention, the NYSE adopted a one-vote, one-share policy.[62] This policy stood relatively unchanged for three generations, and acted as a standard for public companies in the United States, whether they were listed on an exchange or not.[63]

By the 1980s, however, the NYSE began facing competition from other U.S. stock exchanges, like the National Association of Securities Dealer Automated Quotation System (NASDAQ), that offered to list dual-class companies.[64] Concerned about losing listings to other exchanges, the NYSE proposed amendments that permitted dual-class stock offerings and recapitalizations.[65] Given the emerging dichotomy between various stock exchanges and general confusion in the permissibility of the structure, some form of regulation became a necessity.

Arguably, in the 1980s at least four different regulators had the authority to regulate disparate voting rights plans: SROs, state legislatures, state securities commissions (or "blue sky" commissions), and Congress.[66] SROs, like the NYSE, were unlikely to combine efforts to adopt a uniform policy due to their own internal competition.[67] State legislatures took a hands-off approach to the regulation of corporate capital structures, and seemed unlikely to change their policies during the late 1980s.[68] While some state securities regulators used blue sky rules to impose some minor restrictions on dual-class structures, any further regulation by these commissions would likely be ineffective.[69] This stems largely from the patchwork regulatory system that, if left to the states, would result in the emergence of fifty different regulatory schemes.[70] Finally, Congress also held the power to limit dual-class structures under the Constitution's

---

[61] Prominent companies included Industrial Rayon and Dodge Brothers. *Id.* at 982.

[62] *Id.*

[63] *Id. But see* Ronald J. Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807, 807 n.1 (1987) (finding that other stock exchanges did not have such stringent voting standards; specifically, the American Stock Exchange had lower standards, and the National Association of Securities Dealers Automatic Quotation System (NASDAQ) had no voting standards).

[64] *See* Bebchuk & Kastiel, *supra* note 5, at 596 ("[A]fter General Motors threatened to leave for NASDAQ, the NYSE proposed amendments to its listing requirements that would permit listed companies to use dual-class structures."); Gilson, *supra* note 63.

[65] *See NYSE's Proposed Rule Changes on Disparate Voting Rights*, 18 SEC. REG. & L. REP. (BNA) No. 34, at 1389 (Sept. 19, 1986).

[66] Bainbridge, *supra* note 56, at 589.

[67] Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545, 574 (1984).

[68] Bainbridge, *supra* note 56, at 589.

[69] *Id.*

[70] *Id.* at 589–90.

Commerce Clause.[71] Congress, like the other regulatory bodies, seemed unlikely to act, given that during the 1980s it had twice failed to implement proposed federal one-vote-per-share standards.[72] While these four main bodies did not create any form of comprehensive corporate governance regulation, the Securities and Exchange Commission (SEC) promulgated its own rule.

After a significant push from investors the SEC adopted Rule 19c-4 in 1988.[73] That Rule was designed to limit existing companies with one-vote, one-share structures from reorganizing as dual-class structures, in other words, companies were prohibited from giving greater voting rights to a particular group of shareholders after they had already been offering shares on the public market.[74] In effect, the rule prohibited an issuer from being listed on a national securities exchange or traded through the NASDAQ if the company had taken any corporate action that had the effect of "nullifying, restricting or disparately reducing the per share voting rights of existing [common stockholders]."[75] Even when approved by a shareholder vote, companies were restricted from changing their corporate structure if it would have any negative impact at all on the existing voting rights of stockholders.[76]

The ruling was challenged by the Business Roundtable,[77] a group of chief executive officers of major U.S. companies.[78] The D.C. Circuit held that the SEC had exceeded its authority in promulgating Rule 19c-4.[79] This decision has been

---

[71] Colloquium, *Federalism Issues in Corporate Governance,* 45 OHIO ST. L.J. 591, 605–06 (1984) (remarks of Dean Choper).

[72] Bainbridge, *supra* note 56, at 590 (citing several congressional actions directed at mandating a one-share, one-vote standard for exchange- and NASDAQ-traded voting securities).

[73] Voting Rights Listing Standards; Disenfranchisement Rule, 53 Fed. Reg. 26,376, 26,380, 26,394 (SEC July 12, 1988) (codified as amended at 17 C.F.R. § 240.19c-4 (1988)), *invalidated by* Bus. Roundtable v. SEC, 905 F.2d 406, 417 (D.C. Cir. 1990).

[74] *Id.*

[75] Bainbridge, *supra* note 56, at 566.

[76] *See* Voting Rights Listing Standards; Disenfranchisement Rule, 53 Fed. Reg. at 26,380.

[77] The group formed in 1972 to promote pro-business public policy. *About Us: The History of Business Roundtable*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us (last visited Oct. 20, 2018). The group currently includes prominent business executives from corporations like AT&T Inc., Exxon Mobile Corporation, MasterCard Inc., and Walmart Inc. *About Us: Members*, BUS. ROUNDTABLE, https://www.businessroundtable.org/about-us/members (last visited Oct. 20, 2018).

[78] *See Bus. Roundtable*, 905 F.2d at 407.

[79] *See id.* The SEC argued its authority came from Section 19(c) of the Securities Exchange Act of 1934. *Id.* Specifically, Section 19(c) provides the following:

> The Commission, by rule, may abrogate, add to, and delete from . . . the rules of a self-regulatory . . . as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to confirm its rules to the requirements of this chapter and the rules

interpreted to severely restrict the SEC's power to regulate shareholder voting rights.[80] As a result, any impetus for regulation must come from Congress, the shareholders themselves, or from state-level regulators.[81]

Although U.S. regulators and stock exchanges permit companies to offer a dual-class structure in their IPO, the arguments for and against dual-class structure have intensified as high-profile corporations continue to choose it over other corporate structures.[82] In the aftermath of several private stock indices indicating that they will not allow companies with non-voting stock to be eligible in their private indices, the battle surrounding dual-class structures has been rekindled.[83]

C. The Current Role of Dual-Class Structures in the U.S. Marketplace

Dual-class companies make up a significant number of the companies listed on exchanges in the United States, resulting in an aggregate market capitalization exceeding $3 trillion.[84] Lucian Bebchuk and Kobi Kastiel, of Harvard's Program on Corporate Governance, compiled data regarding dual-class companies in the major indices in the following table:[85]

> and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter . . . .

