THE CONTRACTUAL LIMITS OF CONTROL

CALEY PETRUCCI*

For centuries, the law has allowed a separation of ownership and voting power. When founders take a private company public—and benefit from access to more capital as a result—they can preserve control despite selling a majority of the company. How does this work? The primary mechanism involves a curious model of governance: multiple classes of common stock with the founder's class having far more voting power per share. These governance structures are fraught with concerns of increased agency costs, managerial entrenchment, and economic inefficiency. As a result, they have generated a robust debate among scholars and practitioners alike. Prior commentators have examined a handful of mechanisms to limit control in isolation. But doing so necessarily creates an incomplete picture, failing to consider many other limits and overlooking a deceptively simple principle in contract law: that corporate "contracts" must be considered in their entirety.

This Article makes three primary contributions to the literature on multiclass governance. First, it complicates the prevailing understanding by constructing an original database of three hundred and twenty-five corporate charters to identify the emergence of a network of contractual limits of control. Using this database, the Article creates a comprehensive taxonomy of control limits. Second, it reframes the existing debate from a focus on particular limits to treating the charter as an entire contract, which in turn operates as one of many contractual arrangements that can limit control. As a result, it is not a siloed provision but rather the accumulation of control limits and interaction among terms that is the more meaningful measure. Lastly, it leverages economic and contractual theory to examine various implications for policymakers, practitioners, and other corporate players. Ultimately, the Article concludes by arguing that the concerns associated with multiclass governance may be overstated as a result.

* Associate Professor, University of San Diego School of Law. Comments welcome at cpetrucci@sandiego.edu. For thoughtful comments and discussion, I thank Brian Broughman, Stephen Ferruolo, Jill Fisch, Chris Havasy, Aneil Kovvali, Elizabeth Pollman, Morgan Ricks, Gladriel Shobe, Guhan Subramanian, Andrew Verstein, Andrew Winden, and participants from the American Law and Economics Association (ALEA) Annual Meeting, National Business Law Scholars Conference, Junior Business Law Scholars Conference, UCLA Law School Corporate Law Seminar, University of San Diego School of Law Faculty Workshop, Santa Clara University School of Law Faculty Workshop, and Vanderbilt Law & Business Workshop. I also thank Deanna Xu, Haldan Asaad, Liz Parker, and the USD Legal Research Center for providing valuable research assistance.

TABLE OF CONTENTS

Introduction

Control is one of the most important commodities in corporate law. Because shareholders are entitled to vote on matters including fundamental corporate changes and director elections,[1] a shareholder with a controlling stake will have the ability to elect directors, influence governance, and extract various private benefits. Often, control and ownership go hand-in-hand. Under the bedrock principle of "one share, one vote," when a company goes public there is one class of common stock, and a shareholder is entitled to one vote for every share that they own.[2] A shareholder that buys a majority of the company's shares would have the corresponding proportion of voting power and thus control of the company. But that is not always the case.

Google, Facebook, Zillow, and hundreds of the most influential companies of our time have increasingly gone public with a multiclass model of governance where each class of shareholders has unequal voting rights.[3] Today, multiclass companies represent as much as 30% of all initial public offerings (IPOs) and more than half of IPO market capitalization.[4] Most often, one class is comprised of the founder and other insiders, a wealthy elite that has multiple votes per share.[5] Meanwhile, the other class is available to the public and has only one vote per share. Companies have even begun offering a class of stock to the public with no voting rights whatsoever.[6] Moreover,

---

[1] *See, e.g.,* Del. Code Ann. tit. 8, § 242 (2023).

[2] This principle has historically been a common default under state corporate law. *See, e.g.*, Del. Code Ann. tit. 8, § 212 (2023) ("Unless otherwise provided in the certificate of incorporation . . . each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder."); Model Bus. Corp. Act § 7.21(a) (2023) ("[U]nless the articles of incorporation provide otherwise, each outstanding share . . . is entitled to one vote on each matter voted on at a shareholders' meeting."); Cal. Corp. Code § 700 (2023) ("Except as provided in Section 708 and except as may be otherwise provided in the articles, each outstanding share … shall be entitled to one vote on each matter submitted to a vote of shareholders."). However, it has never been mandatory. *See, e.g.*, Del. Code Ann. tit. 8, § 151(a) (2023) (authorizing a corporation to have different classes of stock with "voting powers, full or limited, or no voting powers"); *see also* Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 Stan. L. Rev. 687, 701–02 (2019). Before the adoption of general incorporation statutes, common law required per capita voting (i.e., one vote per *shareholder*). *See* Douglas C. Ashton, *Revisiting Dual-Class Stock*, 68 St. John's L. Rev. 863, 890–91 (1994) (discussing the departure from the one-share, one-vote rule).

[3] Often, these companies are referred to as "dual-class" companies. However, many have more than two class classes of common stock. This Article refers to them primarily as multiclass companies as a result. For data on the historical prevalence of multiclass companies, see Jay R. Ritter, *Initial Public Offerings: Dual Class Structure of IPOs Through 2024*, Warrington College of Bus. 2 Table 23 (last updated Apr. 4, 2025), https://site.warrington.ufl.edu/ritter/files/IPOs-Dual-Class.pdf [https://perma.cc/RGM7-P44W] (listing the number of IPOs each year that have dual class shares).

[4] *See id.* (finding that multiclass companies represent 26.9% of IPOs over the last five years).

[5] Insiders include founders and other pre-IPO investors, such as private equity firms and venture capitalists.

[6] Companies may have two classes of common stock (a voting and nonvoting class) or have three or more classes of common stock (one or more nonvoting classes, low-vote classes, and high-vote classes). For an example of each, *compare* Brown-Forman Corp., Restated Certificate

many companies grant a subset of shareholders special control rights through contractual mechanisms, resulting in a company that is dual class in substance regardless of its form.[7] As a result, in many companies today, control rests in the hands of just a few shareholders: the founders and other insiders who hold the contractual rights of control.

Corporate law thus faces a pivotal question: How should it respond to these governance structures that separate ownership and voting power? Unsurprisingly, this question has been the subject of a vigorous debate among academics and practitioners.[8] Proponents argue that multiclass structures and other contractual control rights protect founders from short-term market pressures, allowing entrepreneurial leaders to pursue unique or idiosyncratic visions.[9] A multiclass arrangement may also encourage otherwise ambivalent founders to go public in the first place, which could help mitigate the declining number of public companies and subject more companies to greater oversight and regulation.[10] In addition, some commentators argue that these structures are beneficial because otherwise uninformed public shareholders can harm corporate value.[11] On the other hand, such governance is fraught with concerns of increased agency costs and managerial entrenchment. Moreover,

of Incorporation, Art. IV (Aug. 3, 2012) *with* AppLovin Corp., Amended and Restated Certificate of Incorporation, Art. IV.3 (May 14, 2021). Nonvoting stock dates back to over a hundred years ago when dual class first gained popularity, with Dodge Brothers, Inc. and Industrial Rayon Corporation each issuing nonvoting stock in the 1920s and facing sharp criticism in response. *See* Ashton, *supra* note 2, at 890–92; Jill E. Fisch & Steven Davidoff Solomon, *Dual Class Stock* 1, 3–5 (European Corp. Governance Inst., Finance Working Paper No. 715/2023), https://ssrn.com/abstract=4436331 (updated Apr. 27, 2023) (forthcoming in Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon & Wolf-Georg Ringe eds.)) [hereinafter *Dual Class Stock*].

[7] *See* Del. Code Ann. tit. 8, § 122(18) (2024) (providing that corporations have the power to contract with their stockholders); *see also* Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 Yale J. Reg. 1343 (2022) (discussing single-class companies that are functionally dual-class) [hereinafter The *Dual-Class Spectrum*]; Gladriel Shobe & Jarrod Shobe, *Contractual Control in Dual-Class Corporations*, 42 Yale J. Reg. 332, 364–68 (2025) (finding that over one-quarter of dual-class companies grant insiders contractual control rights in addition to high-vote stock) [hereinafter *Contractual Control in Dual-Class Corporations*]. The analysis in this Article applies broadly to corporations of a variety of structures when there is a contractual right of control.

[8] *See infra* Part I.A. For an overview of dual-class companies and their utility, see Fisch & Solomon, *supra* note 6, at 3.

[9] *See, e.g.*, Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. Chi. L. Rev. 119, 137–38 (1987); Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 Yale L.J. 560 (2016).

[10] *See* Jay Clayton, Chairman, U.S. Sec. Exch. Comm'n, Remarks to the Economic Club of New York (Sept. 9, 2019), https://www.sec.gov/newsroom/speeches-statements/speech-clayton-2019-09-09.

[11] *See* Lund, *supra* note 2; Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. Corp L. 493, 506–20 (2018); Kobi Kastiel & Yaron Nili, *In Search of the 'Absent' Shareholders: A New Solution to Retail Investors' Apathy*, 41 Del. J. Corp. L. 55, 99 (2016) (arguing that "uninformed retail investors could also support proposals that are not beneficial to the corporation"); *see also* Min Yan, *A Control-Accountability Analysis of Dual Class Share (DCS) Structure*s, 45 Del. J. Corp. L. 1, 8–9 (2020).

because the result is that a few shareholders have control of the company, it creates incentives for the controllers to preserve the structure even when doing so becomes inefficient.

While there is no definitive answer to the multiclass debate, many companies have turned to a critical governance document to limit control: their corporate charter. The charter, also called the "certificate of incorporation" or "articles of incorporation," is the highest governing document in a corporation. Typically, a charter establishes a number of features of the corporation including its purpose, the classes of shares, and the rights and obligations of each class. It is well-established that a corporate charter is a contract.[12] The ability to privately order governance through the charter is one of the greatest strengths of U.S. corporate governance. By providing that one class of shareholders will have more voting power per share than another, a charter can create controlling shareholders. However, a charter can also impose limits on that control, for example, by limiting the duration of control or reducing the power of the controller.

