SHAREHOLDER INEQUITY IN THE AGE OF BIG TECH: PUBLIC POLICY DANGERS OF DUAL-CLASS SHARE STRUCTURES AND THE CASE FOR CONGRESSIONAL ACTION

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Introduction

On July 24, 2019, the Federal Trade Commission (FTC) fined Facebook $5 billion and imposed significant requirements on its Board to increase its accountability and transparency.[1] The FTC, after a year-long investigation into the Cambridge Analytica data breach, found that Facebook had deceived its users about their ability to control the privacy of their personal information.[2] This fine not only underlined the corporate governance failings that created such major privacy violations, but also indirectly brought to the fore the inherent public policy dangers of Facebook's "dual-class" corporate share structure. This type of share structure, in which some of the company's shares hold much greater voting power than others, enables Mark Zuckerberg (Zuckerberg), Facebook's founder, CEO, and chairman, to enjoy total control over shareholder decisions, even though he owns just 14% of the company's shares.[3]

This Note aims to provide a new perspective on the wide-ranging debate around the appropriateness of dual-class share structures. It highlights the unaccountability of those who run dual-class companies and the societal dangers that result from the implementation of these structures, particularly within the "Big Tech" sector that has come to dominate our age. It argues that the only meaningful way of creating much-needed accountability at dual-class companies is for Congress to pass legislation giving the U.S. Securities and Exchange Commission (SEC) the power to mandate "one share, one vote" at all public companies.

Part I begins with an explanation of how dual-class share structures work and how they have proliferated in recent years, especially in technology initial public offerings (IPOs). It goes on to highlight the public policy risks posed by dual-class share structures within Big Tech in particular and why this Note focuses on that sector. It also provides examples of some of the societal dangers posed and concludes with an illustration of the impotence of ordinary shareholders who wish to address such dangers, even when in the majority.

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1 *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, Fed. Trade Comm'n (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

2 Rob Davies & Dominic Rushe, *Facebook to Pay $5bn Fine as Regulator Settles Cambridge Analytica Complaint*, Guardian (July 24, 2019), https://www.theguardian.com/technology/2019/jul/24/facebook-to-pay-5bn-fine-as-regulator-files-cambridge-analytica-complaint.

3 Facebook comprises almost 3 billion shares (Class A and Class B), of which Zuckerberg owns 410 million. Facebook Inc., Proxy Statement (Schedule 14-A) 40–41 (Apr. 12, 2019) [hereinafter Facebook Proxy Statement].

Part II provides an outline of the various arguments for and against dual-class share-structures, including why many believe that the risks posed by unaccountable power are neither mitigated nor outweighed by the lure of higher shareholder returns.

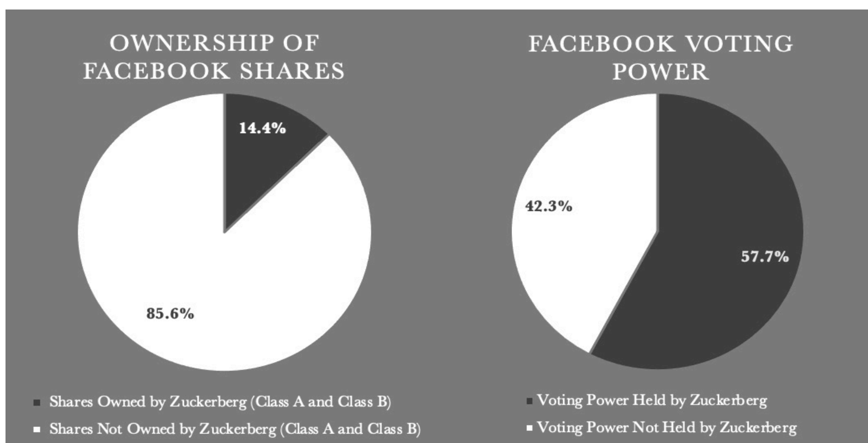
Part III comprises an analysis of a range of solutions proposed by scholars and industry experts to mitigate some of the harmful effects of dual-class structures. These often include "private ordering" solutions, which look to private actors instead of government to provide regulation. This Part explains why, even if they might address other important risks, each solution ultimately fails to protect societies from the dangers posed by unaccountable founder-controllers.

Finally, Part IV outlines why, in light of the unsuitability of each solution explored in Part III, the only meaningful and workable solution to this problem is congressional action. It explains how Congress has acted to address similar public policy dangers in the past and why it must do so now by empowering the SEC to prohibit the implementation of any new dual-class structures and to unwind those structures already in place.

I. PUBLIC POLICY DANGERS CAUSED BY DUAL-CLASS SHARE STRUCTURES

Part I outlines why the age of Big Tech presents something of a "perfect storm" regarding the risks of allowing dual-class structures at public companies. It begins by outlining how dual-class structures work. It then goes on to outline what is meant by "Big Tech," how it has become a defining hallmark of the age, and some of the societal dangers attributed to it. Finally, it explains why dual-class share structures at any company, and especially within Big Tech, exacerbate these dangers by removing accountability from those who run dual-class companies.

First, dual-class share structures present an unusual balance of corporate power at the companies in which they are used. At most major public companies, a $5 billion fine from the FTC would likely result in swift action by shareholders, pressuring the board to implement sweeping changes and forcing culpable directors to fall on their swords. However, Facebook's dual-class structure means that regular investors own "Class A" shares that carry one vote per share, whereas Zuckerberg and a small group of insiders own "Class B" shares, which carry ten times the voting power of Class A shares.[4] This gives Zuckerberg a controlling stake of almost 60% of all votes, even though his economic exposure is to just 14% of the company's shares.[5]



Charts 1 and 2: Mark Zuckerberg's Proportional Ownership of Facebook Shares (Chart 1), Compared with Voting Power (Chart 2)[6]

4 *Id;* Emily Stewart, *Mark Zuckerberg is Essentially Untouchable at Facebook*, VOX (Dec. 19, 2018), https://www.vox.com/technology/2018/11/19/18099011/mark-zuckerberg-facebook-stock-nyt-wsj.

5 Facebook Proxy Statement, *supra* note 3, at 40–41.

6 *Id.*

The dual-class model was popularized in the 1980s as a defensive measure against hostile takeovers[7] but was in use decades earlier.[8] Since 2004, however, it has flourished. In 2005, only 1% of IPOs on U.S. exchanges comprised dual (or more) classes of stock, but by 2017 this figure was 19%.[9] In 2004, Google was one of the first major technology companies to employ the structure, and now it is almost de rigueur among technology startup and other "unicorn" (startups worth $1 billion) IPOs.[10] In the last ten years alone, Facebook, GoPro, Groupon, LinkedIn, Square, TripAdvisor, Yelp, Zillow, and Zynga have all gone public with dual-class share structures.[11] Snapchat's parent company, Snap Inc., appears to have presented something of a high water mark in 2017 by issuing only non-voting shares to its ordinary shareholders at IPO.[12] That particular structure gives regular Snap Inc. shareholders no voting rights whatsoever related to how the company is run, an approach no other company appears to have employed to date.[13] More recently, research by Professors Bebchuk and Kastiel has identified a subset of dual-class companies with "small-minority controllers," which can raise particular concerns because of the considerable governance costs and risks they present.[14]

Big Tech itself presents a strangely unique case in this day and age. Embodying perhaps one of the most extreme outcomes of modern-day capitalism, the sector comprises a small group of supremely rich and powerful companies that provide online services on which billions of people now depend. Yet their use of dual-class share structures means many of these influential tech companies are still controlled and directed by their entrepreneurial founders—normal people who just happened to have the vision, drive, and commitment to create and build companies that have quickly evolved into all-pervasive leviathans. References to the "age of Big

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7 Tian Wen, Comment, *You Can't Sell Your Firm and Own it Too: Disallowing Dual-Class Stock Companies from Listing on the Securities Exchanges*, 162 U. Pa. L. Rev. 1495, 1496 (2014).

8 Benjamin J. Barocas, Comment, *The Corporate Practice of Gerrymandering the Voting Rights of Common Stockholders and the Case for Measured Reform*, 167 U. Pa. L. Rev. 497, 512 (2019).