15 U.S.C. § 78s(c) (2012).

80 Katie Bentel & Gabriel Walter, Dual Class Shares 20 (2016) (unpublished seminar paper) (on file with the University of Pennsylvania Law School Legal Scholarship Repository).

81 *Id.* at 20.

82 *See supra* notes 1, 5, 10 and accompanying text.

83 *See supra* notes 12–14.

84 *See* Bebchuk & Kastiel, *supra* note 5, at 594 (displaying Bloomberg data as of July 2016, where the authors excluded real estate investment trusts from the list of dual-class companies to be consistent with previous studies).

85 *Id.*

	S&P 100	S&P 500	Russell 1000	Russell 3000[86]
Number of Companies	9	32	83	245
% of Index[87]	9%	6.4%	8.4%	8.2%
Total Market Capitalization (Trillions)	$2.26	$2.27	$3.18	$3.35

While dual-class voting is not a new corporate structure, since Google went public in 2004 there has been an upward trend in corporations opting for dual-class stock structures.[88] In particular, there was a significant uptick in dual-class structures between 2012 and 2016, as roughly 19% of U.S. technology companies went public with a dual-class voting structure, doubling the number of dual-class corporations from the previous five-year period.[89] Likewise, following Alibaba's 2014 cross-border listing, there has been an influx of Chinese companies listing in the United States with a dual-class structure.[90]

Technology companies have been implementing the structure as a powerful anti-takeover device. LinkedIn, the popular professional social network, adopted the dual-class share structure prior to its IPO.[91] Public shareholders were limited to less than 1% of the voting power.[92] Square, the payment-processing company, also adopted a dual-class structure prior to its IPO.[93] The dual-class structure

[86] For more information on dual-class companies listed on the Russell 3000, see *Dual Class Companies List*, *supra* note 38.

[87] *See* Bebchuk & Kastiel, *supra* note 5, at 594. The percentage of the index is calculated by dividing the number of companies that utilize the dual-class structure by the overall number of companies listed in the index. *Id.* For example, in the S&P 100, nine companies use the structure. *Id.* Out of the total 100 companies, this means 9% are dual-class structured companies.

[88] *See id.*; Blair Nicholas & Brandon Marsh, *Dual-Class: The Consequences of Depriving Institutional Investors 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/.

[89] *See* Maureen Farrell, *In SNAP IPO, New Investors to Get Zero Votes, While Founders Keep Control*, WALL STREET J. (Jan. 16, 2017, 8:24 PM), https://www.wsj.com/articles/in-snap-ipo-new-investors-to-get-zero-votes-while-founders-keep-control-1484568034.

[90] *See* H.K. EXCHS. & CLEARING LTD., CONCEPT PAPER: WEIGHTED VOTING RIGHTS 36–37 (2014), http://www.HKEx.com.hk/-/media/HKEX-Market/News/Market-Consultations/2011-to-2015/August-2014-Weighted-Voting-Rights/Consultation-paper/cp2014082.pdf; *see also Hong Kong's Stock Exchange*, *supra* 19.

[91] *See* Steven Davidoff Solomon, *A Deeper Look at LinkedIn's Structure*, N.Y. TIMES (May 12, 2011, 4:01 PM), https://dealbook.nytimes.com/2011/05/12/a-deeper-look-at-linkedins-structure/.

[92] *See* Steven Davidoff Solomon, *Plans for LinkedIn's IPO May Make Few Friends*, N.Y. TIMES (May 10, 2011, 5:42 PM), https://dealbook.nytimes.com/2011/05/10/plans-for-linkedins-i-p-o-may-make-few-friends/.

[93] *See* Myles Udland, *4 Reasons Investors Might Hate the Square IPO*, BUS. INSIDER (Oct. 14, 2015, 5:39 PM), http://www.businessinsider.com/square-dual-class-structure-2015-10.

may help insulate companies from the risks of emerging technologies, allowing them to experiment without the sways of short-term market pressure. These companies, like SNAP, have taken a particular interest in the structure, and are largely responsible for reigniting the debate over its merits.

D. Stock Indices' Extreme Backlash and the SEC's Disapproval

While many institutional investor and shareholder advisory groups have long expressed opposition to dual-class structures,[94] their arguments finally struck a chord with stock indices in July 2017. Arguably in the direct aftermath of SNAP's non-voting structure IPO, the stock indices felt that dual-class structure benefits had been stretched too far at the expense of investors.[95] Mark Makepeace of the FTSE Russell noted in early July 2017, "[i]t's quite clear that institutional investors want to put some criteria in place which means that you will not include in their benchmarks companies that have very, very low voting rights. We're consulting to see just where that line should be."[96] A few days after Makepeace's statement, the FTSE Russell made its decision.[97]

The FTSE Russell announced that it would require companies to offer at least 5% voting rights to investors, implying the index deeply disagreed with SNAP's unprecedented non-voting shares.[98] In late July 2017, the S&P 500 announced its ban on dual-class structures, stating that "companies with multiple share class structures tend to have corporate governance structures that treat different shareholder classes unequally with respect to voting rights and other governance issues."[99]

Decades after Rule 19c-4 was struck down, the SEC again made some disapproving remarks of dual-class structures.[100] In a February 2018 speech at the University of California, Berkeley, SEC Commissioner Robert Jackson Jr.

---

[94] Arguably, this has occurred since the *Business Roundtable* decision, although their arguments became heated and prominent after the wave of dual-class IPOs following Google's lead in 2004. *See* John Markoff, *The Google IPO: The Overview; Google's Sale of Its Shares Will Defy Wall St. Tradition*, N.Y. TIMES (Apr. 30, 2004), https://www.nytimes.com/2004/04/30/business/google-ipo-overview-google-s-sale-its-shares-will-defy-wall-st-tradition.html; *see* discussion *supra* Sections I.A.–I.B.

[95] Benjamin Robertson et al., *Index Chiefs Say Dual-Class Shares Are an 'Issue' for Investors*, BLOOMBERG (July 13, 2017, 10:08 PM), https://www.bloomberg.com/news/articles/2017-07-14/dual-class-shares-a-global-problem-for-msci-chief-fernandez; *see* Hunnicutt, *supra* note 16.

[96] Robertson, *supra* note 95.

[97] Hunnicutt, *supra* note 16.

[98] Bullock, *supra* note 18.

[99] *See* Hunnicutt, *supra* note 16.