The use of charters to privately order governance and limit control has generated much scholarly discourse.[13] The most widely discussed approach among academics and practitioners alike is the use of time-based "sunset provisions" in corporate charters, which automatically convert the multiclass company to a single-class company. For example, Professors Bebchuk and Kastiel argue that the adverse effects of multiclass stock increase over time and time-based sunsets can mitigate that problem.[14] Former SEC commissioner

---

[12] *See, e.g.*, Lawson v. Household Fin. Corp., 152 A. 723, 727 (Del. 1930) ("[I]t has been generally recognized in this country that the charter of a corporation is a contract both between the corporation and the state and the corporation and its stockholders. It is not necessary to cite authorities to support this proposition."); Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders."); Salzberg v. Sciabacucchi, 227 A.3d 102, 116 (Del. 2020) (en banc) (providing that "corporate charters are contracts among a corporation's stockholders"). For additional discussion, see, for example, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 ("The corporation is a complex set of explicit and implicit contracts."); Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. L. REV. 501, 526–34 (2021); Megan Wischmeier Shaner, *Interpreting Organizational "Contracts" and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. Rev. 985, 1010 (2019) ("[I]n Delaware, the courts have embraced and endorsed the contract metaphor, holding that contract law presides over issues involving both the enforcement and interpretation of the charter and bylaws."); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373, 380 (2018) ("Delaware courts have largely accepted the contractual theory of corporate law."); George Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 611 (2016) ("[T]he influential Delaware courts seem to be taking a more permissive attitude, based in part on the parallels between contract law and the corporate relationship.").

[13] *See, e.g.*, Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 694 (1986); Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1 (1988).

[14] Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 590 (2017).

Robert Jackson has characterized multiclass companies that lack such time-based sunsets as "antithetical to our values as Americans."[15] Proxy advisory firms, the Council for Institutional Investors (CII), and stock exchanges have likewise encouraged the use of time-based sunset provisions.[16] However, Professors Fisch and Solomon have critiqued this focus on time-based sunsets, instead arguing for the use of sunsets triggered by particular events.[17] Others like Professors Goshen and Hamdani examine efforts to *extend* a sunsetting multiclass structure, arguing that extensions should be evaluated under a deferential standard of review.[18] More recently, scholars have turned from sunsets to other charter provisions, such as "equal treatment" provisions requiring that each class of shareholders is treated the same.[19] In short, the debate on the utility of multiclass governance and contractual control limits is robust.

Notably overlooked in this debate, however, is a deceptively simple principle in contract law: if the charter is a contract, then it must be considered in its entirety. Prior commentators have examined a number of contractual limits in isolation. But doing so necessarily creates an incomplete picture of the contractual ways in which companies limit control, failing to account for the interaction among contractual limits and the accumulation of control limits. As a result of overlooking these features of the corporate "contract," the concerns about multiclass governance—and shareholder control more broadly—may be overstated.

This Article offers a novel perspective on the multiclass model of governance and control. It identifies the emergence of a network of contractual limits on control that companies adopt in their corporate charters. Through constructing an original database on these limits, the Article shows that prior commentators have overlooked not only a number of these contractual limits, but also the importance of the interaction across provisions and the accumulation of control limits. Drawing on law and economics theory and contractual theory, the Article then examines the consequences of control limits and their

---

[15] *See* Robert J. Jackson Jr., *Perpetual Dual-Class Stock: The Case Against Corporate Royalty*, U.S. Sec. & Exch. Comm'n (Feb. 15, 2018), https://www.sec.gov/newsroom/speeches-statements/perpetual-dual-class-stock-case-against-corporate-royalty.

[16] *See, e.g.*, *Dual-Class Stock*, Council of Inst. Inv'rs, https://www.cii.org/dualclass_stock [https://perma.cc/9A8K-DRJR] ("CII has pressured dual-class IPO companies to include reasonable time-based 'sunset' provisions in their charters."); Letter from Kenneth A. Bertsch, Exec. Dir., Council of Institutional Inv'rs, to Ravi Ahuja, Chair, Nominating and Corp. Governance Comm., Roku, Inc., et al. (Sept. 12, 2017), https://www.cii.org/files/issues_and_advocacy/correspondence/2017/09_12_17_Letter%20to%20Roku.pdf .

[17] Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. Rev. 1057, 1063 (2019) [hereinafter *The Problem of Sunsets*]; *see also* Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 Colum. Bus. L. Rev. 852, 950–51 (2018).

[18] Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limits of Judicial Review*, 120 Colum. L. Rev. 941, 946 (2020); *see also* David J. Berger, Jill Fisch & Steven Davidoff Solomon, *Extending Dual Class Stock: A Proposal*, 25 Theoretical Inquiries in L. 23, 24 (2024).

[19] *See* Caley Petrucci, *Equal Treatment Agreements: Theory, Evidence & Policy*, 40 Yale J. Reg. 620, 626 (2023).

impact on the company's governance. In doing so, it pays particular attention to policymakers, practitioners, and investors. The Article has meaningful implications for the efficiency of multiclass governance, contractual grants of control, sufficiency of existing limits on control, and the role of the drafter in aligning party incentives and reducing moral hazard.

The Article proceeds as follows. Part I examines the phenomenon of control rights that exceed a shareholder's economic interest. It first traces the history of multiclass companies over the past century and their rise to prominence in recent years. In doing so, this Part highlights efforts by stock exchanges and the SEC to restrict multiclass companies, as well as the failure of these efforts in the face of market competition and challenges to agency rulemaking authority. In addition, this Part examines the widespread use of alternative contractual arrangements that grant control rights to certain shareholders, resulting in structures that are single class in form, but multiclass in substance. This Part concludes by synthesizing the debate on the utility of these structures, detailing the most common benefits and critiques of multiclass governance.

Part II examines the creation of control and mechanisms that impose limits on it. Using novel empirical evidence from a review of 325 hand-coded multiclass charters, this Part creates a taxonomy of contractual limits, their strengths and weaknesses, and their prevalence in current multiclass companies. Broadly speaking, there are three categories of contractual limits on control: those related to the process of shareholder decision-making ("process-based limits"), those that alter the structure of the company after certain events or a period of time ("structure-based limits"), and those focused on the outcomes of corporate actions, requiring that the controller and other shareholders be treated similarly ("outcome-based limits"). While the focus of this Part is contractual limits, it also discusses legal and extralegal limits on control such as fiduciary duties, reputational capital, and stock exchange listing rules.

Part III analyzes the implications of these control limits. First, it reframes the existing debate from a focus on particular limits to treating the charter as an entire contract, and that contract as part of a broader network of contractual limits of control. This is because it is not a siloed provision but rather the accumulation of control limits and interaction among terms that is the more meaningful measure. Next, it analyzes the economic consequences of these limits and their ability to create corporate value. The economic consequences are considerable: through negotiating across provisions within a corporate charter, firms can create value, manage information asymmetries and allocate risk, as well as align incentives and reduce moral hazard. Next, this Part addresses the implications for a variety of corporate actors, with particular attention to the role of policymakers and practitioners. Lastly, it returns to the broader multiclass debate, arguing that given this network of control limits, the concerns associated with multiclass governance may be overstated.

I. Background

A. A Brief History of the Rise of Multiclass Governance

By the early 1900s, there was a clear norm in shareholder voting: one vote per share.[20] Shareholders with a significant number of shares would have a correspondingly significant number of votes. State general incorporation statutes that had been adopted during the prior century codified this norm by providing that the one share, one vote approach would be the default voting rule.[21] While corporations were generally free to depart from this default, relatively few did so. One share, one vote was the dominant approach to shareholder voting.

A few decades later, in the 1920s, disparate voting rights had started gaining popularity. Corporations were increasingly issuing two classes of common stock: one to the public with few voting rights and one to insiders with substantial voting rights. As a result, one class could control the company despite owning only a minority of its shares. With this structure, founders and other insiders could take a company public while maintaining control.

Backlash to these unequal voting rights came to a head in 1925 when a number of leading corporations issued nonvoting common stock. Perhaps the most well-known example is Dodge Brothers, Inc., an automotive company that was listed on the New York Stock Exchange (NYSE) in 1925.[22] When it went public, Dodge Brothers issued approximately $130 million of nonvoting common stock to the public and approximately $2.25 million of voting common stock to an investment bank.[23] As a result, control of Dodge Brothers was held by the investment bank, despite it owning only 1.7% of the company.[24] Public outcry ensued, reaching the floors of Congress and reportedly resulting in an inquiry from the Justice Department.[25] Within a few short months, disparate voting rights had become a matter of great public concern.

In 1926, the NYSE—at the time, and today, the world's largest stock exchange—responded to the public outcry. It adopted a one share, one vote

[20] Prior to the adoption of general incorporation statutes in the mid-1880s, there were several approaches to shareholder voting: a "democratic" approach of one vote per *shareholder*, the current approach of one-share-one-vote, and an approach that limits voting rights for large shareholders. For an in-depth discussion of the development of shareholder voting rights more generally, see Sarah C. Haan, *Voting Rights in Corporate Governance: History and Political Economy*, 96 S. Calif. L. Rev. 881 (2024).

[21] *See* Harry G. Henn & John R. Alexander, Laws of Corporations and Other Business Associations 534–36 (3d ed. 1983) ("By the end of the nineteenth century . . . [it was] unusual to find a statutory reference to any formula other than one vote per share."). For examples from this time period, see 1909 N.Y. Laws, ch. 28, § 23 (providing that each shareholder will have one vote per share "[u]nless otherwise provided in the certificate of incorporation").

[22] *See* Seligman, *supra* note 13, at 694; Gordon, *supra* note 13, at 62.

[23] *See* Seligman*, supra* note 13, at 694.

[24] *See id.*

[25] *See id*. at 695; 67 Cong. Rec. at 7719–20 (1926).

policy that effectively prohibited multiclass listings.[26] The chairman of one of the NYSE's committees testified on the rationale as follows:

> This device was being increasingly used to lodge control in small issues of voting stock, leaving ownership of the bulk of the property divorced from any vestige of effective voice in the choice of management. The committee felt that this tendency ran counter to sound public policy.[27]

The NYSE's policy greatly deterred companies from issuing multiple classes of common stock. Being listed on a stock exchange increases demand for a company's equity.[28] Thus, the NYSE's refusal to list multiclass companies effectively imposed a financial penalty on them. This approach became a formal rule in 1940 when the NYSE adopted a requirement effectively excluding multiclass companies from listing.[29] With some exceptions,[30] the NYSE generally maintained this policy for the next 40 years.[31]

But in the 1980s, everything changed. Other stock exchanges were taking a less restrictive approach to multiclass stock and the NYSE had to contend with these competitors drawing away potential listers.[32] In addition, more family-run firms sought access to the public equity markets but desired to preserve control in the family. Prompted in part by these factors, the NYSE allowed General Motors to issue shares with disparate voting rights in 1984.[33]

---

[26] *See* Ashton, *supra* note 2, at 893; Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 596 (2017); Louis Lowenstein, *Shareholder Voting Rights: A Response to SEC Rule 19-4 And to Professor Gilson*, 89 COLUM. L. REV. 979, 982 (1989). Over the years that followed, the NYSE would regularly refuse to list stock with disparate voting rights. However, it did not apply these policies uniformly. *See* Seligman, *supra* note 13, at 693–707 (noting that by 1985, ten companies on the NYSE had multiclass structures).