9 Press Release, Council of Inst. Inv'rs, Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies (Oct. 24, 2018), https://www.prnewswire.com/news-releases/investors-petition-nyse-nasdaq-to-curb-listings-of-ipo-dual-class-share-companies-300737019.html.

10 Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 Colum. Bus. L. Rev. 852, 880 (2019).

11 *Id.* at 855.

12 Scott Hirst & Kobi Kastiel, C*orporate Governance by Index Exclusion*, 99 B.U. L. Rev. 1229, 1231, 1237 (2019).

13 Barocas, *supra* note 8, at 514.

14 Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 Geo. L.J. 1453, 1453 (2019).

Tech" are thus now part of common parlance.[15]

It is often said that with great power comes great responsibility. However, the level of responsibility, and indeed accountability, of many founder-controllers is negligible at best. As Professor Renee Jones points out, many prominent tech giants originally "based their business strateg[ies] on changing, skirting or even violating existing laws."[16] Thus, disrupting norms and walking the line are in these companies' nature and have contributed to their explosive growth. Yet now these same companies bestride the world and count their customers (whose personal data they relentlessly harvest) in the hundreds of millions.[17] In an environment such as this, one seemingly minor oversight or bad decision can quickly end up harming millions of citizens across entire countries.

The FTC's findings against Facebook are just one example of how such dangers can manifest. WhatsApp, owned by Facebook, has been implicated in allowing elaborate disinformation campaigns to proliferate on its platform, which are believed to have helped bring Jair Bolsonaro to power in Brazil.[18] There is evidence that Facebook was used to incite racial hatred that culminated in genocide in Myanmar.[19] Additionally, the U.S. Senate's Select Committee on Intelligence found that Russian operatives had weaponized social media to conduct information warfare upon U.S. citizens during the 2016 presidential election.[20] As British investigative journalist Carol Cadwalladr lamented in The Great Hack, "we literally can't have a free and fair election in this country, and we can't have it

15 *See generally, e.g.*, Editorial Board, *U.S. Department of Justice Must Make Antitrust Fit for the Age of Big Tech*, FIN. TIMES (July 28, 2019), https://www.ft.com/content/fca13e16-ae32-11e9-8030-530adfa879c2; Franklin Foer, *What Big Tech Wants Out of the Pandemic*, ATLANTIC (July/August 2020), https://www.theatlantic.com/magazine/archive/2020/07/big-tech-pandemic-power-grab/612238/; Sachin Nair, *The 'Revival' of Competition Law in the Age of Big Tech*, LAW SOCIETY (Sept. 24, 2019), https://www.lawsociety.org.uk/news/blog/the-revival-of-competition-law-in-the-age-of-big-tech/.

16 Renee M. Jones, Essay, *The Unicorn Governance Trap*, 166 U. PA. L. REV. ONLINE 165, 181 (2017).

17 For a detailed and comprehensive critique of the extent to which Big Tech harvests users' data, see SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2019).

18 Tai Nalon, *Did WhatsApp Help Bolsonaro Win the Brazilian Presidency?*, WASH. POST: WORLDPOST (Nov. 1, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/11/01/whatsapp-2/.

19 Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html.

20 STAFF OF S. COMM. ON INTELLIGENCE, 116TH CONG., REP. ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION VOL. 2, at 3–4 (Comm. Print 2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf.

because of Facebook, because of the tech giants, who are still completely unaccountable."[21]

Although shareholders should by no means bear sole responsibility for holding the boards of these companies accountable, when they *can* act, they form an important line of defense. A recent example is the forced resignation of Uber's CEO and co-founder Travis Kalanick in 2017 over reports he presided over a toxic culture at the firm.[22] However, when dual-class share structures render shareholders impotent, this burden is borne more heavily by federal regulators. Furthermore, although Facebook's $5 billion fine was unprecedented in its size, the FTC was criticized for not having gone far enough.[23] The two Democrats on the five-member commission decried what they viewed as a missed opportunity to compel Facebook to change its corporate behavior, warning that the settlement imposed "no meaningful changes to the company's structure or financial incentives, which led to these violations."[24]

Facebook's shareholders have, in fact, already tried to effect change. At the company's 2019 annual general meeting (AGM), they set forth a litany of reasons as to why an independent member of the board, that is, someone other than Zuckerberg, should be appointed as chairman. Those reasons included: Russian meddling; Cambridge Analytica; national security; fake news; violence in developing countries; and racial profiling in advertisements.[25] Sixty-eight percent of public shareholders voted in support of the proposal, yet Zuckerberg overruled these with his high-voting shares.[26] Perhaps unsurprisingly, another shareholder proposal entitled "Give Each Share an Equal Vote," which garnered 83% of outside shareholders' votes, was also batted down.[27] Such is the inequity faced by dual-class shareholders in the age of Big Tech.

21 The Great Hack (Netflix 2019).

22 Mike Isaac, *Uber Founder Travis Kalanick Resigns as C.E.O.*, N.Y. Times (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html.

23 Kiran Stacey & Hannah Murphy, *Facebook to Pay $5bn to Resolve FTC Probe into Privacy Violations*, Fin. Times (July 24, 2019), https://www.ft.com/content/57b2e47c-ae0f-11e9-8030-530adfa879c2.

24 Davies & Rushe, *supra* note 2.

25 Facebook Proxy Statement, *supra* note 3, at 57.

26 Jake Kanter, *Facebook Investors Voted in Support of Proposals to Fire Mark Zuckerberg as Chairman, but Zuckerberg Still Holds Power*, Bus. Insider (June 4, 2019), https://www.inc.com/business-insider/facebook-investors-vote-in-support-fire-mark-zuckerberg-chairman.html?ref=todayheadlines.live.

27 *Id.*; Facebook Proxy Statement, *supra* note 3, at 55.

II. Traditional Arguments For and Against Dual-Class Share Structures

An appraisal of the arguments for and against these structures is necessary in order to understand the potential solutions to the societal dangers posed by dual-class share structures. This part provides a brief, contextual summary before looking more closely at some of these arguments.

SEC Commissioner Robert Jackson succinctly summarized the arguments for and against dual-class share structures in 2018: "[o]n one hand, you have visionary founders who want to retain control while gaining access to our public markets. On the other, you have a structure that undermines accountability [where] management can outvote ordinary investors on virtually anything."[28] Andrew Hill of the Financial Times framed it more wryly: "[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."[29]

The vast majority of tech companies with dual-class structures have gone public within only the past ten to fifteen years, thus the impact of dual-class structures among modern companies, as well as its recent proliferation, have yet to be fully examined.[30] That is not to say, however, that the societal dangers posed by dual-class companies are any less impactful, nor that they should not be addressed. In terms of public policy risks, this Note suggests that the arguments *for* dual-class structures, which focus mainly on economic outcomes, are far outweighed by the public policy risks created by the unaccountability of founder-controllers, particularly within Big Tech.

A. *Arguments for Dual-Class Share Structures*

The main arguments in favor of dual-class share structures can be grouped as follows: (1) improved company performance; (2) long-term interests of the company; (3) potentially higher corporate tax payments; and (4) free-market policies.

The first argument for dual-class structures is that they enable

28 Robert J. Jackson, Jr., *Perpetual Dual-Class Stock: The Case Against Corporate Royalty*, SEC.gov (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty.

29 Andrew Hill, *Enrolment Is Open for an MBA in Murdoch*, Fin. Times (July 19, 2011), https://www.ft.com/content/2fda9e8e-b176-11e0-9444-00144feab49a.

30 Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. Rev. 1057, 1075 (2019).

improved company performance. Proponents believe that those who have the entrepreneurial flair, drive, and risk appetite to launch and grow successful companies are integral to those companies' ongoing success, meaning "such a talented controller [should] remain in control long after the IPO."[31] A recent study has indeed found that some companies with dual-class share structures have shown improved innovation output, particularly "the number of patent filings and the quality of innovations as measured by patent citations and exploratory innovations."[32] Another study has found that, "on average, public shareholders with an inferior vote may benefit from or not be harmed by a dual class structure in at least the first five years after the IPO."[33] However, the definition of harm in this context relates to shareholder returns, rather than the many social harms with which this Note is concerned.