[100] Robert J. Jackson Jr., Comm'r, SEC, 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.

made comments reflecting his belief[101] that dual-class structures should be permitted to exist, though limited by some form of sunset provision.[102] Commissioner Jackson argued that an outright ban on the structure hurt investors, and therefore could not be the right solution.[103] Instead, Commissioner Jackson's comments suggested a better solution would take the interests of both investors and shareholders into account.

The Commissioner's speech at Berkeley summarized the current state of dual-class structures in America: although market participants are generally encouraged to lobby and promote their beliefs in and preferences for corporate governance structures, the recent opposition to dual-class among several indices has created a dichotomy of extremes within the United States.[104] On one hand, it appears SROs entirely support, or at the very least passively accept, the existence of dual-class structures, accepting even the most egregious models of the structure, like SNAP's.[105] On the other hand, several indices have moved on the encouragement of investors to effectively ban the dual-class structure, or at least limit it as much as they can in their capacity as indices. To avoid these extremes, the United States must implement a new policy, which both protects the integrity of the dual-class structure and also avoids completely squashing the rights of investors. Commissioner Jackson's recommendation of limiting the use of dual-class structures through sunset provisions appears to take a desirable moderate approach, which could prove beneficial to both shareholders and investors.

II. DUAL-CLASS POLICY ARGUMENTS

As dual-class structures have shifted in and out of regulation over the years, an ongoing debate has spawned. Many investors consider the potential pitfalls of the structure and argue the dual-class structure results in entrenchment and

101 It should be noted the Commissioner's beliefs do not necessarily reflect the views of the SEC, though Commissioner Jackson did state that he hoped the SEC would someday adopt his beliefs. *Id.* A fellow SEC Commissioner, Kara Stein, also criticized dual-class shares during the week of Commissioner Jackson's Berkeley Address. *See* Kara Stein, Comm'r, SEC, "Mutualism: Reimagining the Role of Shareholders in Modern Corporate Governance" Remarks at Stanford University (Feb. 13, 2018), https://www.sec.gov/news/speech/speech-stein-021318.

102 Jackson Jr., *supra* note 100. A sunset provision would end a dual-class share structure upon the occurrence of a certain amount of time or a certain event, such as the death of the entrepreneur.

103 *Id.*

104 *Id.*

105 *See supra* note 14 and accompanying text.

poor long-term economic returns.[106] However, supporters of dual-class argue the structure's centralized control allows those who have specialized skills to lead companies without interference by the market's fluctuations.[107] Section A will outline investors' arguments about some of the drawbacks of the dual-class structure. Section B will detail the benefits of dual-class structures.

A. *The Problems with Dual-Class*

In recent years, the anti-dual-class faction has gained an impressive roster of dissenters in the United States.[108] Institutional investors,[109] like the Council of Institutional Investors and various leading mutual funds, have expressed some of the strongest opposition to dual-class structures.[110] Arguments against dual-class focus on two fundamental problems: entrenchment and poor long-term economic returns.[111]

1. *Entrenchment*

While proponents of dual-class argue that entrenchment is a positive force,[112] those in opposition suggest the structure insulates poorly performing controllers from shareholder removal.[113] To illustrate this point, Professors Bebchuk and Kastiel analyze Viacom's controlling shareholder, Sumner Redstone, who has maintained full control of the prominent media company thanks to a dual-class capital structure.[114] Redstone purchased Viacom in a hostile takeover and helped transform it into a $40 billion multi-media

---

[106] *See* Bebchuk & Kastiel, *supra* note 5, at 598 n.40 ("The ISS survey included 120 responses from institutional investors. Fifty-seven percent supported negative recommendations against directors at companies that go public with dual-class stock.").

[107] *See, e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 564–65 (2016).

[108] Dissenters include the Council of Institutional Investors; Senator Elizabeth Warren; leading mutual funds, such as Vanguard, Fidelity, and T. Rowe Price; and even prominent pension funds, including the California State Teachers' Retirement System, the California Public Employees' Retirement System, and the Florida State Board of Administration. *See* Bebchuk & Kastiel, *supra* note 5, at 597–98.

[109] Institutional investors are groups that pool money from banks, hedge funds, pension funds, and insurance companies to purchase securities. *See* Symposium, *The Institutional Investor's Goals for Corporate Law in the Twenty-first Century*, 25 DEL. J. CORP. L. 35, 38 n.4 (2000) (quoting Carolyn Brancato, *Institutional Investment Report: Financial Assets and Equity Holdings*, 3 CONF. BD. NO. 1, Aug. 1999, at 7 ("defining an institutional investor as 'any investor with money under professional management'")).

[110] *The Tragedy of the Dual Class Commons*, ISS 1, 3 (Feb. 13, 2012), http://online.wsj.com/public/resources/documents/facebook0214.pdf.

[111] *See* Bebchuk & Kastiel, *supra* note 5, at 602.

[112] *See supra* Section I.D.

[113] *See* Bebchuk & Kastiel, *supra* note 5, at 602.

[114] *Id.* at 587.

powerhouse that now encompasses the Paramount Pictures movie studio and the CBS, MTV, and Showtime television networks.[115] By 2016, however, questions about Redstone's mental capacity arose.[116] The then-ninety-three-year-old Redstone allegedly suffered from "'profound physical and mental illness'; 'ha[d] not been seen publicly for nearly a year'[;] [could] no longer stand, walk, read, write or speak coherently[;] . . . [could not] swallow[;] and require[d] a feeding tube to eat and drink.'"[117] Although public investors held approximately 90% of the company's equity capital,[118] Redstone controlled 80% of the voting shares,[119] leaving shareholders effectively blocked from removing Redstone. Although Redstone did eventually step down after a year-long debate over his mental competence,[120] this example illustrates the dangers of consolidating corporate voting power in the hands of one, or a few.

Sumner Redstone is a relatively extreme example of the possible issues of dual-class structures. Critics of dual-class structures believe that corporate founders entrenching themselves in their companies for the "benefit of the shareholder" is a toxic notion, fed to public investors so the founder can escape shareholder accountability.[121] They point to other examples of controllers behaving badly, like Lord Conrad Black of Hollinger International.[122] Hollinger International, a Canadian public holding company, owned various community newspapers across the United States and Canada.[123] When Black illegally diverted millions of dollars to his own accounts, the only recourse shareholders

---

115 *Id.*

116 *See* Emily Steel, *Sumner Redstone to Leave Viacom Board in February*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/media/sumner-redstone-viacom-board.html.