[27] *Stock Exchange Practices: Hearings on S. Res. 84 and S. Res. 56 & 97 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. pt. 15, at 6677 (1934) (testimony of Frank Altschul, chairman of NYSE Committee on Stock List).

[28] *See* Tom McGinty et al., *Index Funds Are Taking Over the S&P 500*, WALL ST. J. (Oct. 17, 2016, 10:30 AM), https://www.wsj.com/graphics/index-funds-taking-over-sp-500/ [https://perma.cc/92EE-EMFZ].

[29] *See* Ashton, *supra* note 2, at 893.

[30] Among the most notable exceptions was the Ford Motor Company, which went public in 1956 with the Ford family holding the Class B shares and the public able to purchase the Class A shares. *See* John Rosevear, *63 Years Later, What Can Investors Learn From Ford's 1956 IPO?*, THE MOTLEY FOOL (Apr. 18, 2019, 11:35 PM), https://www.fool.com/investing/2019/01/16/63-years-later-what-can-investors-learn-from-fords.aspx [https://perma.cc/5VV2-UELY]. As a result of this structure, the Ford family retained, and continues to retain, 40% of the shareholder voting power. *Id.*

[31] *See* Ashton, *supra* note 2, at 893–94.

[32] For example, competitors to the NYSE, like the American Stock Exchange (AMEX) and NASDAQ, allowed multiclass companies to list. *See* Fisch & Solomon, *Dual Class Stock,* supra note 6, at 4 (noting that "in 1976, [when] the NYSE informed Wang Laboratories that it could not be listed . . . Wang Laboratories chose instead to be listed on the AMEX").

[33] *See id.*

Shortly thereafter, the NYSE created a policy that allowed multiclass companies to list on the exchange, subject to a number of conditions.[34]

The NYSE's more flexible governance policy dovetailed with another development in the corporate landscape during the 1980s: heightened hostile takeover activity. State legislatures adopted a variety of antitakeover statutes, courts developed a robust body of takeover doctrine, and boards implemented a number of takeover defenses.[35] Perhaps the most potent tool to preserve control and prevent an unwanted party from taking over the company was a multiclass structure. When the founder and other insiders have a majority of the voting power, a hostile takeover becomes impossible.

Between the NYSE's more flexible listing policy and the increased threat of hostile takeovers, multiclass listings saw a resurgence. The SEC took notice. In 1988, it promulgated Rule 19c-4, which restricted stock exchanges from listing multiclass companies unless certain conditions were satisfied.[36] The effect of this rule was to drastically limit the ability of corporations to adopt multiclass structures with disparate voting rights.[37] Shortly thereafter, the Business Roundtable, an association of CEOs from major United States companies, challenged the rule.[38] In 1990, the D.C. Circuit vacated the rule in *Business Roundtable v. SEC*, holding that the SEC had exceeded its statutory authority.[39] With that, the life of Rule 19c-4 came to an end.

---

[34] These conditions include approval from two-thirds of the shareholders, a 10:1 voting rights ratio, approval by the majority of the independent directors, and that "all other rights be substantially the same." *See* Self-Regulatory Organizations; Proposed Rule Change by New York Stock Exchange, Inc. Relating to Amendments to the Exchange's Voting Rights Listings Standards for Domestic Companies, Exchange Act Release No. 23724, 41 Fed. Reg. 37529, 37530 (Oct. 22, 1986).

[35] Defenses include shareholder rights plans ("poison pills") and staggered boards, among others. For a discussion of takeover activity, whether boards are justified in resisting takeovers, and the use of takeover defenses *see, e.g.*, FRANK H. EASTERBOOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (arguing that management should remain passive when faced with a hostile bid); Caley Petrucci & Guhan Subramanian, *Pills in a World of ESG and Activism*, 1 U. CHI. BUS. L. REV. 417 (2022) (discussing the role of Easterbook & Fischel's passivity thesis in the modern era and providing recommendations for pill design); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981); Lucian A. Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1695 (1985).

[36] *See* Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4,* 69 WASH. U. L.Q. 565, 570–71, 575 (1991); Rights Listing Standards; Disenfranchisement Rule, Exchange Act Release No. 25091, 53 Fed. Reg. 26376 (July 12, 1988) (codified as amended at 17 C.F.R. § 240.19c-4 (2018)).

[37] *See id.*; *see also* Lund, *supra* note 2, at 703; Stephen M. Bainbridge, *The Scope of the SEC's Authority over Shareholder Voting Rights* 6–7 (UCLA Sch. Of Law Pub. Law & Legal Theory Research Paper Series, Paper No.07-16, 2007) [hereinafter *SEC's Authority*].

[38] *See* Bus. Roundtable v. SEC, 905 F.2d 406, 407, 417 (D.C. Cir. 1990); *see also* Bainbridge, *SEC's Authority*, *supra* note 37, at 7–14 (discussing the *Business Roundtable* litigation).

[39] *See id.*

Over the next decade, as takeover activity slowed, so did the growth of multiclass companies. During the following years, these companies accounted for only 7.9% of companies going public.[40] But in the 2000s, this governance model saw a resurgence. This resurgence can be attributed in part to peculiarities in the 21st century financial and securities markets. Private capital to fund later-stage startups has become increasingly available,[41] and in recent years, companies have more frequently raised financing from venture capital firms before going public.[42] Greater availability of funding results in greater bargaining power, allowing founders and other controllers to extract more favorable terms in an IPO. Google is largely credited with starting the modern multiclass boom, making headlines in 2004 when it went public with the express purpose of preserving founder and executive control.[43] The founders, executives, and other insiders held stock with ten times the votes per share as the class available to the public. As a result, Google's founders and insiders controlled over 61% of the voting power. Founders Larry Page and Sergey Brin explicitly adopted this approach in part so that public shareholders "will have little ability to influence [Google's] strategic decisions through their voting rights."[44]

---

[40] This number represents the average proportion of IPOs from 1991–2000 that were multiclass. Ritter, *Initial Public Offerings*, *supra* note 3, at tbl. 23 (listing the number of IPOs each year that have dual class shares per year).

[41] *See* Xiaohui Gao et al., *Where Have All the IPOs Gone?*, 48 J. FIN. AND QUANTITATIVE ANALYSIS 1663–92 (2014); Craig Doidge, Kathleen Kahle, Andrew Karolyi & Rene Stulz, *Eclipse of the Public Corporation or Eclipse of the Public Markets?*, 30 J. OF APPLIED CORP. FIN. 8–16 (2018).

[42] *See* Dhruv Aggarwal et al., *The Rise of Dual-Class Stock IPOs*, 144 J. FIN. ECON. 122, 123 (2022).

[43] *See* Larry Page & Sergey Brin, *Founders' IPO Letter*, ALPHABET: INVESTOR REL., https://abc.xyz/investor/founders-letters/ipo-letter/ [https://perma.cc/28RM-68CU]; Emily Chasan, *Google's Multi-Class Stock Structure Made Alphabet Move Unique*, WALL ST. J. (Aug. 12, 2015, 4:47 PM), https://www.wsj.com/articles/BL-CFOB-8866 [https://perma.cc/7JYV-HFLM]; John Markoff, *The Google I.P.O.: The Overview*, 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 [https://perma.cc/GK4S-H4NQ]; *see also* Lund, *supra* note 2, at 705.

[44] Page & Brin, *Founders' IPO Letter*, ALPHABET: INVESTOR REL., https://abc.xyz/investor/founders-letters/ipo-letter/ [https://perma.cc/28RM-68CU]; *see* Google, Inc., Amendment No. 9 to Registration Statement (Form S-1), 2, 24–25 (Aug. 18, 2004) https://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm [https://perma.cc/LPP8-XU5A] [hereinafter Google Registration Statement].

In 2012, Google created a new class of *nonvoting* common stock, enabling the founders to maintain their control while obtaining additional equity for the company. *See* Page & Brin, *2012 Founders' Letter,* ALPHABET (Apr. 12, 2012), https://www.sec.gov/Archives/edgar/data/1288776/000119312512160666/d333341dex993.htm; Steven Davidoff Solomon, *New Share Class Gives Google Founders Tighter Control*, N.Y. TIMES: DEALBOOK (Apr. 13, 2012, 9:17 AM), https://archive.nytimes.com/dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/ [https://perma.cc/3HPF-26VN]. Google faced sharp criticism over the announcement of nonvoting stock and eventually reached a settlement of over $500 million paid to the nonvoting shareholders because their shares traded at such a large discount. *See* Verified Class Action Complaint ¶¶ 1–2, 27–37, In re Google Inc. Class C S'holder Litig., No. 7469-CS, 2013 BL 308498 (Del. Ch. Nov. 6, 2013); Matt Chiappardi, *Attys in Google Stock Split Row Deserve $25M, Court Told*, LAW360 (Apr. 29, 2015, 8:57 PM), Other companies, particularly in the technology sector, quickly followed suit to adopt governance models that allowed founders to maintain control. For example, in 2012, Facebook went public with a multiclass structure expressly intended to "limit [the public investors'] ability to influence corporate matters for the foreseeable future."[45] Like Google, Facebook offered one class of shares to the public, with a single vote per share, while the other class had ten votes per share and was owned exclusively by Facebook insiders.[46] As a result, Facebook CEO Mark Zuckerberg controlled 57% of the company's voting power despite owning only 28% of the company's equity.[47] In response, later that year several of the largest U.S. pension funds, including the California Public Employees' Retirement System (CalPERS), the California State Teachers' Retirement System, and the Florida State Board of Administration, threatened to boycott multiclass listings that allow a minority shareholder to control the majority of the votes.[48] Proxy advisory firms took similar stances against multiclass structures.[49]

Recently, many companies have also gone public with a nonvoting class. In 2017, Snap (the parent company of Snapchat) made headlines for offering *only* nonvoting stock to the public in its IPO.[50] Later that year, a collective of

---

https://www-law360-com.eresources.law.harvard.edu/articles/649708/attys-in-google-stock-split-row-deserve-25m-court-told [https://perma.cc/743L-P77Z]. Other companies issuing nonvoting common stock include DoorDash, Inc., Dropbox, Inc., Endeavor Group Holdings, Inc., Ginkgo Bioworks Holdings, Inc., Liberty Broadband Corp., Match Group, Inc., and Robinhood Markets, Inc.

[45] Facebook, Inc., Registration Statement (Form S-1), at 31 (Feb. 1, 2012), https://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm [hereinafter Facebook Registration Statement].