Second, some argue that allowing entrepreneur-founders to retain control can protect companies from the short-term temptations of share-price-boosting takeover offers.[34] Information asymmetries can also mean these entrepreneurs want to protect information about their businesses that they do not wish to make public for competitive reasons.[35] Some further argue that many retail investors have little interest in learning in-depth about the company and may not vote wisely, or that passive shareholders, such as those in index funds, "may lack the financial incentives to vote intelligently because of their investment strategies."[36] These arguments thus mainly focus on longer-term control over companies and their information flows.

Third, some have suggested that dual-class companies are potentially less likely to avoid paying taxes.[37] One possible reason for this is that the economic exposure faced by founder-controllers is disproportionately lower

31 Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 Va. L. Rev. 585, 604 (2017) (arguing that "this superior-controller argument does not provide a good basis for the use of a perpetual dual-class structure").

32 Lindsay Baran, Arno Forst, & M. Tony Via, *Dual Class Share Structure and Innovation*, SSRN 40 (Dec. 8, 2019), https://ssrn.com/abstract=3183517.

33 Martijn Cremers, Beni Lauterbach, & Anete Pajuste, *The Life-Cycle of Dual Class Firm Valuation* 40 (European Corp. Gov't Inst., Working Paper No. 550, 2018), https://ssrn.com/abstract=3062895.

34 Fisch & Solomon, *supra* note 30, at 1069; *see also* Facebook Proxy Statement, *supra* note 3, at 56 ("This level of investment may not have been possible if our board of directors and CEO were focused on short-term success over . . . long-term interests.").

35 Fisch & Solomon, *supra* note 30, at 1069.

36 Dorothy Shapiro Lund, *The Case for Nonvoting Stock*, Wall St. J. (Sept. 5, 2017), https://www.wsj.com/articles/the-case-for-nonvoting-stock-1504653033.

37 *See* Sean T. McGuire, Dechun Wang, & Ryan J. Wilson, *Dual Class Ownership and Tax Avoidance*, 89 Acct. Rev. 1487, 1512 (2014).

than their voting power.[38] However, even if appropriate payment of taxes by dual-class companies is prevalent, the highly publicized tax-avoidance of prominent Big Tech companies in recent years[39] presents something of a paradox and suggests that the issue is far from clear-cut. For instance, a 2019 report by Fair Tax Mark suggested that, between 2010 and 2018, Facebook used legal tax avoidance strategies to pay just 10.2% of its profits in cash tax payments.[40]

Fourth, free-market policy arguments suggest that investors should have the right to invest in dual-class companies if they so wish, so long as they are sufficiently informed. A theory akin to "caveat emptor" is sometimes asserted, that is, investors know what they are getting into with dual-class companies. Therefore, they can hardly be said to be hoodwinked by such structures when companies are obligated to disclose them, in full, in the IPO prospectus.[41] In a similar vein, some argue that the doctrine of contractual freedom should allow parties to contract as they wish, including via dual-class structures.[42] However, although contractual freedom is, arguably, an important component of any capitalist society, that does not preclude the need for appropriate limits in order to serve and protect greater public policy interests.

B. *Arguments Against Dual-Class Share Structures*

Notwithstanding the above arguments in favor of dual-class structures, there are reasons why, in terms of corporate governance and accountability, dual-class share structures present significant problems. These can be grouped as follows: (1) immunity from accountability and reduced economic exposure; (2) management entrenchment; (3) reduced board independence; (4) curtailment of legitimate shareholder activism; and

38 See Charts 1 and 2, *supra*, for an example of the disparity between economic exposure and voting power.

39 Erik Sherman, *A New Report Claims Big Tech Companies Used Legal Loopholes to Avoid Over $100 Billion in Taxes. What Does That Mean for the Industry's Future?*, Fortune (Dec. 6, 2019), https://fortune.com/2019/12/06/big-tech-taxes-google-facebook-amazon-apple-netflix-microsoft/.

40 Fair Tax Mark, Ltd., The Silicon Six and Their $100 Billion Global Tax Gap 22 (2019), https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf.

41 *See* Investor as Owner Subcomm., Sec. Exch. Comm'n Investor Advisory Comm., Dual Class and Other Entrenching Governance Structures in Public Companies 3–4 (2018), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-on-dual-class-shares.pdf [hereinafter Investor Advisory Comm.].

42 *See* Bebchuk & Kastiel, *supra* note 14, at 1461 (noting that this debate on contractual freedom in corporate law is longstanding).

(5) rebuttals to the free-market policy arguments outlined above.

First, dual-class structures allow founders to "have their cake and eat it too," at the expense of regular shareholders, who suffer both disenfranchisement and increased financial risk. Founder-controllers can extract vast amounts of cash from their company at IPO and retain control with significantly less financial exposure than that borne by regular shareholders.[43] Furthermore, if they make poor or harmful decisions, the economic impact on them is limited because of their relatively smaller economic stake, and thus the incentive to make good or non-harmful decisions is also limited. This risk is neatly illustrated by the impact of Facebook's $5 billion fine,[44] which was the result of the management decisions of Facebook's dual-class (high-voting) shareholders, but borne more heavily by the company's "low-voting" shareholders.[45] High-voting shareholders thus enjoy private benefits, while imposing disproportionate costs and risks not only on regular shareholders, but also on courts, regulators and governments.[46] The effects are especially pronounced where this equity disparity, or "wedge," is large or where it can increase over time without the further approval or consent of other shareholders.[47]

Second, this allure of power without commensurate accountability or economic risk can result in entrenchment, whereby management, regardless of their level of competence, can insulate themselves from corporate governance mechanisms such as challenges from non-controlling shareholders. This is how Rupert Murdoch and James Murdoch remained at the helm of News Corp after being associated with a criminal investigation into phone hacking at the company.[48] Despite substantial noncontrolling votes being cast in favor of their replacement on the board of directors, their own votes were enough to defeat the proposal.[49] As illustrated above, this is also how Mark Zuckerberg retains the roles of both CEO and Chairman of the Board despite Facebook's many high-profile failings.

Third, dual-class share structures can diminish board members' independence as well as their accountability to public shareholders. The election and removal of independent board members is one of the most

43 See Charts 1 and 2, *supra*, for an example of the disparity between economic exposure and voting power.

44 Fed. Trade Comm'n, *supra* note 1.

45 Due to the distribution of voting rights within Facebook, *see* Part I, *supra*, the financial exposure of "high-voting" shareholders to this fine, compared with their voting power, was 1/10 that of regular, "low-voting" shareholders.

46 Wen, *supra* note 7, at 1499.

47 McGuire et al., *supra* note 37, at 2, 5.

48 Wen, *supra* note 7, at 1501–02.

49 *Id.* at 1502.

significant issues on which shareholders are empowered to vote.[50] In turn, one of the key responsibilities of these independent directors is to hold management, including the CEO, to account on behalf of the shareholders.[51] Thus, these directors' vulnerability to removal by shareholders for problematic behavior or poor decision-making provides a valuable and powerful market check. However, when the CEO is the largest shareholder, that person essentially controls the board. And when board members can be hired or fired by that one person, those board members' fiduciary duties to act in the interests of all shareholders can become compromised.[52] Thus, by depriving public shareholders of a meaningful voice in how the company is run, dual-class share structures can reduce both board independence and management accountability.

Fourth, dual-class structures also pose a significant obstacle to shareholder activism. Shareholder activism can be defined as the use by investors of their shareholder rights to bring about changes, often social or environmental, at a publicly traded corporation.[53] Although the practice is often said to be used exploitatively for financial gain by activist hedge funds,[54] it also provides an important tool for society, via shareholders, to hold errant companies to account on specific matters of public policy. Shareholder activism has increased markedly in recent years and is now considered by some to be the accepted norm.[55] Professor Lisa Fairfax has found that many corporate officers and directors now accept that "shareholder activism, in the form of shareholder influence and engagement, is in the corporation's best interests."[56] Professor Marc I. Steinberg also suggests that "the shareholder proposal rule . . . should be recognized as a vintage asset—a Rule that has symbolized for 75 years that vibrant federal corporate governance at times is an appropriate vehicle for ameliorating state law shortcomings."[57] Dual-class

50 *What Is a Shareholder?*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/finance/shareholder/ (last visited June 16, 2020).