117 *See* Bebchuk & Kastiel, *supra* note 5, at 587–88, 588 n.4 (citing to other news articles discussing Sumner Redstone's mental capacity).

118 *Id.* at 587. Although Redstone only held 8% of Viacom's shares, his shares held a significantly higher voting right than those owned by public investors. *Id.*

119 *See* Steel, *supra* note 116.

120 *Id.*

121 *See, e.g.*, Andrew Ross Sorkin, *Stock Split for Google that Cements Control at the Top*, N.Y. TIMES (Apr. 16, 2012, 9:14 PM), http://dealbook.nytimes.com//2012/04/16/stock-split-for-google-that-cements-control-at-the-top/. Criticizing Google's issuance of a third class of stock in 2012, Sorkin commented:

> Just think about other once highflying technology companies that turned sour. Yahoo. Or Research in Motion. Its founders were once lionized as visionaries—until they weren't. The problem is that Google will succeed until it doesn't. And when it falters, it won't have the kick in the pants that the prospect of pressure from shareholders can provide.

Id.

122 *See* Thomas J. Chemmanur & Yawen Jiao, *Dual-Class IPOs, Share Recapitalizations, and Unifications: A Theoretical Analysis* 2 (European Corp. Governance Inst., Working Paper No. 129, 2006), http://ssrn.com/abstract_id=925236.

123 Robert Lenzner, *Press Lord Pressed*, FORBES (May 26, 2003, 12:00 AM), https://www.forbes.com/forbes/2003/00526/052.html#5cd1e3604cf8.

had was to sell their shares.[124] Without a court order deeming a controller's actions illegal or finding a controller mentally incompetent, shareholders are likely to have little ability to find relief.

2. *Poor Long-Term Economic Returns*

A second critique of the dual-class structure is that it may lead to poor long-term economic returns. In one-vote, one-share structures, shareholders can remove managers who act in ways contrary to the interests of shareholders and investors.[125] Critics argue that right is limited in dual-class structures.[126] Take Viacom for example, whose television and film divisions struggled through negative press regarding Sumner Redstone's failing health.[127] The company's stock price dropped by almost 50% in the two years leading up to Viacom's public leadership struggle.[128] At the end of its 2016 fiscal year, the company also reported a 25% drop in profit, and a 6% decrease in revenue.[129]

Several recent studies have demonstrated that a combination of entrenchment of management and low long-term economic returns can reduce company value over time.[130] Professors Bebchuk and Kastiel argue that the costs associated with dual-class structures are magnified over time for two reasons: the erosion of the controlling stockholder's superiority, and a decrease in the controlling stockholder's equity capital.[131] Although the controlling shareholder keeps a tight grip on the company, Professors Bebchuk and Kastiel assert that "[m]any dual-class structures enable controllers to unload their holdings without losing control, and controllers often do so to diversify their portfolios and reduce their idiosyncratic risk."[132] As controllers distance themselves from the company by selling equity, the gap between their interests and those of investors grows.[133]

---

124 *Id.*; *see also* Chemmanur & Jiao, *supra* note 122.

125 Bebchuk & Kastiel, *supra* note 5, at 602.

126 *See* Velasco, *supra* note 26, at 416–18. Generally, shareholders can vote, sell their stock, or sue to exert pressure on the company's board of directors to remove the underperforming manager. *Id.* In dual-class structures, one of those options is removed, making it harder for shareholders to voice their concerns.

127 *See* Steel, *supra* note 116.

128 *Id.*

129 *See* Emily Steel, *Viacom's Earnings Plunge After Battle for Control*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/business/viacoms-earnings-plunge-after-battle-for-control.html.

130 *See* Paul A. Gompers et al., *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1052–54, 1075 (2010); Ronald W. Masulis et al., *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697, 1722 (2009).

131 *See* Bebchuk & Kastiel, *supra* note 5, at 604–06.

132 *Id.* at 606–07.

133 *Id.* at 607.

The table below demonstrates the tendency of controllers to reduce their equity holdings over time. The table documents changes in ownership interests of 2015's ten largest dual-class companies:[134]

COMPANY NAME	DATE OF FIRST AVAILABLE FILING	INITIAL HOLDINGS	HOLDINGS AS OF 2015
Berkshire Hathaway Inc.	1999	32%	15%
Broadcom Corporation	1999	45%	8%
CBS Corporation	1995	26%	8%
Comcast Corporation	1978	42%	0.4%
Facebook, Inc.	2012	28%	15%
Ford Motor Company	1969	7.1%	1.8%
Google Inc.	2004	28%	12%
NIKE, Inc.	1984	68%	31%
Regeneron Pharmaceuticals, Inc.	1991	7%	5%
Twenty-First Century Fox, Inc.	2005	16%	15%
Average	**N/A**	**30%**	**11.6%**

The disproportionality of voting rights to ownership rights result in the interests of controllers moving away from the interests of their investors.[135] As owners become less involved in their companies, they tend to be less responsive to investors' concerns.

B. The Benefits of Dual-Class

Supporters of dual-class argue that the structure enables the founder to create a long-term vision and utilize his special skills to produce superior returns.[136] The increased returns benefit the founder, company, and all other investors.[137]

---

134 *Id.* at 608.

135 *Id.* at 608–09.

136 Chemmanur & Jiao, *supra* note 122, at 3.

137 *See, e.g.*, Goshen & Hamdani, *supra* note 107, at 567.

Rather than losing value, as opponents suggest, supporters claim that insulating the founder from market pressure results in greater economic return for all parties involved.[138]

In 2012, Google issued a third class of common stock instead of opting to dilute its existing Class A and Class B stock.[139] The founders wrote a letter to Google's shareholders explaining their move: they wanted to pursue long-term projects without the possibility of losing control of those projects.[140] The founders argued that dual-class was necessary because "[t]echnology products often require significant investment over many years to fulfil their potential."[141]

The long-term value account emphasizes that the entrepreneurial vision is too precious to be altered by short-term market sways, leaving incumbent leaders to pursue new investments and seek greater value.[142] As Larry Page and Sergey Brin aptly stress, shareholders do not always share their idiosyncratic vision for the future.[143] These entrepreneurs need time and space away from shareholders to execute their business decisions.[144] This structure is overall beneficial to all parties because if an investment succeeds, then the shareholders benefit from receiving their pro rata share in profits.[145]

New technology companies are inherently different than Industrial Age corporations that derived most of their value from manufacturing activities.[146] Technology and information companies draw their value from "human capital and intangible assets,"[147] hence the importance of protecting the entrepreneur and his vision. While many of the arguments against dual-class structures originated at the height of influence of manufacturing companies, the new economy has changed the function of emerging technology, necessitating a change to the old arguments against dual-class structures.