[46] *See id.*

[47] J. O'Dell, *Power Play: How Zuckerberg Wrested Control of Facebook from His Shareholders*, VentureBeat (Feb. 1, 2012, 4:22 PM), https://venturebeat.com/entrepreneur/zuck-power-play/ [https://perma.cc/8HRH-GBXY]. In 2017, Facebook considered a stock split and issuance of nonvoting shares. *See* Verified Class Action Complaint ¶¶ 1, 30–31, 38, McGinty v. Zuckerberg, No. 12282 (Del. Ch. Apr. 29, 2016), 2016 WL 1719348; *see also* Verified Class Action Complaint ¶¶ 1, 30, 39, 53, Levy *ex rel.* Coverdell Educ. Sav. Plan FBO Dash Redding Levy v. Zuckerberg, No. 12287 (Del. Ch. May 2, 2016), 2016 WL 2606008; Deepa Seetharaman & Sarah E. Needleman, *Facebook Abandons Plans to Change Share Structure, Avoiding Lawsuit*, Wall St. J. (Sept. 22, 2017, 7:43 PM), https://www.wsj.com/articles/facebook-abandons-plans-to-change-share-structure-avoiding-lawsuit-1506114877 [https://perma.cc/5XPL-XX46]. However, it eventually abandoned the plan in the face of subsequent litigation. *See id.*

[48] *See* Shanny Basar, *Calpers Sets Sights on Dual-Class Stock Structures*, Wall St. J. (Aug. 20, 2012, 12:16 PM), https://www.wsj.com/articles/SB10000872396390443855804577601271252759472 [https://perma.cc/2RGW-DMC7].

[49] For example, one of the most influential proxy advisory firms, Institutional Shareholder Services (ISS), criticized multiclass governance as "an autocratic model of governance." *See* Institutional S'holder Serv., *The Tragedy of the Dual Class Commons* 3 (2012), https://www.wsj.com/public/resources/documents/facebook0214.pdf [https://perma.cc/G54L-ZZG3].

[50] *See* Snap Inc., Amendment No. 2 to Registration Statement (Form S-1), at 4, 9, 130 (Feb. 16, 2017), https://www.sec.gov/Archives/edgar/data/1564408/000119312517045870/d270216ds1a.htm [https://perma.cc/R9MK-GWTV] [hereinafter Snap Registration Statement]; *id.* at 5; Lund, *supra* note 2, at 690. Despite predictions that Snap would be penalized by the market for its controversial and shareholder-hostile structure, even vocal opponents did not seem deterred from investing in the nonvoting shares and Snap closed its first day of trading up

some of the largest institutional investors, including Vanguard, BlackRock, State Street, and T. Rowe Price, took a stance against multiclass companies in its Framework for U.S. Stewardship and Governance.[51] That same year, the chairman of the SEC's Investor Advisory Committee called the creation of a corporate structure in which *only* nonvoting shares were available to the public, such as Snap, "a significant concern" and "troubling development from the perspective of investor protection and corporate governance."[52]

In the months and years that followed, index providers began playing a more active role in restricting multiclass companies. Index providers are firms that develop and maintain market indices, such as S&P Dow Jones Indices, MSCI, and FTSE Russell. Being listed on an index, like being listed on a stock exchange, increases demand for a company's equity. Following Snap's offering, FTSE Russell announced that it would exclude companies from its indices unless the public shareholders held more than 5% of the company's voting rights.[53] As a result, Snap faced the financial consequences of being excluded from FTSE's popular indices.[54] S&P Dow Jones Indices and MSCI followed shortly thereafter with similar policies. In 2017, S&P Dow Jones

---

44% from its IPO price. *See, e.g.*, Ross Kerber & Liana B. Baker, *Lacking Voting Rights, Snap IPO to Test Fund Governance Talk*, REUTERS (Feb. 3, 2017, 12:54 PM), https://www.reuters.com/article/snap-ipo-votingrights/lacking-voting-rights-snap-ipo-to-test-fund-governance-talk-idUKL1N1FO17I/ [https://perma.cc/EQ3G-RMW5] (emphasizing opposition by fund managers and academics to Snap's structure); *Institutional Ownership in Snap*, SEEKING ALPHA (Sept. 5, 2017, 1:39 PM), https://seekingalpha.com/symbol/SNAP [https://perma.cc/JNB5-J6UY] (noting that 24% of ownership in Snap is by institutional investors); Lund, *supra* note 2, at 707 ("[I]nvestors, including some of the large institutional investors that vocally opposed the dual-class structure, did not seem to be deterred from purchasing nonvoting shares.").

[51] *See Corporate Governance Principles For US Listed Companies* INVESTOR STEWARDSHIP GROUP; Inv'r Stewardship Grp., HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 7, 2017), https://corpgov.law.harvard.edu/2017/02/07/corporate-governance-and-stewardship-principles/ [https://perma.cc/X88G-7CZN] (providing the fundamental principle that "[s]hareholders should be entitled to voting rights in proportion to their economic interest").

[52] Therese Poletti, *Potential Snap IPO Effect: More Unicorns to Wall Street, but with Horrible Terms*, MARKETWATCH (Mar. 2, 2017, 7:47 PM), https://www.marketwatch.com/story/potential-snap-ipo-effect-more-unicorns-to-wall-street-but-with-horrible-terms-2017-03-02 [https://perma.cc/LRK4-KL6N]; *see Securities and Exchange Commission Investor Advisory Committee: Minutes of the Meeting on March 9, 2017*, U.S. SEC. & EXCH. COMM'N (updated June 23, 2017), https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac030917-minutes.htm [https://perma.cc/FY6U-JGNV]; David J. Berger, *Dual-Class Stock and Private Ordering: A System That Works*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 24, 2017), https://corpgov.law.harvard.edu/2017/05/24/dual-class-stock-and-private-ordering-a-system-that-works/ [https://perma.cc/2ZLN-CT2N].

[53] *See* FTSE Russell, FTSE Russell Minimum Voting Rights Hurdle (2023), https://www.lseg.com/content/dam/ftse-russell/en_us/documents/policy-documents/minimum-voting-rights-hurdle-faq.pdf [https://perma.cc/VD8M-G52A]; *see also* Richard Teitelbaum, *Index Firms Take Issue with Nonvoting Rights*, WALL ST. J. (Apr. 9, 2017, 8:00 AM), https://www.wsj.com/articles/index-firms-take-issue-with-nonvoting-rights-1491739227 [https://perma.cc/6JCZ-CRMW]. A five-year "grandfathering" period provided to existing constituents expired in September 2022. FTSE Russell, *supra*.

[54] *See No-Vote Common Stock*, S&C DEALPORTAL (Aug. 4, 2017), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/General/Corporate_Governance_Hot_Topics_Quarterly_Update_August2017.pdf [https://perma.cc/LKT2-U6LY].

announced it would begin excluding new multiclass companies.[55] In 2018, MSCI announced that it would adjust the weights of multiclass stock to reflect their voting power.[56] As of today, the grace periods afforded to existing index participants to achieve compliance with such policies have expired.[57]

Today, some of the most significant pressures on multiclass companies come from proxy advisory firms and institutional investors. In early 2024, leading proxy advisory firms ISS and Glass Lewis announced in their annual voting guidelines that they would target multiclass structures aggressively and generally recommend voting against all nominees for directors of multiclass companies, subject to just a handful of exceptions.[58] This policy means these advisors would recommend against directors at many of the largest and most well-known U.S. public companies, including the likes of Alphabet Inc. (Google), Meta Platforms, Inc. (Facebook), Ford Motor Company, Berkshire Hathaway, and the New York Times Company. Likewise, institutional investors, including T. Rowe Price, have stated plans to vote against lead directors, and nominating and governance committee members, of multiclass companies.[59]

However, these pressures do not seem to have been a meaningful deterrent. More than 25% of all companies that went public in the past five years did so with multiclass structures.[60] While many of these are technology companies,

---

[55] *See* Press Release, S&P Dow Jones Indices, S&P Dow Jones Indices Announces Decision on Multi-Class Shares and Voting Rules (July 31, 2017), https://press.spglobal.com/2017-07-31-S-P-Dow-Jones-Indices-Announces-Decision-on-Multi-Class-Shares-and-Voting-Rules [https://perma.cc/2J76-RL4L]; *see also No-Vote Common Stock*, *supra* note 54.

[56] *See* MSCI, Consultation on the Treatment of Unequal Voting Structures in the MSCI Equity Indexes (2018), https://www.msci.com/documents/1296102/8328554/Consultation_Voting+Rights.pdf/15d99336-9346-4e42-9cd3-a4a03ecff339 [https://perma.cc/RW4F-6BK3]. MSCI's policy provided a three-year grace period for current index participants. *See id.*

[57] For a discussion of indices excluding, underweighting, or limiting multiclass companies, see Scott Hirst & Kobi Kastiel, *Corporate Governance by Index Exclusion*, 99 B.U. L. Rev. 1229, 1232 (2019).

[58] *See* ISS, *United States Proxy Voting Guidelines, Benchmark Policy Recommendations*, ISS 14 (Jan. 2024), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/YL4U-H35N] ("Generally vote withhold or against directors individually, committee members, or the entire board … if the company employs a common stock structure with unequal voting rights."); 2024 Policy Guidelines, Glass Lewis 79, https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf [https://perma.cc/3Z7T-HBWJ] ("We will generally recommend voting against the chair of the governance committee at companies with a multi-class share structure and unequal voting rights when the company does not provide for a reasonable sunset of the multi-class share structure (generally seven years or less).").

[59] Ross Kerber & Jessica Toonkel, *Exclusive: T. Rowe Price to Oppose Key Directors at Super-voting Share Companies*, Reuters (Mar. 4, 2016, 10:16 PM), https://finance.yahoo.com/news/exclusive-t-rowe-price-oppose-key-directors-super-174917491--sector.html [https://perma.cc/7CSK-6JX2]; Ross Kerber, *U.S. Investor Group Urges Halt to Dual-Class Structures in IPOs*, Reuters (Mar. 23, 2016, 1:23 PM), https://www.reuters.com/article/business/us-investor-group-urges-halt-to-dual-class-structures-in-ipos-idUSKCN0WP1Q0/ [https://perma.cc/L25D-VXAW].

[60] *See* Ritter, *Initial Public Offerings*, *supra* note 3, at tbl. 23 (listing the number of IPOs each year that have dual class shares); *see generally infra* Part II; *see also* Newly Public Operating Companies Snapshot: Jan-Jun 2023, Council of Institutional Inv'rs, https://www.cii.org/

among the ranks are also the likes of Duolingo, Sweetgreen, Warby Parker, and many others. Moreover, even among companies that are formally single class, there is an increasing use of alternative contractual arrangements to grant control rights to shareholders that result in structures that are single class in form, but multiclass in substance.