51 *Board Responsibilities*, CHARTERED FIN. ANALYST INST., https://www.cfainstitute.org/en/advocacy/issues/board-responsibilities (last visited June 16, 2020).

52 Charles M. Elson et al., *Dual-Class Stock: Governance at the Edge*, DIRECTORS & BOARDS, Third Quarter 2012, at 37, 38, https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/f/506/files/2012/10/Dual-Shares-Q3-20121.pdf.

53 James Chen, *Shareholder Activist*, INVESTOPEDIA, https://www.investopedia.com/terms/s/shareholderactivist.asp (last updated June 25, 2020).

54 *See* Lucian A. Bebchuk, Alon Brav, & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COL. L. REV. 1085, 1154 (2015) (arguing that such interventions do not harm the long-term interests of companies or their shareholders).

55 *See* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1301 (2019).

56 *Id.* at 1306.

57 MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 190 (2018).

structures, however, diminish the voting power of ordinary shareholders on any matters put to a shareholder vote, including those designed to improve or protect corporate governance or public policy. These structures therefore, significantly hinder the effectiveness of this "vintage asset," stifling an important accountability mechanism that should enable shareholders to keep companies in check.

Finally, there are important counter-arguments to the "caveat emptor" argument outlined above. First, it is not only the investor who suffers if the company does harm. As Professor Charles Elson points out, "[i]t's the public who ends up suffering because the board no longer acts as an accountability mechanism and shareholders have no vote. . . . This cost is no longer simply absorbed by the investors, but also by society."[58] A second counterargument, propounded by Bebchuk and Kastiel, is that investors are not necessarily given all the information they need, even if all the regulatory boxes are ticked.[59] Citing the 2017 Snap IPO, the authors point out that, even though Snap disclosed the ownership interests of its cofounders, "it failed to disclose the minimum equity stake that its cofounders could own without relinquishing control."[60] Bebchuk and Kastiel calculate this figure to be as low as just 1.4% of equity for each cofounder.[61] Finally, the degree of choice that investors really have is also questionable, especially if they invest in index-linked funds, which are often deemed an appropriate investment vehicle for regular retail investors due to their breadth of scope and economies of scale.[62] Investors in these index-linked funds are necessarily compelled to hold shares in many dual-class companies because of their size and index listing. Therefore, if these investors wish to avoid investing in companies with dual-class structures, they cannot do so unless they choose not to invest in many index funds altogether.

58 *See* Eve Tahmincioglu, *The Pros and Cons of the Dual-Class Stock Structure: Two Corporate Governance Experts Battle It Out*, Directors & Boards (Aug. 30, 2018), https://www.directorsandboards.com/news/pros-cons-dual-class-stock-structure-two-corporate-governance-experts-battle-it-out.

59 *See* Bebchuk & Kastiel, *supra* note 14, at 1503.

60 *Id.* at 1456, 1503.

61 *Id.* at 1503.

62 *See* Julie Young, *Market Index*, Investopedia, https://www.investopedia.com/terms/m/marketindex.asp (last visited June 16, 2020) (explaining index-linked funds).

III. Deficiencies of Alternative Solutions

In light of the many issues posed by dual-class share structures, a wide range of solutions has been proposed. These include, inter alia: action by the SEC; restrictions imposed by stock exchanges and index providers; pressure from institutional investors; inclusion of sunset provisions; enhanced disclosure and monitoring; limiting the power of high-voting shares; guaranteed board representation; and the mandating of equal voting rights in certain, specific contexts. However, when examined through a public policy lens, not one of these solutions, nor any combination of them, addresses the fundamental public policy dangers created when companies, especially those in Big Tech, are allowed to use dual-class structures.

A. *Securities and Exchange Commission*

One option that might seem appropriate is for the federal regulator, the SEC, to implement restrictions. However, this door was closed in 1990 when the United States Court of Appeals for the D.C. Circuit ruled that such restrictions are beyond the boundaries of the SEC's regulatory powers.[63] Thus, although in recent years the SEC's Investor Advisory Committee has recommended changing certain aspects of dual-class corporate governance,[64] as long as the D.C. Circuit's 1990 decision stands, the regulator's hands are essentially tied. Congress can change this by granting the SEC greater powers.

The SEC's problems in controlling dual-class share structures began in 1988 when it implemented Rule 19c-4[65] banning U.S. stock exchanges from allowing companies to list with dual-class share structures. The regulator subsequently failed to defend this rule in a challenge brought by the Business Roundtable in 1990.[66] The D.C. Circuit held that the SEC had stepped "beyond [the] control of voting procedure and into the distribution of voting power," and that such a step was not permitted under the Securities Exchange Act.[67]

However, more recently, Steinberg has suggested that since the Sarbanes-Oxley and Dodd-Frank Acts were enacted in 2002 and 2010,

63 *See* Bus. Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990).

64 Investor Advisory Comm., *supra* note 41, at 3–4; *see also* Bebchuk & Kastiel, *supra* note 14, at 1501 (advocating that the SEC follow their committee's advice).

65 17 C.F.R. § 240.19c-4 (1990).

66 *Bus. Roundtable*, 906 F.2d at 416–17.

67 *Id.* at 411.

respectively,[68] a wider interpretation of the SEC's responsibility in regulating corporate governance may be warranted.[69] Steinberg notes that "[w]hile the SEC is not itself creating . . . new stock exchange standards, it is 'encouraging' the exchanges to propose these standards and then subsequently approving them for implementation."[70] He goes on to argue that, "[w]ith this regimen now in place, corporate governance today is increasingly within the purview of federal law."[71] A natural extension of Steinberg's logic would be that the stage is already set for new legislation to broaden the SEC's powers where warranted.

The SEC, for its part, has remained vocal on the issue. The SEC's Investor Advisory Committee, established as a result of the Dodd-Frank Act, conducted a study on "Dual Class and Other Entrenching Governance Structures in Public Companies" and concluded that greater disclosure and monitoring would better protect investors from the risks posed by dual class companies.[72] Following this study, SEC Commissioner Robert Jackson called for listing standards to require sunset clauses for all dual-class stock.[73] More recently, the SEC's Investor Advocate, Rick Fleming, has championed more action by investors, regulators, and exchanges.[74]

However, despite these recommendations, *Business Roundtable v. SEC* means that the SEC remains fundamentally unable to prohibit dual-class structures. Unless, or until, a new challenge is brought to the D.C. Circuit's decision, the regulator is left with only a narrow scope of powers with which it can limit the harmful effects of dual-class structures. The only way of meaningfully expanding these powers is via statute.

B. *Stock Exchanges*

Stock exchanges present another solution if, for instance, they choose to delist dual-class companies from their exchanges. Indeed, as the court noted in *Business Roundtable v. SEC*, "an *exchange* may delist an issuer and thus in some sense 'enforce' its listing standards."[75] However, despite

68 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7201); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301).

69 Steinberg, *supra* note 57, at 230.

70 *Id.* at 230–31.

71 *Id.* at 231.

72 Investor Advisory Comm., *supra* note 41, at 6–9.

73 Jackson, *supra* note 28.

74 Rick Fleming, *Dual-Class Shares: A Recipe for Disaster*, SEC.gov (Oct. 15, 2019), https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster.

75 *Bus. Roundtable*, 905 F.2d at 414 (emphasis added).

encouragement from investor bodies and the SEC, the exchanges have been slow to take up this opportunity. The main reason for this reluctance is likely a lack of incentivization, with too much at stake in terms of lost business if companies choose instead to list on foreign exchanges.