---

[138] *Id.*

[139] *Third-Class Shares,* FIN. TIMES (Apr. 15, 2012, 4:15 PM), https://www.ft.com/content/0df7a4c4-856a-11e1-a75a-00144feab49a.

[140] *See, e.g.*, Goshen & Hamdani, *supra* note 107, at 590 n.99.

[141] Letter from Larry Page, Google CEO & Co-Founder, and Sergey Brin, Google Co-Founder, to Google S'holders (Apr. 2012) [hereinafter 2011 Founders' Letter] ("For example, it took over three years just to ship our first Android handset, and then another three years on top of that before the operating system truly reached critical mass.").

[142] *See* Yu-Hsin Lin, *Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control,* 2017 COLUMB. BUS. L. REV. 453, 473–74 (2017).

[143] 2011 Founders' Letter, *supra* note 141.

[144] *See* Lin, *supra* note 142.

[145] *See, e.g.*, Goshen & Hamdani, *supra* note 107, at 577–79.

[146] *See* Lin, *supra* note 142.

[147] *Id.* at 474.

Other proponents of the dual-class structure argue that freedom of contract challenges the strict proportionality principle of one-share, one-vote.[148] A mandatory one-share, one-vote rule unreasonably and improperly interferes in shareholders' sovereignty.[149] Shareholders should be free to purchase shares as they wish, and are free to sell shares if they do not agree with the company's practices. On balance, this Comment argues that the main problems of the structure can be mitigated with minimal safeguards, allowing the benefits of dual-class structure to be captured.

III. THE CURRENT CHANGES IN DUAL-CLASS STRUCTURE REGULATION AROUND THE GLOBE

Dual-class share structures are quite common in various jurisdictions,[150] though are noticeably missing from many of the major exchanges around the world. Of the world's more competitive stock exchanges, the exchanges of Hong Kong, London, and Singapore are all at various stages of considering the merits of dual-class structures to remain competitive in the global market. This Part will consider recent developments on those exchanges in turn. As the debate over dual-class continues in the United States, Congress should remain mindful of U.S. competitors.

A. Hong Kong

The HKEx is perhaps the biggest competitor to U.S. indices, as it finds itself placed in a fast-growing economy.[151] As a result, the current state of dual-class structures in Hong Kong should be of particular interest to U.S. companies, U.S. stock exchanges, and the U.S. government. Earlier in 2018, the HKEx approved a massive overhaul of its IPO rules.[152] The new HKEx framework comes after years of debate and amongst fears that the next great IPO—like Alibaba—would opt for U.S. -based exchanges like the NYSE.[153] The HKEx now allows

---

148 *See* OECD STEERING GRP. ON CORP. GOVERNANCE, LACK OF PROPORTIONALITY BETWEEN OWNERSHIP AND CONTROL: OVERVIEW AND ISSUES FOR DISCUSSION 6–7 (2007).

149 *See* Lin, *supra* note 142, at 473.

150 These countries include Canada, France, the Netherlands, and Sweden. *See* H.K. EXCHS. & CLEARING LTD., *supra* note 88, at III–1, III–3–4, III–6, III–9–10.

151 ERNST & YOUNG, IPO INSIGHTS: COMPARING GLOBAL STOCK EXCHANGES 10 (2009).

152 H.K. EXCHS. & CLEARING LTD., CONSULTATION CONCLUSIONS: A LISTING REGIME FOR COMPANIES FROM EMERGING AND INNOVATIVE SECTORS 9 (2018), http://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/February-2018-Emerging-and-Innovative-Sectors/Conclusions-(April-2018)/cp201802cc.pdf.

153 Enda Curran, *How Hong Kong Lost the Alibaba IPO*, WALL STREET J. (Mar. 15, 2014, 11:40 AM) https://www.wsj.com/articles/how-hong-kong-lost-the-alibaba-ipo-1394891944; Emma Dunkley, *HKEX*

technology firms with weighted voting rights to go public, putting it in a position to challenge the NYSE's current dominance.

While seen as a big win for corporations, the HKEx has imposed several entry requirements, structural limits, and enhanced disclosure procedures designed to maintain shareholder protection. Notably, the HKEx only allows "innovative" companies to utilize the structure.[154] The new regulations denote that the company must either be a new technology company, have a research and development core component, demonstrate unique features or intellectual property, or have either an unusually high market capitalization or intangible asset value.[155] The HKEx notes that what is considered innovative may fluctuate over time; therefore, any company that wants to use the structure must undergo its own application procedure.[156]

The HKEx imposed several other restrictions on companies using dual-class shares, which they have termed "Weighted Voting Rights" (WVRs). The new listing requirements also prohibit existing companies on the exchange from recapitalizing with dual-class WVRs; only new applicants may use the WVR framework.[157] The HKEx also only permits certain individuals to hold WVR shares, denoting that such holders must be directors, and that their shares will automatically convert to common stock upon cessation of directorship, death or incapacity, or share transfer.[158] Finally, biotech companies using WVRs must comply with enhanced disclosure and corporate governance requirements.[159]

After the new framework went live in July 2018, Hong Kong won a series of high-profile IPOs. Xiaomi Corporation is an apt example—the smartphone maker raised $5.4 billion in its HKEx IPO shortly after the new rules took effect, and is now one of the most actively traded stocks on the HKEx.[160] The new rules

---

Admits Alibaba Forced It to Rethink Dual-Class Shares, FIN. TIMES (Jan. 16, 2018, 10:03 PM), https://www.ft.com/content/6f0e9914-fa96-11e7-a492-2c9be7f3120a.

154 H.K. EXCHS. & CLEARING LTD., *supra* note 152, at II–8.

155 *Id.* With regard to outsized intangible asset values, the regulations focus on those with an unusually high intangible asset value relative to their tangible asset value. *Id.*

156 *Id.*

157 *Id.* at 30–31.

158 *Id.* at 31.

159 *Id.* at 15–16.