B. Alternative Contractual Arrangements

Through contractual arrangements, certain shareholders can obtain and maintain control in excess of their economic interests, even if the corporation has only one class of common stock. Over the past twenty years, nearly one third of companies going public have used contracts to grant control rights to insiders.[61] These contracts are between the company and one or more of its insiders. They can take a variety of forms, such as: shareholder agreements, nomination agreements, director-designation agreements, voting agreements, investment agreements, investor-rights agreements, and master separation agreements.[62] Because of these contracts, shareholders that have the same economic stake can have differing control rights.[63] For example, insiders may have the right to appoint a majority of members to the board of directors.[64] Because the board manages the business and affairs of a company, the ability to control the board is effectively the ability to control the company despite owning a minority equity stake. Alternatively, insiders may receive the right to approve or reject various corporate decisions, such as selling the company or issuing new stock.[65] These arrangements blur the line between traditional multiclass companies and their single-class counterparts.

Files/publications/dual-class/2023-1H-Dual-Class-Report.pdf [https://perma.cc/TD3C-QM6S]; *Dual Class Stock*, Council of Inst. Inv'rs, https://www.cii.org/dualclass_stock [https://perma.cc/9NMJ-W5VH].

[61] Shobe & Shobe, *The Dual-Class Spectrum, supra* note 7, at 1345 (examining companies that went public from 2000–2020).

[62] This Article uses "shareholder agreement" or "stockholder agreement" to refer generally to these other types of contractual arrangements.

[63] Shareholder agreements have generated increasing attention in recent years. For a discussion of these agreements, *see, e.g.*, Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 Wash U. L. Rev. 913, 951 (2021) ("[A] shareholder agreement may cause shareholders with the same economic interest to have different rights."); Gabriel V. Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 Yale J. Reg. 1124, 1149 (2021) (finding that 15% of corporations that went public in recent years did so subject to a shareholder agreement); Shobe & Shobe, *The Dual-Class Spectrum, supra* note 7; Jesse M. Fried & Ehud Kamar, *Alibaba: A Case Study of Synthetic Control*, 11 Harv. Bus. L. Rev. 279, 279 (2021) ("[C]orporate control can be created synthetically with little or no equity ownership via a web of employment and contractual arrangements.").

[64] *See* Shobe & Shobe, *The Dual-Class Spectrum, supra* note 7, at 1346–48 (discussing board nomination rights).

[65] *Id.* at 1347–48; *see, e.g.*, Palomar Holdings, Inc. Prospectus (Form 424(b)(4)), at 136 (Apr. 17, 2019) (describing a shareholder agreement granting an insider a veto right over a range of corporate actions, such as dividends, asset sales or acquisitions, and debt).

Shareholder agreements are an attractive governance device for a number of reasons. As a threshold matter, they have value as a mechanism for granting control rights. Shareholders have the power to vote on a variety of matters—from fundamental transactions to amending governance documents to election of directors—and can commit to vote their stock in a certain matter in these contracts or remove certain decisions from the standard voting process entirely.[66] They are also more flexible than the traditional route of amending the charters and bylaws, as shareholder agreements can be implemented and amended without the same formalities required.[67]

But shareholder agreements are also controversial. They can undermine the board's power to manage the affairs of the corporation by delegating certain aspects of governance to one or more shareholders. They lack the transparency of charter provisions and do not follow the same formal process by which charter provisions are adopted or amended, which requires both board and shareholder approval. Moreover, they can operate as a workaround to create a multiclass company without being subject to the same limitations. For example, while companies can go public with a multiclass structure, they cannot recapitalize from a single-class company to a multiclass company after going public. One of the primary bases for this restriction is to protect the low-vote shareholders. Shareholder agreements are not subject to such restrictions. Thus, they result in less predictability, certainty, and accountability than other avenues of contractually granting control rights.

The shareholder agreement controversy came to a head on February 23, 2024, in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, where the Delaware Court of Chancery invalidated a shareholder agreement between the company and its founder.[68] When Moelis & Company went public through an IPO, its board effectively delegated all of the rights and powers traditionally vested in the board to the founder, Ken Moelis.[69] As a result, the board became a mere "advisory body,"[70] which the court emphasized was inconsistent with DGCL § 141(a).[71] The *Moelis* decision was controversial, in part because the stockholder agreement at issue had been entered into, and fully disclosed, before the company went public. Furthermore, shareholder

[66] *See* Fisch, *supra* note 63, at 931; Rauterberg, *supra* note 63, at 1124.

[67] *See* Fisch, *supra* note 63, at 932 ("Shareholder agreements require no formal action by the corporation or the board and can be implemented and amended by shareholders acting in their individual capacity."); Rauterberg, *supra* note 63, at 1147.

[68] *See* W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).

[69] *Id.* at 818. In general, the business and affairs are managed by the board of directors and not by individual shareholders.

[70] *Id.* at 869.

[71] *See id.* at 816–18; *see* DEL. CODE ANN. tit. 8, § 141 (a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").

agreements are commonplace, though usually not as broad as *Moelis*.[72] As such, the court's decision called into question virtually all stockholder agreements that provide governance rights, with critics emphasizing that "[t]he decision will upend market practice."[73]

Shortly after *Moelis*, the Corporate Law Council of the Delaware State Bar Association drafted proposed amendments to the Delaware General Corporation Law (DGCL), creating § 122(18) and a bright-line rule. Critics have described this move as "gutting" the "iconic principle of board-centricity."[74] These amendments, which became effective on August 1, 2024, provide in part that:

> Every corporation created under this chapter shall have power, whether or not so provided in the certificate of incorporation, to. . . [n]otwithstanding § 141(a) of this title, make contracts with 1 or more current or prospective stockholders (or 1 or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, 1 or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation.[75]

The true impact of DGCL § 122(18) remains to be seen, although it is likely that shareholder agreements and other contractual arrangements have become an even more attractive avenue for stealth multiclass governance. Regardless, given the similarities in function between traditional multiclass

---

[72] *See* Shobe & Shobe, *Contractual Control in Dual-Class Corporations, supra* note 7, at 355–56 (discussing how founders or insiders can maintain control over board composition even after losing voting control).

[73] Fried Frank, *Important Chancery Decision Upends Practice of Providing Certain Governance Rights in Stockholder Agreements—Moelis* (Mar. 4, 2024), https://www.friedfrank.com/news-and-insights/important-chancery-decision-upends-practice-of-providing-certain-governance-rights-in-stockholder-agreements-moelis-11629 [https://perma.cc/945N-GQNX].

[74] Marcel Kahan & Edward Rock, *Proposed DGCL § 122(18), Long-term Investors, and the Hollowing Out of DGCL § 141*, HARV. L. SCH. F. ON CORP. GOV. (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl-%C2%A7-12218-long-term-investors-and-the-hollowing-out-of-dgcl-%C2%A7-141a/ [https://perma.cc/LV4W-V2DD]; Jill E. Fisch & Anat Alon-Beck, *Does the Moelis Decision Warrant a Quick Legislative Fix?* CLS BLUE SKY BLOG (Jun. 10, 2024), https://clsbluesky.law.columbia.edu/2024/06/10/does-the-moelis-decision-warrant-a-quick-legislative-fix/ [https://perma.cc/WJD6-BDK2] (critiquing the proposal as going "well beyond the Moelis decision and purport[ing] to authorize virtually any provision in a stockholder agreement unless such a provision is explicitly prohibited elsewhere in the statute").

[75] DEL. CODE ANN. tit. 8 § 122(18) (2024).

companies and functionally multiclass companies, the analysis in this Article applies broadly to the range of multiclass companies, including those that are multiclass in substance but not form. Moreover, just as these shareholder agreements can grant control rights, so too can their provisions impose limitations on control.[76]

C. The Governance Debate

With each wave of multiclass companies comes renewed debate about their value. Whether multiclass increases or decreases shareholder value remains contested, with empirical evidence going both ways.[77] It would be disingenuous to say there are no benefits to multiclass governance. Just so, it would be short-sighted to say there are not serious concerns created by these structures. The benefits and drawbacks will each be considered in turn.

1. The Benefits of Multiclass Governance

Ordinarily, when a founder takes their company public, they are selling shares of the company to raise capital. As a result of selling shares, founders and other insiders lose control. With a multiclass structure, they can sell a majority of the company and raise significant capital while retaining control. For founders and other insiders, this control is valuable. It protects them from short-term market pressures, which in turn allows the founder to pursue a long-term business strategy without fear of a hostile takeover. This insulation from market pressures means founders can pursue unique, innovative, or idiosyncratic visions.[78]

---

[76] For a discussion of the ways in which contractual arrangements can limit control, see *infra* Part II (advancing a taxonomy classifying types of control limits).

[77] *See generally* Renée Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 REV. FIN. 51 (2008). *Compare* Paul A. Gompers et al., *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051 (2010) (finding increased agency costs and reduced value), *with* Scott W. Bauguess et al., *Large Shareholder Diversification, Corporate Risk Taking, and the Benefits of Changing to Differential Voting Rights*, 36 J. BANKING & FIN. 1244, 1244–46 (2012) (finding closer alignment of shareholder interests and superior performance), Valentin Dimitrov & Prem C. Jain, *Recapitalization of One Class of Common Stock into Dual-Class: Growth and Long-Run Stock Returns*, 12 J. CORP. FIN. 342 (2006) (finding increased shareholder value), and Ronald Anderson et al., *The Dual Class Premium: A Family Affair* 6 (Fox Sch. Of Bus., Research Paper No. 17-021, 2017) (finding that dual-class family firms outperform single-class family firms). Some studies find no meaningful change in the long-term value for dual-class companies relative to their single-class peers. *See* Gabriel Morey, Council of Institutional Inv'rs, *Multi-Class Stock and Firm Value: Does Multi-Class Stock Enhance Firm Performance? A Regression Analysis* (May 2017), https://www.cii.org/files/publications/misc/05_10_17_dual-class_value_study.pdf.

[78] *See, e.g.*, Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 137–38 (1987); Goshen & Hamdani, *supra* note 9.

So why, then, do public investors purchase stock with little or no voting power? In part, it is because, theoretically, the controller can enhance overall firm value too. The controller is able to run the company without fear of a takeover or being ousted, which allows them to pursue a longer-term perspective that results in increased firm value.[79] Relatedly, corporate governance may be more efficient when voting rights are limited to the founder, insiders, and other high-vote holders, who are adequately informed and therefore able to exercise their rights appropriately.[80] Those who subscribe to this view often question the utility of shareholder democracy on efficient outcomes given heterogeneous shareholder interests.[81] Moreover, because multiclass stock can trade at a discount, public investors may be more financially able and willing to invest in the first place. In other instances, investors may purchase the shares of a multiclass company simply because it is their only avenue to own stock in a company that is valuable (financially or socially) to that individual, and the value exceeds the risks.