Various investor bodies, including the Chartered Financial Analyst Institute (CFA Institute),[76] the Council of Institutional Investors (CII),[77] and the International Corporate Governance Network (ICGN),[78] have called for the stock exchanges to take up the gauntlet of greater self-regulation. In late 2018, the CII called on both the New York Stock Exchange (NYSE) and NASDAQ to prohibit dual-class structures or, at least, impose seven-year sunsets.[79] The SEC's Rick Fleming, speaking in his personal capacity, has made similar overtures: "[stock exchanges] have an important role to play as guardians of market integrity, and the weakening of corporate governance in publicly-traded companies is not a hidden hazard, but one that stares us right in the face."[80] Fleming has acknowledged the competing interests that the exchanges face but has urged them to "step up and reassert their role as self-regulatory organizations."[81]

However, the exchanges themselves, mindful of the risk of losing major clients, have remained largely muted. NASDAQ's president has pledged to review listing standards to make sure they protect investors,[82] but there has been little in the way of overt action. Furthermore, viewing the issue from a global perspective, professors Hirst and Kastiel highlight the difficulty in gaining any form of consensus among the International Organization of Securities Commissions, as well the non-binding nature any such agreement would likely encompass.[83]

Ultimately, with the U.S. offering one of the world's more relaxed

76 Mary Leung & Rocky Tung, CFA Inst., Dual-Class Shares: The Good, the Bad, and the Ugly 8–9 (2018), https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx.

77 *Dual-Class Stock*, Council Institutional Inv'rs, https://www.cii.org/dualclass_stock (last visited Mar. 24, 2020) (identifying letters sent to NASDAQ and NYSE on Oct. 24, 2018).

78 Email from Kerrie Waring, Chief Exec. Editor, ICGN, to Elizabeth King, Chief Regulatory Officer, NYSE (Nov. 7, 2018), (available at https://www.icgn.org/sites/default/files/24.%20ICGN%20Letter%20to%20NYSE%20Re%20Dual%20Class%20 Share%20Structures_0.pdf).

79 *See Dual-Class Stock*, *supra* note 77.

80 Fleming, *supra* note 74.

81 *Id.*

82 Hazel Bradford, *Investors Intensify Fight Against Dual-Class Shares*, (Apr. 1, 2019, 1:00 AM), https://www.pionline.com/article/20190401/PRINT/190409984/investors-intensify-fight-against-dual-class-shares.

83 Hirst & Kastiel, *supra* note 12, at 1275.

regulatory environments for dual-class IPOs, it is difficult to see why its exchanges would close the door on such a lucrative source of revenue without compulsion. As Kurt Schacht of the CFA Institute opines, "[this situation] prevails due to the commercial interests of the exchanges and entrepreneurial managers that want your money but not your input as a shareholder."[84]

C. *Index Providers*

One sector that *has* acted recently in restricting dual-class structures is the major index providers.[85] In the months following Snap's controversial 2017 IPO, FTSE Russell and S&P Dow Jones, two of the best-known index providers, announced restrictions or weighting changes for companies with multiple share classes that wished to list (prospectively) on some of their most famous indexes.[86] Actions such as this can act as a powerful incentive for companies to opt for equal-voting instead of dual-class share structures. However, the impact of such restrictions is also unclear as their voluntary nature makes them potentially vulnerable to reversal in the future. Nevertheless, these restrictions do represent a step forward in curtailing dual-class share structures, even if their influence and permanence is, as yet, unquantified.

Inclusion of a company's stock in a major index is widely agreed to have a positive impact on that stock's value.[87] "Joining the Standard & Poor's 500[,] an index of the nation's biggest and most popular stocks[,] has long been an important mark of validation" signaling "that a company has ascended to corporate America's elite" and typically boosting its share price by about 5%.[88] Index funds are also required to buy indexed stocks in line with their proportional representation on that index.[89] Therefore, barring a stock from an index can have implications that will reduce demand for it and thus reduce its price.

However, the restrictions that FTSE Russell and S&P Dow Jones

84 Bradford, *supra* note 82.

85 Indexes can be broadly defined as groups or "hypothetical portfolios" of investment holdings that represent a segment of the market, for instance the largest stocks by market capitalization within a particular sector of the market. Young, *supra* note 62.

86 Hirst & Kastiel, *supra* note 12, at 1232.

87 *See* Investor Advisory Comm., *supra* note 41, at 2–3.

88 Ethan Varian & Paresh Dave, *S&P 500 Will Exclude Snap Because Its Stock Gives New Shareholders No Power*, L.A. Times (Aug. 1, 2017), http://www.latimes.com/business/hollywood/la-fi-snap-sp-20170801-story.html.

89 James Chen, *Guide to Index Fund Investing*, Investopedia (May 23, 2020), https://www.investopedia.com/terms/i/indexfund.asp.

have adopted are of their own volition and thus lack any guaranteed permanence. Indeed, stock exchanges in both Singapore and Hong Kong have recently begun allowing dual-class IPOs,[90] prompting fears of a "race to the bottom" in terms of corporate governance standards, which could seep into other international securities markets.[91] If such a scenario were to develop, U.S. indexes might find themselves under pressure to relax their restrictions and encourage dual-class companies to remain in the U.S.

Some argue that the ease with which certain index restrictions can be circumvented makes this an inferior solution when compared with state laws or federal regulations.[92] Others suggest that the prospective nature of index exclusions means they are unlikely to have any meaningful impact on dual-class structures for some time.[93] Limited evidence does suggest that the index providers' actions may have already reduced the use of dual-class in recent IPOs and might also have resulted in an up-tick in "sunset" provision usage.[94] However, the same commentators are careful to point out that the index providers here represent "reluctant regulators" rather than "new sheriffs" and that it is currently too early for any meaningful assessment of the impact of such restrictions.[95]

Therefore, because of the absence of any guaranteed permanence surrounding index exclusions, and because their impact may prove to be limited, the restrictions imposed by these "reluctant regulators" provide a welcome but limited line of defense in countering the public policy dangers of dual-class structures.

D. *Institutional Investors*

Institutional investors, such as insurance companies, pensions, and mutual funds, control vast swathes of publicly traded stock and thus present another group of actors with the power to effect change.[96] However, although some industry bodies and fund manager groups do advocate for equal voting rights, the sector's overall approach is fragmented, and the main objective

90 Benjamin Robertson & Andrea Tan, *Asia Embraces Dual-Class Shares, and Investor Activists Smolder*, BLOOMBERG (Aug. 7, 2018) https://www.bloomberg.com/news/articles/2018-08-07/asia-embraces-dual-class-shares-and-investor-activists-smoulder.

91 *See* LEUNG & TUNG, *supra* note 76, at 2–3.

92 Barocas, *supra* note 8, at 535.

93 Hirst & Kastiel, *supra* note 12, at 1264.

94 *Id.* at 1237–38.

95 *Id.*

96 *See* James Chen, *Institutional Investor*, INVESTOPEDIA, https://www.investopedia.com/terms/i/institutionalinvestor.asp (last updated Mar. 20, 2020) (providing an explanation of institutional investors).

of most institutional investors is to secure high financial returns for their investors. Thus, wherever dual-class companies produce strong financial returns, institutional investors are less likely to be sufficiently incentivized to pressure founder-controllers into converting from dual-class to equal voting structures.

The power and influence of institutional investors has grown considerably in recent decades. From 1900 to 1945, institutional investors managed approximately 5% of all outstanding stock in the U.S.,[97] yet by 2010 they beneficially owned two-thirds.[98] Mutual funds alone hold approximately a quarter of the stock of publicly traded companies in the U.S. and thus "have the power to be a significant force in the governance of large U.S. corporations."[99] That is, if they choose to exercise this power.

Hirst and Kastiel have suggested that, if a broad group of these investors were to adopt common strategies, and refused to invest in companies that did agree to certain constraints, the significant pools of investment at stake could dissuade founders from adopting dual-class structures.[100] In fact, a groundswell already exists. The CII has, for some time, been clear in its calls for curbs on dual-class structures.[101] Investors such as the California Public Employees' Retirement System (CalPERS) have similarly campaigned for years for their removal.[102] Many large mutual fund managers, such as State Street and Blackrock, are also strong, vocal proponents of equal rights for shareholders.[103] However, the continued popularity of dual-class structures means the actual impact of this vocal support is, as yet, inconclusive.