160 *See* Press Release, H.K. Exchs. & Clearing Ltd., HKEX to Offer Investors More Options When Xiaomi Shares Debut (July 4, 2018); *cf. Chinese Phone Giant Hasn't Lived Up to Its Mega-IPO Hype*, BLOOMBERG (Aug. 21, 2018, 12:00 PM), https://www.bloomberg.com/news/articles/2018-08-21/chinese-phone-giant-xiaomi-struggles-to-live-up-to-mega-ipo-hype (discussing Xiaomi's investor confidence issues post-IPO).

may serve to lure away large technology companies who would have otherwise listed on U.S. exchanges like the NYSE.

B. United Kingdom

Although U.K. companies are not legally bound to a one-share, one-vote structure,[161] institutional investors in the United Kingdom have essentially prohibited the use of dual-class structures in the country.[162] While prevalent until the mid-1960's, dual-class structures began disappearing as the proportion of shares owned by institutional investors increased.[163]

Dual-class shares were common on the London Stock Exchange in the late nineteenth century, possibly because the exchange required that at least two-thirds of any security was made available to the public in a public issuance.[164] Professors Braggion and Giannetti argue that those new listing requirements ensured liquidity in the market, but made it difficult for shareholders or management to form controlling blocks.[165] This resulted in many companies utilizing dual-class structures.[166] Pointing to the 1948 Company Act,[167] Braggion and Giannetti suggest that as institutional investors were able to gain proportionally more in stocks, the percentage of companies utilizing dual-class structures decreased significantly.[168] These institutional investors would purchase as many available shares as possible and leverage the shares as a way to reduce dual-class structure listings.[169]

Due to the increased prevalence of institutional investors in U.K. markets, the Financial Conduct Authority (FCA) has considered encouraging dual-class listings several times. Most recently, in February 2017, the FCA published a discussion paper considering the possibility of opening U.K. markets to science

---

161 The one-share, one-vote structure is the default under U.K. law. *See* Companies Act 2006, c. 46, § 284 (UK).

162 *See* Bebchuk & Kastiel, *supra* note 5, at 599.

163 *See* Wolf-Georg Ringe, *Deviations from Ownership-Control Proportionality—Economic Protectionism Revisited*, *in* COMPANY LAW AND ECONOMIC PROTECTIONISM: NEW CHALLENGES TO EUROPEAN INTEGRATION 209, 228 (Ulf Bernitz & Wolf-Georg Ringe eds., 2010).

164 *See* Fabio Braggion & Mariassunta Giannetti, At the Origins of the Non-Voting Shares' Discount: Investor Preferences vs. Fundamentals 7 (Dec. 2012) (unpublished manuscript) (on file at https://pdfs.semanticscholar.org/a48e/53a18141d21de29615ed9cdc4e472c6e2c5a.pdf).

165 *Id.*

166 *Id.* at 7–8.

167 The Company Act introduced various disclosure and voting rules focused on giving shareholders a more transparent view of the company and their financial position. *Id.* at 8.

168 *Id.*

169 *Id.*

and technology dual-class structured companies.[170] The paper proposed creating an additional segment for mature international companies, with the express purpose of allowing those companies "to focus more on long-term performance, and less on short-term market pressures."[171] Although the paper kept the specifics of an implementation plan minimal, Andrew Bailey, the FCA's Chief Executive, stated that the plan comes as "[t]he FCA has an overarching strategic objective of ensuring markets function well, and a key part of that is ensuring the U.K.'s primary markets remain effective."[172] While the United Kingdom has a long history of opposing dual-class corporate structures, the competitive global market may force a shift toward dual-class structures within the United Kingdom.

C. Singapore

Like Hong Kong, Singapore also felt the effects of a high-profile IPO listing in a U.S.-based exchange. Motivated by the loss of Manchester United, new HKEx rules, and a desire to reinvent itself as a new technology hub, the Singapore Exchange (SGX) introduced new rules that permitted dual-class shares in June 2018.[173] The SGX launched a public consultation on dual-class structures earlier in 2018, weeks after the HKEx sought public views on the structure.[174] This move indicates that SGX is reacting to the sway of similarly positioned markets, and seeks to compete with those markets.

The rules look quite similar to those of the HKEx: in particular, the exchange has capped each WVR share at ten votes, only allows named individuals to hold shares,[175] and requires sunset provisions.[176] Like the HKEx,

---

[170] *Cf. Review of the Effectiveness of Primary Markets: The U.K. Primary Markets Landscape* 8 (Fin. Conduct Auth., Discussion Paper No. DP 17/2, 2017), https://www.fca.org.uk/publication/discussion/dp17-02.pdf (discussing U.K. efforts to support science and technology growth through dual-class structures).

[171] *Id.*

[172] Press Release, Fin. Conduct Auth., FCA Reviews Effectiveness of U.K. Primary Capital Markets (Feb. 14, 2017).

[173] *Singapore Details Rules for Listing of Dual-Class Shares*, CHANNEL NEWSASIA (June 26, 2018, 6:32 PM) [hereinafter *Singapore Details Rules*], https://www.channelnewsasia.com/news/business/singapore-exchange-rules-listing-dual-class-shares-10471876.

[174] *Id.*

[175] *Compare supra* notes 152–59 and accompanying text, *with* SING. EXCH., LISTING FRAMEWORK FOR DUAL CLASS SHARE STRUCTURES: AMENDMENT TO MAINBOARD RULES § 210(a), (d)–(e) (2018), http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Mainboard_Rules_June_26_2018.pdf. As opposed to institutions, individuals must be named to hold shares, though the rule does allow holder groups if they are specified during an IPO. *See id.*

[176] SING. EXCH., *supra* note 175.

the SGX also has specified certain instances that require all WVR shares to carry only one vote, like during the removal of directors.[177]

The new framework was drafted with both shareholders and investors in mind. Specifically, the Monetary Authority of Singapore noted that the "SGX's framework for dual-class share . . . structures strikes a balance between supporting high-growth companies, and having in place safeguards to mitigate governance risks associated with such structures. [Dual-class share] listings will broaden the range of investment options for investors and add vibrancy to Singapore's capital markets."[178] Similar to the HKEx, the SGX framework is a useful model U.S. markets should emulate if it were to take on new dual-class regulations.