Control also brings industry- and founder-specific benefits. For technology companies like Facebook and Google where shareholders invest in part *because of* the identity of the founder, it helps protect public shareholder expectations by ensuring the one making decisions is the founder and not the other, uninformed shareholders. For media companies like The New York Times, preserving control while being insulated from market pressures helps preserve journalistic integrity and editorial independence.[82] For family-run companies like Berkshire Hathaway and Ford, multiclass structures allow the families to keep control in the family while accessing public markets.[83]

Moreover, multiclass governance may bring broader social benefits. Some firms pursue objectives that benefit stakeholders and other non-shareholder constituencies.[84] These stakeholders might include employees, communities, charities, and consumers. For firms embracing stakeholder governance, the corporate purpose is not limited to maximizing profits. Yet, it can be difficult

---

[79] *See* Bernard S. Sharfman, *A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs*, 63 Vill. L. Rev. 1, 21 (2018) (arguing that investors would only invest in a multiclass structure where there is "wealth-maximizing efficiency that results").

[80] *See* Lund, *supra* note 2; Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. Corp L. 493, 506–20 (2018); Kobi Kastiel & Yaron Nili, *In Search of the 'Absent' Shareholders: A New Solution to Retail Investors' Apathy*, 41 Del. J. Corp. L. 55, 99 (2016) (arguing that "uninformed retail investors could also support proposals that are not beneficial to the corporation").

[81] *See* Min Yan, *A Control-Accountability Analysis of Dual Class Share (DCS) Structure*s, 45 Del. J. Corp. L. 1, 8–9 (2020).

[82] *See* Council of Institutional Inv'rs, *Dual Class Companies List* (2022) [hereinafter *CII Dual Class Companies List 2022*], https://www.cii.org/Files/issues_and_advocacy/Dual%20Class%20post%206-25-19/2022_1_19%20Dual%20Class%20Companies%20Webpage.pdf [https://perma.cc/U3SJ-44WV].

[83] *See id.*

[84] *See, e.g.*, Caley Petrucci & Guhan Subramanian, *Stakeholder Amnesia in M&A Deals*, 50 J. Corp. L. 87 (2024) (discussing shareholder primacy and stakeholder governance).

for a company to maintain its stakeholder objectives when faced with a hostile takeover or threats to remove its leadership.[85] A multiclass governance structure can prevent the company from being taken over, the board from being overthrown, and the mission from being replaced by the will of the highest bidder. Moreover, a multiclass structure can make stakeholder governance more effective in its day-to-day operation by increasing the reliability of socially conscious firms in their dealings with investors, employees, and other contracting partners.[86]

Finally, allowing founders to retain control may encourage otherwise ambivalent founders to go public in the first place.[87] Private companies are subject to far fewer regulations and far less oversight than public companies. They are also not subject to the same risk of activist pressure or hostile takeovers. In addition, there are costs associated with becoming a public company related to complying with regulatory obligations and other disclosure obligations.[88] In recent years, the number of public companies has been declining as firms no longer need to go public to raise capital.[89] Allowing founders who take their company public to preserve control could help mitigate the declining number of public companies and subject more companies to greater regulation and oversight.[90]

2. The Drawbacks of Multiclass Governance

There are also serious economic and governance concerns created by multiclass governance. As a result, it has faced sharp opposition from shareholder advocacy groups, institutional investors, and proxy advisory firms. As a threshold matter, this structure typically results in an individual or group having control of the company. Corporate law is acutely concerned with such controlling shareholders. Under the prevailing expropriation theory, a controlling shareholder seeks to exploit its controlling position and divert value

---

[85] *See id.* (using the Musk/Twitter deal as an illustrative example of the threat that takeovers can pose to stakeholder missions).

[86] *See* Emily Aguirre, *The Social Benefits of Control*, 74 Duke L.J. 692, 693 (2024) ("Without multiclass structures, pro-social firms risk becoming systemically unreliable contracting partners for the growing number of socially conscious investors and employees who seek to bargain for their pro-social investment and employment preferences.").

[87] *See* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 Hastings L.J. 445, 447 (2017) (highlighting "the rising regulatory costs of becoming and remaining a public company"); Petrucci, *supra* note 19, at 636.

[88] *Id.*

[89] *See* de Fontenay, *supra* note 85, at 447 ("Firms no longer need to go public to raise large amounts of capital.").

[90] *See* M. Todd Henderson & Richard A. Epstein, *The Going-Private Phenomenon: Causes and Implications*, 76 U. Chi. L. Rev. 1, 5 (2009) ("[T]he private model is worrisome (albeit efficient) because of its lack of transparency, either for investors or the public at large."); Clayton, *supra* note 10.

from the company to itself, thus capturing the private benefits of control.[91] In addition, when there is a controller with the power to make decisions that impact the value of other shareholders' investments, there are increased agency costs.[92] The concerns that arise when a company has a controlling shareholder are naturally at play here.

But the problem is magnified in a multiclass company. That is because this structure separates an investor's economic interest in the company from their voting power. As a result of this disconnect, a small, wealthy elite group of shareholders has control over the company despite owning only a minority stake. Decisions that a controller makes will disproportionately impose risk on the public shareholders, who will be left with the economic consequences of poor decision-making while the controller enjoys relatively little economic risk. The controller's outsized influence on the governance of the company is coupled with reduced accountability to the majority of the company's shareholders.[93] A controller has a strong incentive to maximize the benefits for *their* class (rather than the company as a whole).[94] Moreover, the company is impossible to take over because the controller can simply refuse to support any potential takeover and cannot be ousted. Managerial entrenchment and the private benefits of control create incentives for the controllers to preserve the structure even when doing so becomes inefficient.[95]

---

[91] For example, a controller may engage in self-dealing transactions, employ family members, or compel the corporation to donate to particular charities. *See*, *e.g.*, Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008). An alternative, and more charitable, theory, proposes that allowing the controller to extract private benefits is necessary to incentivize efficient monitoring and better performance. *See* Goshen & Hamdani, *supra* note 9, at notes 30–49 (discussing the monitoring theory and private benefit of control theory); Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537, 540–41 (2004).

[92] *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior*, *Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (analyzing agency costs).

[93] One of the most common assumptions about a multiclass structure is that it results in increased managerial entrenchment. *See*, *e.g.*, Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016); Fischel, *supra* note 9, at 119–52; Bebchuk & Kastiel, *supra* note 14. However, Professors Aran, Broughman, and Pollman have recently argued that managerial entrenchment in multiclass companies is not meaningfully different from single-class companies when accounting for differences in M&A activity. *See* Yifat Aran, Brian Broughman & Elizabeth Pollman, *Executive Turnover at Dual-Class Firms* (working draft dated Dec. 30, 2024) (Research Paper No. 24-38) (finding only a modest difference in CEO tenure—6.6 years vs. 4.8 years—which disappears when excluding turnovers caused by M&A activity); *see also* Yifat Aran & Elizabeth Pollman, *Ousted*, 25 THEORETICAL INQUIRIES IN LAW, 243–57 (2024) (arguing that poor financial performance and other forces can lead to founder-CEOs resigning despite holding a significant voting stake); *see generally* Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353, 1376 (2023) (noting that "superstar CEOs' power is limited in both duration and scope: it is likely to vanish when markets lose faith in their star qualities").

[94] *See* Lund, *supra* note 2, at 707.

[95] In one particularly famous example, 90% of Viacom was owned by its public investors, but Sumner Redstone was able to control the majority of the voting power because of its multiclass structure. Zoe Condon, *A Snapshot of Dual-Class Share Structures in the Twenty-First Century:*

In addition, there are a number of non-economic criticisms of multiclass companies. Perhaps most saliently, they are undemocratic structures. It is not one shareholder one vote, nor is it one share one vote. Instead, those who hold the high-vote shares have more votes. Naturally, this structure consolidates control among a wealthy elite, at times perpetually, and as a result has been characterized by former SEC Commissioner Robert Jackson as "antithetical to our values as Americans."[96]

This Article does not seek to determine the value of multiclass governance. Empirical studies on its value thus far have been inconclusive.[97] Rather, the Article recognizes the pervasiveness of this structure and argues that it can be made more efficient through contractual limits to control. Indeed, any efforts to regulate or promote these structures are necessarily incomplete without consideration of this network of contractual limits. As a result, this Article will next turn to a close examination of the contractual limits of control.

II. Contractual Limits of Control

The ability to privately order governance arrangements through the corporate "contracts" is a cornerstone of U.S. corporate governance. In this sense, control is both granted and constrained by a company's contractual arrangements. The primary contract is the corporate charter. For multiclass companies, the charter establishes each class of common stock, its rights, and any limitations on those rights. Naming conventions and rights of these classes

---

A Solution to Reconcile Shareholder Protections with Founder Autonomy, 68 Emory L.J. 335, 353–54 (2018). This voting structure enabled Mr. Redstone to hold onto control even after he reportedly became incapacitated and unable to speak coherently or move. *Id.*

[96] *See* Robert J. Jackson Jr., Commissioner, U.S. Sec. Exch. Comm'n, Perpetual Dual-Class Stock: The Case Against Corporate Royalty (Feb. 15, 2018). The SEC's Investor Advisory Committee went on to recommend that the Division of Corporation Finance require more detailed risk disclosures about such capital structures. *See* SEC, Recommendation of the Investor Advisory Committee: Dual Class and Other Entrenching Governance Structures in Public Companies 6.

[97] While determining the value of multiclass structures is beyond the scope of this article, for a summary of the empirical literature on dual-class companies, see Anita Anand, *Governance Complexities in Firms with Dual Class Shares*, 3 Annals of Corp. Governance 184, 203–07 (2018). For empirical evidence that dual-class structures decrease value, *see, e.g.*, Henry DeAngelo & Linda DeAngelo, *Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock*, 14 J. Fin. Econ. 33 (1985); Ronald C. Lease, John J. McConnell & Wayne H. Mikkelson, *The Market of Control in Publicly-Traded Corporations*, 11 J. Fin. Econ. 439 (1983); Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. Fin. Econ. 325 (2003). Of course, there is also ample empirical research suggesting that dual-class structures increase value. *See, e.g.*, Martijn Cremers, Beni Lauterbach & Anete Pajuste, *The Life-Cycle of Dual Class Firms* 1, 27 (European Corp. Governance Inst., Finance Working Paper No. 550, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062895 (finding that multiclass companies outperform single-class ones for seven to eight years after the IPO); Hyunseob Kim & Roni Michaely, *Sticking Around Too Long? Dynamics of the Benefits of Dual Class Structures* 19 (European Corp. Governance Inst., Finance Working Paper No. 590, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3145209.

will differ by firm. There are norms, but firms have wide latitude to depart from them. Ordinarily, firms will designate the high-vote stock as "Class B" common stock, which generally has ten votes per share. The low-vote stock typically has one vote per share and is designated as "Class A" common stock. If there is a class of common stock with no voting rights, it is typically designated as "Class C" common stock.[98] As a result of the difference in voting power, the high-vote class can generally control the company.