Concurrently, whereas institutional investors might have previously moved investments away from companies with dual-class stock, evidence suggests that they are now more likely to engage directly with that

97 Steinberg, *supra* note 57, at 159.

98 *Id.*

99 Barocas, *supra* note 8, at 506 (citing Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 Colum. L. Rev. 863, 886 (2013)).

100 Hirst & Kastiel, *supra* note 12, at 1277.

101 *Dual-Class Stock*, *supra* note 77.

102 *See* Shanny Basar, *Calpers Sets Sights on Dual-Class Stock Structures*, Wall St. J. (Aug. 20, 2012), https://www.wsj.com/articles/SB10000872396390443855804577601271252759472.

103 Elzio Barreto & Sumeet Chatterjee, *BlackRock Pitches for Shareholder Protection as Asia Bourses Weigh Dual-Class Listings*, Reuters (Sept. 26, 2017), https://www.reuters.com/article/us-summit-regulation-blackrock/blackrock-pitches-for-shareholder-protection-as-asia-bourses-weigh-dual-class-listings-idUSKCN1C10KD; Madison Marriage, *State Street Asks SEC to Block Non-Voting Shares*, Fin. Times (June 18, 2017), https://www.ft.com/content/9595e5c4-51db-11e7-bfb8-997009366969.

company to effect change.[104] For instance, following Facebook's 2019 AGM, fund managers who had proposed some of the changes to the company's board voiced concern over Mark Zuckerberg's unilateral power to reject such proposals.[105] Jonas Kron, Senior Vice President of Trillium Asset Management, remarked that "[t]his outpouring of support for the independent board chair proposal springs from a deep well of concern about governance at Facebook. Concentrating so much power in one person—any person—is unwise."[106] Kron made a point of stating, "[w]e look forward to speaking with the board about how it can make the transition to an independent board chair now that so many investors have voted in favor of the proposal."[107]

As welcome as such interventions might be to opponents of dual-class structures, many institutional investors face an inherent conflict of interest: for most, the overriding goal remains making money for their own investors.[108] The debate regarding the relationship between strong corporate governance and profitability is wide-ranging and beyond the scope of this Note. However, if the focus of most institutional investors is primarily on shareholder returns, and if Big Tech companies continue to post the huge profits for which they are famous, there would appear to be little incentive for many institutional investors to lobby for change. This is, perhaps, borne out by the fact that the "Big Three" firms (Blackrock, Vanguard and State Street) still side with management in more than 90% of shareholder votes.[109] Therefore, caution should be exercised not to place too great a reliance on institutional investors to provide a move towards "one share, one vote" in the foreseeable future.

E. *"Sunset" Clauses*

Many argue that dual-class share structures should include sunset clauses (sunsets).[110] Sunsets allow a founder-controller to retain control of the company in the years following an IPO but require conversion of all

104 Wen, *supra* note 7, at 1504.

105 *As Antitrust Concerns Grow, Facebook Encounters Renewed Pressure from Investors over Governance Problems*, OpenMIC (June 4, 2019), https://www.openmic.org/news/2019/6/4/antitrust-concerns-fb-governance-problems.

106 *Id.*

107 *Id.*

108 *See* Chen, *supra* note 96.

109 Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 Bus. & Pol. 298, 316–17 (2017).

110 *See generally, e.g.*, Winden, *supra* note 10; Fisch & Solomon, *supra* note 30.

shares to "one share, one vote" at a later date.[111] This can be required after either a set period of time, for example, seven years, or the occurrence of a specific type of event, such as the death or incapacity of the founder or the transfer of high-voting shares to another party.[112] However, although these clauses may present some form of compromise (and have been implemented by some technology companies),[113] they fail to address the main public policy issues posed by dual-class shares, particularly in Big Tech, because they allow founder-controllers to remain unaccountable to shareholders until the clauses' terms are invoked.

A common argument in favor of sunsets is that they represent a pragmatic compromise that allows the founder to retain control of the company in the short-term, while protecting investors from the risks posed by perpetual control, such as inefficiency or a divergence of interests between founder and investors. In essence, they allow a visionary founder, for a limited time, to navigate the sometimes choppy, post-IPO waters without fear of the company being sold to a larger rival at an attractive mark-up. Some clauses also include the option for investors (on a "one share, one vote" basis) to extend a time-based sunset if they so wish.[114] The CII has endorsed sunsets since 2016, "if necessary to achieve alignment over a reasonable period of time,"[115] and the approach is also endorsed in the 2018 Commonsense Principles of Corporate Governance.[116]

Although, overall, most dual-class companies do not have a sunset provision,[117] the approach is becoming increasingly popular.[118] Fitbit, Groupon, Kayak and Yelp all included time-based sunset clauses at the time of their IPOs,[119] and Google, Groupon, LinkedIn, and Zynga all adopted event-based sunsets.[120] Yelp, in fact, also adopted a dilution-based sunset, a type of event-based sunset that would trigger once the founder's economic stake dropped below 10%.[121] Invocation of this clause in 2016 actually

111 *Dual-Class Stock*, *supra* note 77.

112 Winden, *supra* note 10, at 869.

113 Barocas, *supra* note 8, at 529.

114 Fisch & Solomon, *supra* note 30, at 1084.

115 *Dual-Class Stock*, *supra* note 77.

116 *Commonsense Principles 2.0*, CommonsensePrinciples.org 7, https://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf (last visited Sept. 7, 2020).

117 Bebchuk & Kastiel, *supra* note 14, at 1504.

118 *See* Fisch & Solomon, *supra* note 30, at 1080 (citing Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 Colum. Bus. L. Rev. 852, 950–51 (2019)).

119 Barocas, *supra* note 8, at 529.

120 *Id.*

121 Fisch & Solomon, *supra* note 30, at 1087.

resulted in Yelp converting from a dual-class to an equal voting structure.[122]

Yet despite its appeal and popularity, one can find inherent weaknesses in the sunset model when analyzed through a public policy lens. First, sunsets tend to be arbitrary in nature, especially when time-based.[123] For instance, how is a company or its investors to determine what the optimal period of years is before conversion should occur? This applies both in terms of shareholder return and accountability for social harm. It is hard to see how or why a founder-controller's unaccountability suddenly poses any less of a risk once an arbitrary seven-year mark is reached. Second, time-based sunsets have the potential to create perverse incentives; if a founder is nearing the expiration of their controlling tenure, that founder might be tempted to take actions that serve their own interests rather than those of the company before their enhanced voting powers expire. Third, where shareholders *are* offered the chance to extend a sunset period, they can face their own conflict of interests between the value of obtaining control and the potential investment value of extending the dual-class structure for a longer time, [124] especially if company performance is strong. Finally, where dilution-based clauses are employed, the specified threshold can often be too low to prevent the risks posed by small-minority shareholders, who need only hold a small equity stake to maintain control.[125]

Ultimately, none of the public policy dangers posed by dual-class share structures, particularly within Big Tech, would be properly addressed by sunset provisions. Indeed, sunsets actually present something of a distraction by creating the illusion that imposing a time-based restriction in some way excuses the suppression of shareholders' voting rights.

F. *Enhanced Disclosure and Monitoring*

Because the SEC is unable to ban dual-class structures per se,[126] it has instead focused on improving access to information for investors.[127] The regulator has long sought to ensure that investors receive detailed information.[128] It has also been outspoken in its concerns over dual-class

122 *Id.*

123 *Id.* at 1081.

124 *Id.* at 1085.

125 Bebchuk & Kastiel, *supra* note 14, at 1504–05.

126 Bus. Roundtable v. SEC, 905 F.2d 406, 416–417 (D.C. Cir. 1990) (holding that the Securities Exchange Act does not empower the SEC to prevent exchanges from listing dual-class share structures).

127 *See* INVESTOR ADVISORY COMM., *supra* note 41, at 6–7.