IV. BALANCING SHAREHOLDER PROTECTION WITH FOUNDER AUTONOMY

As other major markets revisit their stance on dual-class structures, the United States should consider shifts in corporate regulation abroad and adopt a similar governing standard in turn. Although companies, especially technology companies, demand the dual-class system, there are many inherent risks associated with the structure that can easily be mitigated by minor regulations, like those adopted by the HKEx and SGX. As more markets become receptive to dual-class structure listings with the express purpose of attempting to draw international listings from their home jurisdictions, the United States should be careful to limit any major or sweeping reform that undermines the integrity of the dual-class structure. However, without some limitations on dual-class structures, the risk to shareholders of losing voting power may continue. To prevent the continuing clash between extreme permissiveness and extreme backlash in the dual-class corporate structure debate, the United States should implement new legislation that protects the freedom of domestic markets and insulates shareholders from the most egregious offenses that dual-class structures can pose.

A. Proposed Solution

As demonstrated by listings like Alibaba and Manchester United, it is clear that many large companies want to list with a dual-class structure, and are willing to enter markets away from their home jurisdictions if necessary to

---

[177] *Id.*

[178] *Singapore Details Rules*, *supra* note 173.

capture that corporate structure.[179] Likewise, many exchanges which currently prohibit dual-class structures have concluded that their market participants want dual-class structures to list on their respective exchanges.[180] At least with respect to such interested corporations, the United States should not deprive companies and investors of what they want—permissive dual-class structure regulations. Necessarily, the horrors of Viacom and other company founders behaving badly can make even the strongest supporters of dual-class begin to question the propriety of allowing dual-class corporate structures.[181] Striking a balance via minimal regulation, however, can protect against the risks of entrenchment and expropriation by management.

The United States should adopt legislation that contains several safeguards similar to what the HKEx and SGX have recently implemented.[182] These safeguards should include a maximum voting differential, sunset provisions, and limiting multiple-vote shares in certain pre-specified situations.[183] Such legislation would help protect investors while preserving the ability of corporations to adopt a desirable dual-class structure.

While dual-class structures can effectively insulate management and founders from removal, the phenomenon of complete entrenchment can be avoided by adopting the Singaporean solution of maintaining a maximum voting differential of ten-to-one between classes of shares.[184] This regulation would protect the integrity of the dual-class structure and ensure that holders of higher voting rights could exercise their will and discretion over company business more freely, avoiding the extreme situation of non-voting shares that completely silence shareholders. The HKEx has also implemented structural limits, where a shareholder holding 10% of the shares has the right to call a general meeting and propose resolutions in their meeting agenda.[185] This would also be useful in the United States, where many minority shareholders are often silenced.

---

179 *See supra* note 1 and accompanying text; *see also* Yiu, *supra* note 10.

180 When the HKEx was considering dual-class arguments in late 2017, it sought opinions from local companies. The exchange found, *inter alia*, that "[o]verall, respondents gave clear support to the enhancement of the Hong Kong's listing regime, with 91% supporting measures that would help diversify the Hong Kong market and, in particular, help attract more New Economy issuers." *See* H.K. EXCHS. & CLEARING LTD., CONSULTATION CONCLUSIONS: NEW BOARD CONCEPT PAPER 8–9 (2017), http://www.HKEx.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/June-2017-Concept-Paper-on-New-Board/Conclusions-(December-2017)/cp2017061cc.pdf.

181 *See* Bebchuk & Kastiel, *supra* note 5, at 587.

182 *See* discussion *supra* Sections III.A., III.C.

183 *Id.*

184 *See* Pong Chen Yih, *Listing of Dual-Class Shares on the SGX*, LEXOLOGY (Sept. 15, 2016), https://www.lexology.com/library/detail.aspx?g=fad97b57-185c-4e42-ae80-ea7efafdafec.

185 H.K. EXCHS. & CLEARING LTD., *supra* note 152, at I–11.

Likewise, many founders claim the dual-class structure helps protect their vision from external market pressures, as voting structures are set up in a way that allows them to maintain majority control in their company. However, once a founder leaves his company, his majority control should not be passed to someone else who did not share his entrepreneurial vision and expertise. Instead, his special shares should automatically convert to common shares,[186] through imposing either "death or incapacity" or "separation" sunset provisions.

Specifically, a sunset provision automatically converts a high-vote share to a standard, low-vote share upon the occurrence of a particular event.[187] A death or incapacity[188] sunset provision would convert an individual's high-vote share to a standard, low-vote share upon the death or incapacity of that shareholder.[189] Dual-class companies have increasingly adopted death or incapacity sunset provisions.[190] Notably, most of the companies that adopt these sunset provisions are technology companies, signaling that technology companies especially prefer these structures.[191] Imposing a death or incapacity sunset provision upon founders of a company will help ensure that the founder's vision is protected, but only to the extent the founder is actually carrying out that vision at the company. A separation sunset provision is similar to a death or incapacity sunset provision in that once a founder no longer manages his or her company, the high-vote stock will automatically convert back to standard stock.[192]

While many companies have already adopted these types of sunset provisions in their corporate charters, mandating them would help ensure continuity across the market.[193] Additionally, mandatory requirements would prevent founders and other board members from altering corporate documents so that they may retain control after a sunset provision event occurs.

---

186 This is true unless the shares are sold or transferred to a pre-determined successor. Yih, *supra* note 184.

187 *See* Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, COLUM. BUS. L. REV. (forthcoming 2018) (manuscript at 13) (on file with SSRN).

188 "Incapacity" refers to legal incapacity. *Id.* at 17.

189 *See id.* at 16.

190 *Id.* at 17.

191 *See id.* at 8, 17 ("[T]he adoption of dual-class structures by increasing numbers of technology companies is largely responsible for the rapid *increase* in the number of dual-class companies in the last seven years. . . . Only five percent of the dual-class data set companies listed in the twentieth century included provisions for the high vote stock to convert upon the death of the holder. The numbers have risen dramatically in the twenty-first century, however, with 22% of the data set companies listed in the first decade including them and 54% of the companies listing in the second decade including such provisions.").

192 *Id.* at 13.

193 *Id.* at 5, 8, 57–58.

The other major argument against dual-class structures concerns expropriation and the risk of weakened accountability. These risks are especially prominent during governance events like amending constitutional documents, the appointment of directors, or similar events. To minimize these risks, the power of multiple-vote shares should be limited to one vote per share for these issues. This ensures that all shareholders have an opportunity to have their voice heard in corporate governance matters and are accounted for when the leaders of the company they have invested in are being elected. These three minor proposals will help to mitigate against the most extreme abuses of the dual-class system while still permitting the presence of dual-class structures in the United States.