This Part of the Article examines the various contractual limits on control and their bounds. In doing so, it incorporates novel empirical evidence using an original, hand-coded data set of 325 publicly traded multiclass companies and their charters (the "Sample").[99] Entities were eliminated if they had less than $200 million in market capitalization, did not have at least two outstanding classes of common stock with unequal voting rights, or were no longer publicly traded because they went private, bankrupt, or otherwise. This dataset, and the contractual limits and taxonomy derived in part from it, represents the largest and most comprehensive consideration of such terms that currently exists.[100] This Part uses the findings from this data to provide insight into the current status of multiclass governance and inform the discussion that follows.

The analysis in this Part will complicate the prevailing understanding of control and multiclass governance by developing a more nuanced picture of the contractual limits of control. It distinguishes between three very different kinds of control limits: process, structure, and outcome. The result is to replace a narrow understanding of the prospective limits on controllers with three more comprehensive categories. First, this part will examine the process-based limits focused on shareholder voting rights, requirements, and approval

---

[98] While the conventions outlined in this paragraph are the most common in the U.S., there are alternative naming conventions and ways in which voting rights can be assigned. For example, some firms use "loyalty shares," where shareholders are entitled to more votes per share if they have held their shares for a certain amount of time.

[99] This dataset was created using information from the CII Dual Class Companies List and FactSet. For an overview of the methodology used by CII, *see Dual Class Companies List,* COUNCIL OF INSTITUTIONAL INVS., https://www.cii.org/dualclass_stock [https://perma.cc/9NMJ-W5VH] (updated Jan. 2024) [hereinafter *CII Dual Class Companies List* 2024]. Each entity was classified in accordance with its FactSet Revere Business and Industry Classification Systems (RBICS) industry. This system separates each entity in the Sample into one of twelve sectors: Business Services, Consumer Services, Consumer Cyclicals, Energy, Finance, Healthcare, Industrials, Non-Energy Materials, Consumer Non-Cyclicals, Technology, Telecommunications, and Utilities. While the RBICS classification system contains fourteen top-level sectors, none of the entities in the Sample fell within two of these categories ("Other" and "Non-Corporate"). For a guide to this classification system, its benefits, and categories, *see* FACTSET, REVERE BUSINESS AND INDUSTRY CLASSIFICATION SYSTEM (RBICS) DATA AND METHODOLOGY GUIDE (2019). For sixteen of the entities in the Sample, their industry was hand-coded after reviewing the goods or services they provided because FactSet did not identify an RBICS category.

[100] Previous research has examined various features of multiclass governance, but not comprehensively across process-based, structure-based, and outcome-based limits. *See generally, e.g.*, Winden, *supra* note 17; Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019); Roberto Tallarita, *Dual Class Contracting*, 49 J. CORP. L. 972 (2024); Petrucci, *supra* note 19; Aggarwal et al., *supra* note 43.

thresholds. Next, it will examine structure-based limits focused on when and how a multiclass structure is altered to reduce, or remove, a controller. Lastly, it will turn to outcome-based limits, focusing on the treatment of each class of shareholders in a multiclass company.

A. Process-Based Limits

Shareholder voting is a critical part of the process by which decisions get made. From director elections to fundamental corporate changes, shareholder voting shapes the operations and governance of a firm. As a result, a number of contractual limits modify the process for shareholder voting. In particular, these limits relate to the relative shareholder voting power and the requirements for shareholder approval. Each will be discussed in turn.

1. Shareholder Voting Power

One of the simplest methods to limit the founder and other insiders' ability to control the firm is to reduce the voting inequality between the classes of common stock. This can be done from the outset. The charter specifies the amount of votes each class has per share. Typically, Class A common stock has one vote per share and Class B common stock has ten votes per share. But a company can provide for any voting ratio. Some firms adopt voting rights that give the high-vote class over 100 times the voting power of the low-vote class or all the voting rights except as otherwise required by law.[101] Others take a more modest approach in which the high-vote class has only two or three times the voting power per share.[102] The more modest approach reduces the "wedge" between one's economic investment and voting power to more equally distribute risk. It could also result in a shift from absolute control (where the holder has more than 50% of the voting power) to relative control (where the holder has a substantial minority stake, like 30%, that could be countered by the other shareholders uniting against the high-vote holder).[103]

---

[101] *See, e.g.*, Him and Hers Health Inc., Certificate of Incorporation (175 votes per share).

[102] *See, e.g.*, Covenant Transport Group, Certificate of Incorporation (two votes per share); Intuitive Machines, Certificate of Incorporation (three votes per share). For additional discussion of voting inequality at the IPO and over time, see, e.g., Bebchuk & Kastiel, *supra* note 98; Tallarita, *supra* note 98.

[103] It should be noted that an individual can exert control with less than 50% voting power. *See Controller Confusion: Realigning Controlling Stockholders and Controlled Boards,* 133 HARV. L. REV. 1706, 1712–13 (2020) (detailing *Cysive* and its progeny where controlling shareholders had less than a majority of voting power).

Thus, one way in which a controller's power is limited is by reducing the voting ratio—the difference in voting power between the classes or other shareholder groups.

Shareholder voting power can also be limited through exceptions to the voting rights ordinarily granted to each class. Companies can enumerate situations where, notwithstanding ordinary voting differences between classes, shares of both classes are entitled to a more similar number of votes per share. For example, the Bentley Systems charter provides that when there is no longer a founder involved as a director or officer, the high-vote class's voting power decreases from twenty-nine votes per share to only eleven votes per share.[104] Other events include amendments to the charter,[105] founders exiting certain leadership roles in the firm,[106] voting to remove directors,[107] and failure to pay dividends.[108] Alternatively, a corporate contract can limit control by granting extra voting power only in limited circumstances. For example, a group of insiders can be given the right to nominate one or more of the directors or veto certain decisions but otherwise have equal voting power.[109]

Companies have broad discretion in determining which events warrant reducing the voting ratio, but they do so relatively rarely compared to other contractual limits.

2. Shareholder Approval Requirements

Companies can also limit the powers of a controller by targeting the shareholder approval process. There are two main limits that expand the low-vote class's power in shareholder decision-making: class-specific approval requirements and supermajority approval requirements. These are not mutually exclusive; many corporations have both.

---

[104] *See* Bentley Systems, Amended and Restated Certificate of Incorporation (Sept. 22, 2020).

[105] *See, e.g.*, A.O. Smith Corp., Restated Certificate of Incorporation (Apr. 22, 2009).

[106] *See, e.g.*, Bentley Systems Inc., Amended and Restated Certificate of Incorporation, Article XI (Sept. 22, 2020). These rights can also sunset after a certain amount of time or specified event, such as dilution of interest. *See, e.g.*, PPD, Inc., Prospectus (Form 424B4), at 168 (Feb. 6, 2020) (decreasing nomination rights from three directors to one director if stock ownership drops from at least 30% to less than 15%).

[107] *See, e.g.*, Bio-Rad Laboratories, Inc., Restated Certificate of Incorporation (Feb. 5, 2002).

[108] *See, e.g.*, W. H. Brady Co., Restated Articles of Incorporation (Mar. 2, 1984).

[109] *See, e.g.*, Palomar Holdings, Inc. Prospectus (Form 424B4), at 136 (Apr. 17, 2019) (granting an insider shareholder the veto right over a range of corporate actions, such as dividends, asset sales or acquisitions, and taking on debt); *see also* Shobe & Shobe, *The Dual-Class Spectrum, supra* note 7, at 1307 (finding that 30% of companies studied grant insiders the right to nominate only a minority of the board). However, this nomination right can often be in addition to, not in lieu of, a shareholder's general right as a shareholder to vote in director elections.

a. Class-Specific Approval Requirements

Generally, the holders of each class of common stock will vote together as a single class on all matters.[110] As a result, the high-vote class will typically end up controlling the outcome of any such vote. In only limited circumstances does the law interfere with the distribution of voting rights between parties. In Delaware, this primarily occurs through DGCL § 242(b)(2), which requires each class vote separately to approve proposals that would "alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely."[111]

Rather than limit themselves to this circumstance, some companies have voluntarily imposed a contractual requirement for *each class, as a separate class,* to approve certain corporate actions. When companies identify circumstances requiring such approval, the low-vote class effectively has a veto over these decisions. Approximately two-thirds of charters require that in enumerated circumstances the controller cannot impose its will without approval of the low-vote class. Most commonly, companies will specify circumstances like amending the charter or issuing more shares of the high-vote stock.[112] In addition, a number of firms use a class-specific (and exclusive) vote for electing some of the directors, requiring, for example, that the low-vote class has the exclusive right to elect a portion of the board.[113] Class-specific approvals are also commonplace when it comes to outcome-based limits, which often require that the classes are treated equally unless each class, voting as a separate class, approves of disparate treatment.[114]

---

[110] *See, e.g.*, Holicity Inc., Second Amended and Restated Certificate of Incorporation, at 604 (Apr. 30, 2021) ("Except as otherwise required by applicable law or [the charter], the holders of shares of Class A Common Stock and Class B Common Stock, as such, shall . . . at all times vote together as a single class on all matters.").

[111] *See* Del. Code Ann. tit. 8, § 242(b)(2) (2023); *see also, e.g.*, Garfield v. Boxed, Inc., No. 2022-0132-MTZ, 2022 WL 17959766 (Del. Ch. Dec. 27, 2022) (holding that Class A and Class B stockholders were entitled to separate class votes). The legal and other non-contractual limitations on control are discussed in Part I, *supra* (discussing pressures from proxy advisors and stock exchanges) and Part III, *infra* (discussing the role of policymakers and other corporate players).

[112] *See, e.g.*, Bird Global, Inc., Amended and Restated Certificate of Incorporation (May 18, 2023); Cal-Maine Foods, Inc., Second Amended and Restated Certificate (July 20, 2018).