128 *Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment: Hearing Before the Subcomm. on Inv'r Prot., Entrepreneurship, and Capital Mkts. of the House Fin. Serv. Comm.,*

share structures specifically.[129] In particular, the SEC has argued for greater monitoring and a stronger definition of "common stock."[130] However, in spite of the benefits these measures would bring to investors, they do not address the fundamental lack of accountability caused by dual-class structures.

Improving access to information has long been a major objective of the SEC, fitting squarely within its overall aim of protecting investors. Both the Securities Act of 1933 and the Securities Exchange Act of 1934 (which created the SEC) were enacted primarily with the purpose of ensuring investors were provided with an appropriate level of information when buying or selling shares and when deciding how to vote.[131]

The SEC has also been vocal regarding dual-class share structures. Its Investor Advisory Committee has recommended, in particular, that investors should be informed of the risks relating to a company's wedge,[132] which companies are not currently compelled to disclose.[133] Other dual-class-related risks that companies might be compelled to disclose include: types of conflicts that have given rise to disputes in the past;[134] risks of non-inclusion on certain indexes;[135] and other more general risks on which reporting currently varies from one company to the next.[136] Snap, incidentally, was praised by the SEC for the level of disclosure it provided ahead of its otherwise controversial 2017 IPO.[137]

The SEC Investor Advisory Committee also recommends that greater monitoring should be conducted on shareholder disputes arising from non-traditional governance structures and that "common stock," that is, stock with only one vote per share, should be defined more specifically.[138] Such disclosures, the Investor Advisory Committee argues, are "crucial to the functioning of a market economy" because they will "reduce the information asymmetry between corporate insiders and current and potential investors

116th Cong. 1 (Sept. 11, 2019) (written statement of Renee M. Jones, Professor of Law and Associate Dean for Academic Affairs, Boston College Law School), https://docs.house.gov/meetings/BA/BA16/20190911/109907/HHRG-116-BA16-Wstate-JonesR-20190911.pdf.

129 *See* Investor Advisory Comm., *supra* note 41, at 2.

130 *Id.* at 7.

131 *See* Jones, *supra* note 128, at 2.

132 *See* Investor Advisory Comm., *supra* note 41, at 2; *see also* Part II, *supra* (describing the "wedge" as the difference between voting control and economic interests of shareholders).

133 Investor Advisory Comm., *supra* note 41, at 4.

134 *See id.* at 5.

135 *See id.* at 2–3, 6.

136 *Id.* at 3.

137 *Id.*

138 *Id.* at 7.

and creditors."[139]

However, although each of these arguments is entirely in keeping with the SEC's primary mission of investor protection, each fails to address the principle issue of lack of founder-controller accountability to those same investors within dual-class companies. Greater disclosure will, of course, serve to inform investors better. It could also, as the Investor Advisory Committee suggests, "facilitate the efficient allocation of resources, capital market development, market liquidity, and . . . reduce firms' cost of capital."[140] However, it will not fundamentally change the fact that dual-class share structures allow founder-controllers to avoid accountability to their shareholders, regardless of the level of social harm or risk the company might cause.

G. *Limiting the Power of High-Voting Shares*

Another option, discussed by Bebchuk and Kastiel, is to place a ceiling on the voting power held by higher-voting classes of shares.[141] This approach would also force a controlling shareholder to retain a higher minimum percentage of the company's equity capital, thus limiting the wedge.[142] However, although this would increase the voting power of public and institutional shareholders, it does not remove the inequity inherent in allowing one class of shares to hold greater voting power than another.

Bebchuk and Kastiel have shown that when owning shares "with ten times the voting power of ordinary shares, a founder need only retain 9.1% of equity to maintain full control" of a company.[143] They warn that public officials and institutional investors concerned about the governance costs of "small-minority controllers" should pay close attention to the high/low vote ratios used by all dual-class companies,[144] and suggest that regulations or exchange-listing standards could limit the maximum multiple to as low as five times or even three times that of regular shares.[145] This approach, already used in parts of Europe,[146] would help increase the economic exposure of founder-controllers, who would need to hold more shares in order to maintain voting control, and would, concurrently, increase the

139 *Id.*
140 *Id.*
141 Bebchuk & Kastiel, *supra* note 14, at 1505.
142 *See id.*
143 *Id.* at 1478.
144 *Id.* at 1505.
145 *Id.*
146 *Id.*

voting power of public and institutional shareholders.

However, this option would still not give equal voting rights to all shareholders. It simply means regular shareholders would be *less* handicapped when voting on important board matters such as the election of directors. Furthermore, although this approach does reduce the wedge, it still leaves founder-controllers at a lower level of economic exposure than ordinary shareholders. For instance, if high-voting shares are limited to three times voting power, ordinary shareholders will still face three times the economic exposure of high-voting shareholders. Thus, although this approach reduces some of the harmful effects of dual-class share structures, it does not address them fully. It, therefore, presents an insufficient solution for holding founder-controllers properly accountable.

H. *Guaranteed Board Representation*

Guaranteed board representation is sometimes mooted as a solution, whereby a guaranteed proportion of directors are chosen exclusively by low-voting shareholders, who would naturally expect them to act principally in their interests. As Benjamin Barocas has explained, citing the example of Beasley Broadcast Group, Inc., this measure compels founder-controllers to maintain a higher equity stake in the company if they want to maintain control, and gives low-voting shareholders a dissenting voice on the board if decisions are made that adversely affect them or other stakeholders.[147] However, it is unclear how effective this option would be in increasing accountability, as that would depend on both the number of board seats guaranteed and the level of influence those seats would carry.

One outcome of guaranteed board representation is that it would effectively increase the equity stake that the founder-controller must hold to maintain majority control.[148] This is because they would not have voting control over those board seats reserved only for low-voting shareholders. This necessity to hold more equity would therefore go some way toward addressing the wedge.

However, the effectiveness of this approach would, of course, depend on the percentage of board seats reserved for low-voting shareholders. It is, presumably, unlikely that this percentage would reach that of a majority because that would significantly diminish the voting power of high-voting shares. Yet even in the minority, these board members could at least register their dissent if the board chose to act against the wishes or interests of low-

147 Barocas, *supra* note 8, at 530–31.
148 *Id.* at 531.

vote shareholders.

The influence of directors representing low-voting shareholders could, in fact, reach veto power if any board decisions required unanimous assent. Of course, that would depend on which, if any, board decisions were covered by such a mandate. Where a founder-controller has implemented a dual-class structure specifically to maintain voting control over a company, it is unlikely that they would diminish that control by then choosing for board decisions to require unanimous assent.

Ultimately, it is unclear how far this option would go in curtailing the harmful societal effects of managerial or strategic decisions made by controlling founders. To be truly effective, its implementation would require either a meaningfully high level of board representation for low-voting shareholders, or a wide range of board matters requiring unanimous agreement to pass a vote. Neither scenario is likely because each would require a significant twisting of governance norms and each would also largely defeat the purpose of installing a dual-class setup in the first place.

I. *Mandating Equal Voting Rights in Specific Contexts*

Finally, equal voting, or "one share, one vote," could be mandated in certain, specific contexts, such as when shareholders are voting on whether to sell the company.[149] However, this option would only partially limit the harmful effects of dual-class share structures overall. Additionally, it would not address the accountability issues posed by dual-class structures unless equal voting rights were extended to a broad range of contexts, which would effectively negate the point of using a dual-class structure altogether.

Under this option, the founder-controller would still hold the power to decide on managerial and strategic matters but would be denied this power in wider matters of shareholder interests. One example is when a company is up for sale and where the visionary founder's unique vision or skills are less relevant and thus offer less justification for dual-class voting.[150] In such circumstances the main objective changes from protecting or maintaining the corporate enterprise to selling it to the highest bidder.[151] A similar situation might be where a controlling shareholder could divert value from public investors.[152]

Mandatory equal voting measures have been introduced in several countries in cases where a certain type of transaction could present a

149 *See id.* at 540 (arguing for equal voting rights in specific contexts).

150 *Id.* at 540–41.

151 *Id.*

152 Bebchuk & Kastiel, *supra* note 14, at 1509.

conflict.[153] Bebchuk and Kastiel cite the example of Switzerland, where equal voting applies at times when a special audit or liability action is being considered. Conceivably, therefore, there is space for introducing similar mandatory equal voting measures in the United States.