B. Responses to Possible Objections

Objectors to the proposed solution may argue that current U.S. law already addresses several of the highlighted risks of dual-class corporate structures. Under current law, controlling shareholders, corporate officers, and directors all owe fiduciary duties to the corporation and its shareholders.[194] The duties of care and loyalty require that directors and officers perform their duties in good faith and in a manner that they believe to be in the best interest of their company.[195] Objectors may also point to U.S. law that provides an ability for shareholders to file a class action,[196] perhaps on a claim for corporate expropriation. Finally, objectors may also argue that imposing a maximum vote-per-share ratio is unwarranted and unnecessary because investors should have sufficient knowledge of the shares they are purchasing. If investors lack sufficient knowledge to understand the nuances of the shares they purchase, companies should not have to take on an extra burden to protect the unaware investor. Under these corporate governance cornerstones, objectors argue extra regulation is simply unnecessary.

Given examples like Viacom, however, the dual-class structure can exacerbate issues where a founder and a board have differing conceptions of what their fiduciary duty entails. Where both the board and the founder, who each own a greater percentage of shares than the public shareholders, do something completely against the wishes of an entire class of shareholders, those shareholders are left with only two options: selling their shares, or resorting to

---

[194] *See* Robert A. Kutcher, *Chapter 1: Breach of Fiduciary Duties*, *in* BUSINESS TORTS LITIGATION 4 (David A Soley et al. eds., 2d ed. 2005).

[195] While there is no national law that imposes these duties, state law typically defines what fiduciary duties are imposed. *See* Regal-Beloit Corp. v. Drecoll, 955 F. Supp. 849, 858 n.3 (N.D. Ill. 1996).

[196] *See* WENJING CHEN, A COMPARATIVE STUDY OF FUNDING SHAREHOLDER LITIGATION 15–16 (2017).

costly shareholder litigation.[197] They may thus argue to objectors that these are the only two rights shareholders should have in such a situation, because shareholders do not have the right to manage the business.[198] Current Delaware corporate law, however, indicates that shareholders should have the right to vote on important matters relating to the management of the business.[199] The right to vote on corporate matters gives shareholders a voice that is recognized in state law. In tandem with this Comment's proposed minimum shareholder protections, shareholders stand to gain robust uniform rights across all states in the United States.

Under recent changes to the HKEx and SGX listing rules, those who are pro-dual-class may argue that imposing new requirements will make U.S. markets less attractive. As it stands, U.S. exchanges are the only exchanges that do not have any limiting rules. Dual-class supporters argue that following the SGX and HKEx would disincentive foreign listings who may as well list in their home jurisdiction over the NYSE. In response, it is worthwhile to note that many dual-class structures lose capital and power over time.[200] Additionally, allowing the United States to be the outpost for all dual-class structures will only allow extreme examples to become the norm in the United States.

C. The Path to Implementation

While it may be expected that the SEC could promulgate the regulations necessary to implement the proposed solution, any change in policy regarding dual-class structures must come from either the stock exchanges themselves or by congressional mandate.[201] The limitations on the SEC's regulation of dual-class companies stems from the 1990 *Business Roundtable* case as discussed above, which was brought in response to the SEC's drafting of Rule 19c-4.[202] This Rule barred companies from listing stock that had "the effect of nullifying, restricting or disparately reducing the per share voting rights of [existing common stockholders]."[203] The D.C. Circuit concluded that the SEC had

---

197 *See* Velasco, *supra* note 26, at 414, 421.

198 *Id.* at 416.

199 *See* DEL. CODE ANN. tit. 8, § 109(a) (West 2018) (the right of shareholders to amend corporate bylaws); DEL. CODE ANN. tit. 8, § 211(b) (West 2018) (the right to elect directors); DEL. CODE ANN. tit. 8, § 242(b) (West 2018) (the right of shareholders to approve charter amendments).

200 *See supra* note 130.

201 *See* Bus. Roundtable v. SEC, 905 F.2d 406, 407 (D.C. Cir. 1990).

202 *Id.*

203 *Id.* (brackets in original).

exceeded its authority under the Securities Exchange Act of 1934, because its proposed rule regulated substantive matters of corporate governance.[204]

Although the exchanges themselves can voluntarily change their position on dual-class structures, a realistic solution would likely need to come from a congressional mandate. As demonstrated by the HKEx, the London Stock Exchange, and the SGX, exchanges often alter their policies depending upon competition in the global market. For a more lasting and continuous solution, only Congress can compel regulatory change and alterations in the law.

CONCLUSION

The arguments for and against dual-class structures often look similar, changing only in tone depending on which side the declarant supports. To an opponent of dual-class, all of the features that make the structure undesirable are often exactly the features that make a supporter of the structure argue that it is beneficial. As one critic ironically commented, "[t]he advantage of a dual-class share structure is that it protects entrepreneurial management from the demands of ordinary shareholders. The disadvantage of a dual-class share structure is that it protects entrepreneurial management from the demands of shareholders."[205]

While the United States and its markets have been permissive of the dual-class structure, there must be some degree of limiting the excessive power that founders and corporate management can wield under such a structure. The safeguards in this Comment's proposed solution achieve this limiting goal by maintaining the integrity of the dual-class structure and ensuring that investors are afforded basic degrees of protection. This limited approach should be adopted for several reasons. In the current market, many companies specifically list in the United States to take advantage of its dual-class-accepting exchanges. To disallow the structure completely would result in many competitive IPOs simply listing somewhere else that is more permissive. Therefore, dual-class structures must remain generally permissive in the United States to maintain global competitiveness in the financial markets.

To prevent unchecked dual-class power in the United States, safeguards should necessarily be imposed. The extreme positions that several indices have taken with respect to dual-class corporate structures should be reconciled with

---

204 *Id.*

205 Andrew Hill, *Enrolment Open for an MBA in Murdoch*, FIN. TIMES (July 18, 2011), http://www.ft.com/cms/s/0/2fda9e8e-b176-11e0-9444-00144feab49a.html#axzz2IYIKmzDt.

the extreme position of non-voting shares. Going forward, the United States should strive to protect the interests of parties on both sides of the debate by adopting new legislation.

ZOE CONDON*

* Notes and Comments Editor, *Emory Law Journal*, Volume 68; Emory University School of Law, J.D., 2019; University of Georgia, B.A., 2016. I extend my sincerest thanks to my faculty advisor, Professor George Georgiev, for his invaluable feedback, and my *Emory Law Journal* editors for their excellent recommendations. Thank you to Mason, Pauley, and Piper Wachter for their unwavering love and support.