However, although mandating equal voting rights in specific contexts like these does meet the goal of "one share, one vote," it *only* does so in those contexts. Its effectiveness in holding high-voting shareholders accountable thus depends entirely on the nature and scope of where it applies. Furthermore, situations like the example given above, when a company is up for sale, would do nothing to increase founder-controller accountability. The only way that this approach would properly address the public policy risks of dual-class share structures is if equal voting rights were mandated across a broad range of voting matters. However, in such instances, the subsequent reduction in control held by the founder-controller would likely negate the purpose of implementing a dual-class structure in the first place. It is difficult, therefore, to see company founders adopting such a model at IPO.

153 *Id.*

IV. Congressional Action: The Only Meaningful Solution

The only meaningful way of holding leaders of dual-class corporations accountable to their shareholders is for Congress to empower the SEC to prohibit the implementation of dual-class structures and to unwind those structures already in place.[154] Congressional action is needed because not one of the alternative solutions discussed above in Part III fully addresses the public policy issues implicated by dual-class structures. Congress has shown in the past that it will act when systemic deficiencies in investment structures endanger society.[155] The D.C. Circuit even left the door open to congressional action in 1990, when it ruled that the SEC was not, at that time, empowered to ban dual-class share structures.[156] Congress has the power to act, and it should do so.

When viewed through a public policy lens, none of the potential solutions explored in Part III, nor any combination of them, comprehensively addresses the dangers posed by dual-class structures, particularly within Big Tech.[157] Without new powers from Congress, the decision in *Business Roundtable v. SEC* renders the SEC powerless to act. The stock exchanges are conflicted by competing commercial interests. The exclusionary efforts of the index providers will achieve only limited impact. Institutional investors are hamstrung by their need to produce high shareholder returns. Sunset provisions fail to address the public policy issues faced. Enhanced disclosure and monitoring, while important, solves a different problem. Limiting the power of high-voting shares falls short of addressing the fundamental inequality of dual-class structures. And measures such as guaranteeing higher board representation for low-voting shares, or equal voting in specific contexts, will yield only limited success unless the guarantees are set so high as to render them impractical.

When faced with public policy dangers in the past, Congress has acted. The Securities Act of 1933 and the Securities Exchange Act of 1934 were both direct responses to the 1929 stock market crash.[158] More

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154 Any unwinding of existing dual-class share structures should be carried out via an equitable and considered process, acknowledging the fact that their establishment was legitimate under the rules in place at the time.

155 *See generally, e.g.,* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

156 Bus. Roundtable v. SEC, 905 F.2d 406, 407–11 (D.C. Cir. 1990) ("Neither the wisdom of the requirement, nor of its being imposed at the federal level, is here in question.").

157 *See* Part III, *supra*.

158 *See* Paul S. Atkins, *Speech by SEC Commissioner: Remarks Before the Securities Traders Association*, SEC.gov (Oct. 7, 2004), https://www.sec.gov/news/speech/spch100704psa.htm.

recently, the Sarbanes-Oxley and Dodd-Frank Acts sought to address major corporate frauds and the 2008 financial crisis, respectively.[159] However, despite the much-needed protections that these statutes provide, they do not address the new dangers posed by dual-class share structures in the age of Big Tech. As Steinberg has noted, when discussing the broader need for continued evolution of federal protection, "significant gaps remain that should be filled[,] [and] measures . . . should be implemented on the federal level to enhance corporate governance standards."[160]

It is hard to envisage substantially negative outcomes from such a solution, other than for power-hungry founder-controllers. One result might be a decline in the number of IPOs, particularly among unicorn tech companies. However, it is the prerogative of company founders to keep their businesses private should they wish. In such instances, they retain complete control, but they forgo certain benefits that come with an IPO, such as increased profile and vast extraction of cash. They don't get to have their cake and eat it too. Another outcome might be that founders choose overseas stock exchanges for future IPOs. In 2018, exchanges in both Hong Kong and Singapore amended their listing rules to allow dual-class IPOs,[161] and there have been calls for the London Stock Exchange to do the same.[162] However, despite these calls, the London Stock Exchange's rejection of dual-class structures has hardly dented its popularity and reputation; it still "rivals the New York Stock Exchange . . . in terms of market capitalization, trade volume, access to capital, and trade liquidity."[163] The United States should embrace this opportunity to enhance its corporate governance standards.

In delivering the court's opinion in *Business Roundtable* in 1990, Judge Williams made a point of stating that "[n]either the wisdom of the requirement [for prohibiting dual-class share structures], *nor of its being imposed at the federal level*, is here in question."[164] At the time, in 1990, both social media and Big Tech were yet to be conceived, as was the manner in

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159 116 Stat. 745; 124 Stat. 1376.

160 Steinberg, *supra* note 57, at 284.

161 *Singapore Details Rules for Offering Dual-Class Shares, Follows Hong Kong*, Reuters (June 20, 2018), https://www.reuters.com/article/sgx-regulation/singapore-details-rules-for-offering-dual-class-shares-follows-hong-kong-idUSL4N1TS3E3.

162 *See* Editorial Board, *Why Dual-Class Shares Deserve Consideration*, Fin. Times (Nov. 11, 2019), https://www.ft.com/content/6f576e60-0231-11ea-be59-e49b2a136b8d; Claire Keast-Butler, *Why the UK Should Rethink its Restrictive Rules on Dual-Class Shares*, City A.M. (July 27, 2020), https://www.cityam.com/why-the-uk-should-rethink-its-restrictive-rules-on-dual-class-shares/.

163 James Chen, *London Stock Exchange (LSE)*, Investopedia (May 8, 2020), https://www.investopedia.com/terms/l/lse.asp.

164 Bus. Roundtable v. SEC, 905 F.2d 406, 407 (D.C. Cir. 1990) (emphasis added).

which they would come to dominate how societies now interact. Today, in this age of Big Tech, the need for prohibition of dual-class share structures is greater than ever, and its imposition at the federal level is required to give the SEC the power to restore equity to voting rights across the board.

Conclusion

When the wide-ranging debate around the appropriateness of dual-class share structures is framed in the context of societal harm, the unaccountability of those who run dual-class companies, particularly within Big Tech, is thrown into sharp relief. The only meaningful and reliable way of holding such leaders accountable is congressional action, empowering the SEC to prohibit the implementation of dual-class structures and enable the efficient and effective wind-down of those structures already in place.

The influence and power that Big Tech companies now wield mean their founder-controllers rank among the world's most powerful actors. Yet the unaccountability they enjoy under dual-class structures means they remain free to pursue strategies and ideologies with which the majority of their shareholders may fundamentally disagree. Faced with the ever-growing dangers this presents, Congress must act to prohibit dual-class share structures in order to protect the voting rights of ordinary shareholders and, vicariously, the human rights of global societies.

Analysis of other potential solutions to this problem, when viewed through a public policy lens, shows why none are suitable for addressing the dangers faced. The SEC is powerless to act with meaningful force in the absence of new powers. The stock exchanges are conflicted by competing commercial interests. The index providers have acted, but their impact will likely be limited. Institutional investors are conflicted by the need to produce high shareholder returns. Sunset provisions fail to address the public policy issues faced. Enhanced disclosure and monitoring solve a different problem. Limiting the power of high-voting shares falls short of addressing the fundamental inequality of dual-class structures. Finally, measures such as guaranteed higher board representation, or equal voting in specific contexts, are likely impractical or unworkable to achieve the aims sought.

The only meaningful way of holding Big Tech leaders accountable to their shareholders is for Congress to empower the SEC to prohibit the implementation of dual-class structures and unwind those structures already in place. Congress has acted to address public policy risks in the past, via the Securities and Securities Exchange Acts in the 1930s, and more recently via the Sarbanes-Oxley and Dodd-Frank Acts in the 2000s. Now it should empower the SEC to inject accountability into the boards of dual-class Big Tech companies and to protect societies from the grave dangers posed by unaccountable power.