[113] *See, e.g.*, American Software Inc., Amended and Restated Articles of Incorporation (Jan. 13, 1983) (1/3 of board seats); Beasley Broadcast Group, Inc., Restated Certificate of Incorporation, Article IV (May 23, 2012) (2 directors).

[114] *See, e.g.*, Zuora Inc., Restated Certificate of Incorporation (Apr. 16, 2018) (providing class-specific approval requirements for differential treatment of the classes for dividends, reclassifications, liquidations, and mergers). For more discussion on outcome-based limits, see discussion *infra* Section II.C.

b. Supermajority Voting Requirements

Another method of limiting control using the shareholder voting process is to increase the threshold required for shareholder approval. Under state corporate law defaults, the minimum threshold required for shareholder approval varies depending on the context.[115] Typically, as long as there is a quorum,[116] then a majority of the votes cast or outstanding is sufficient for shareholder approval.[117] As long as the controller has 51% of the voting power of a firm, a shareholder vote is all but a formality.

However, corporations have flexibility in some instances to depart from these defaults. Under Section 216 of the DGCL, for example, a Delaware corporation may specify the vote of stockholders required for corporate action, subject only to the other provisions of the DGCL.[118] Most firms take this approach to require a supermajority vote to approve enumerated actions. In situations where the high-vote class has more than half but less than two-thirds of the voting power, a portion of the low-vote class will need to support the proposal for it to be approved. Thus, these supermajority voting requirements can operate as a limit to the high-vote class's power to depart from the status quo.

Most commonly, supermajority support will be required for amending the charter and/or bylaws, the removal of directors, and certain transactions.[119]

[115] *See* DEL. CODE ANN. tit. 8, § 216 (2023) (outlining default voting requirements for ordinary matters, director elections, and other circumstances).

[116] By default, quorum is a majority. *Id.*

[117] While generally only a majority of shares *cast* is required, certain fundamental changes require a majority of shares *outstanding*, even if only a subset of those shares actually vote. While this distinction between a majority of shares voting and a majority of shares outstanding may seem minor, in reality it can have a meaningful impact on whether proposals pass. Consider the following illustration: If there is a firm with 100 shares outstanding, as long as 51 shares vote on an ordinary business matter to establish quorum, then a simple majority of 26 votes in favor would be sufficient to approve the matter. In contrast, when a matter requires a majority of outstanding shares for approval, it would need 51 shares voting in favor. This is a meaningful difference. For more discussion on shareholder voting, thresholds, and the distinction between shares voting and shares outstanding, *see generally* Usha Rodrigues, *The Hidden Logic of Shareholder Democracy* (last updated Mar. 24, 2024) (discussing shareholder voting and how voting rules vary), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4755251.

[118] *See* DEL. CODE ANN. tit. 8, § 216, *supra* note 113 ("Subject to this chapter in respect of the vote that shall be required for a specified action, the certificate of incorporation or bylaws of any corporation authorized to issue stock may specify the number of shares and/or the amount of other securities having voting power the holders of which shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business.").

[119] *See, e.g.*, Zillow Group Inc., Amended and Restated Articles of Incorporation, Section 9.1 (Feb. 10, 2015) (requiring an affirmative vote of two-thirds of the voting power for matters relating to amending the charter or bylaws, directors, and special meetings); Qurate Retail Inc., Restated Certificate of Incorporation, Article IX (May 23, 2018) (requiring supermajority approval for amending charter and by laws, mergers or consolidations, sales of all or substantially all assets, and dissolutions, subject to exceptions); Allbirds, Inc., Ninth Amended and Restated Certificate of Incorporation (Nov. 5, 2021) (requiring supermajority approval for certain mergers and consolidations).

Transactions like change of control transactions, as well as transactions with an interested party, are most often the kinds of transactions that would require heightened shareholder approval. Firms also take different approaches to defining supermajority shareholder approval. Typically, a supermajority is two-thirds of the votes, however some firms require higher thresholds.[120]

It should be noted that some firms weaken this limit by including various exceptions or carveouts. For example, a number of firms provide that majority approval (not a supermajority) is required if at least 75% of the board of directors approves the action or when state corporate law does not require a shareholder vote.[121] Some firms state that the supermajority voting threshold only applies after certain events occur, like the high-vote class has less than 50% of the voting power. As a result, in some companies the supermajority voting threshold has the opposite effect—it can make it harder for the low-vote class to push through shareholder approval unless a significant portion of the high-vote class also supports the action.

Nevertheless, shareholder voting limits can be powerful. If, despite the multiclass structure, the low-vote class has a separate vote on certain matters or the controller has less than a supermajority of the voting power, then theoretically the public shareholders are able to prevent the controller from imposing their will.[122] A supermajority requirement can make the status quo of the corporation more "sticky", and therefore provide all shareholders with a greater sense of stability and consistency. Similarly, a class-specific vote enables low-vote shareholders to veto or block changes to the status quo. Shareholders would also be able to better "price in" the amount they are willing to pay for the stock based on the status quo with more assurance that the status is less likely to change.

B. Structure-Based Limits

Perhaps the most widely discussed limits relate to the structure of the company. That is, a multiclass company is a company with multiple classes of common stock.[123] This structure differs from a traditional, single-class

[120] *See, e.g.*, American Well Corp., Amended and Restated Certificate of Incorporation Article XI (Sept. 21, 2020) (75% vote required for certain amendments or director removal).

[121] *See, e.g.*, Asana, Inc., Restated Certificate of Incorporation Article XII (Sept. 21, 2020).

[122] It is important to note, however, that a shareholder may be able to exert control despite not having a majority stake of voting power given a diffuse public shareholder body and tendency to support management.

[123] Either formally, through establishing for example Class A and Class B common stock, or functionally through the use of shareholder agreements or other contractual arrangements. Often times, it may be a combination of the two.

company where there is only one class of common stock. Sunset provisions set out the circumstances under which a company's multiclass structure converts to a single-class structure. Typically, this is done by converting the high-vote stock into low-vote stock. By collapsing a company into a single-class company, a sunset provision results in all the shareholders having equal voting power per share. Such provisions, generally located in a corporation's charter, have been advanced as a means of balancing the benefits of multiclass—such as protecting the founder's innovative long-term vision—with the costs, including increased agency costs and perpetual entrenchment.[124]

Sunset provisions enjoy widespread support from individuals and groups focused on the rights and protections of shareholders. The Council for Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. funds, employee benefit plans, foundations, and endowments, has encouraged the use of sunset provisions in dual-class companies.[125] Similarly, the Canadian Coalition for Good Governance (CCGG) has advocated for dual-class companies to "collapse at an appropriate time."[126] For companies with "reasonable" sunset provisions, proxy advisory firms like Glass Lewis have also provided exceptions in their otherwise anti-multiclass voting policies.[127] Likewise, former SEC Commissioner Jackson, who has criticized the use of disparate voting rights, has advocated for stock exchanges to require sunset provisions.[128]

Sunsets are commonplace in the modern era of corporate governance, with 78% of current multiclass companies having a sunset provision. There are many events that can trigger a sunset provision. Table 1 indicates the prevalence of sunset provisions by trigger type within the Sample:

---

[124] For an excellent discussion of sunset provisions, see Fisch & Solomon, *The Problem of Sunsets*, *supra* note 17, at 1062.

[125] *See, e.g.*, *Dual-Class Stock*, COUNCIL OF INSTITUTIONAL INV'RS, https://www.cii.org/dualclass_stock [https://perma.cc/8XHL-VP98] ("Since 2016 CII has supported sunset provisions if necessary to achieve alignment over a reasonable period of time."); Letter from Kenneth A. Bertsch, Exec. Dir., Council of Institutional Inv'rs, to Ravi Ahuja, Chair, Nominating and Corp. Governance Comm., Roku, Inc., et al. (Sept. 12, 2017).

[126] CANADIAN COAL. FOR GOOD GOVERNANCE, DUAL CLASS SHARE POLICY 7 (2013).

[127] *See* GLASS LEWIS, *2024 Benchmark Policy Guidelines* 79, https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf [https://perma.cc/VF5M-BCJR] ("We will generally recommend voting against the chair of the governance committee at companies with a multi-class share structure and unequal voting rights when the company does not provide for a reasonable sunset of the multi-class share structure (generally seven years or less).").

[128] *See* Jackson Jr., *supra* note 15. In his landmark speech, former Commissioner Jackson described "perpetual dual-class" stock as creating "the prospect that control over our public companies, and ultimately of Main Street's retirement savings, will be forever held by a small, elite group of corporate insiders—who will pass that power down to their heirs." *Id.*

TABLE 1: SUNSET PROVISIONS BY TYPE

Type	**Sample Provision Language**	**#**	**Prop.**
Time	On the seventh anniversary of the Effective Date, each outstanding share of Class B Common Stock shall automatically convert into one share of Class A Common Stock. . .	71	22%
Transfer or Sale	Upon any Transfer of shares of Class B Common Stock, such shares shall be converted automatically into Class A Common Stock. . .	232	71%
Death or Incapacity	Class B Common Stock shall automatically convert into Class A Common Stock upon the death of the holder. . .	114	35%
Dilution of Interest	Class B Common Stock shall automatically convert into Class A Common Stock when the outstanding shares of Class B Common Stock represent less than 10% of the aggregate shares then outstanding. . .	152	47%
Election	Class B Common Stock shall be automatically converted into Class A Common Stock upon the affirmative vote of the holders of a majority of the Class B Common Shares then outstanding . . .	94	29%
Employment Termination	Class B Common Stock shall automatically convert into Class A Common Stock upon such a time as the Founder is no longer serving as an officer of the Corporation. . .	41	13%
Other Event	Class B Common Stock shall automatically convert into Class A Common Stock upon the holder's breach of the noncompetition agreement or termination of the holder's marriage. . .	22	7%

Each of these will be discussed in greater detail in the sections that follow.

1. Time-Based Sunsets

Typically, sunset provisions automatically convert the multiclass company to a single-class company after a predetermined period of time, often seven or ten years. Time-based sunsets are increasingly common, although the proportion of multiclass companies that are publicly traded today with a time-based sunset will naturally skew lower than the proportion of firms adopting these sunsets. That is because older companies with time-based sunsets would have already converted to single-class companies and thus be excluded from the Sample.[129] Among companies that went public in the past four years, before

[129] Because most time-based sunsets last for a period of 7 or 10 years, companies that went public more than ten years ago with a sunset would have already converted to single-class

a time-based sunset would be triggered, 46% have a time-based sunset. The most common durations of time-based sunsets are 7 and 10 years, although a handful of companies in the Sample have sunsets as short as 5 years[130] and as long as 50 years.[131]

Unlike most contractual limits of control, time-based sunsets have received extensive attention from academics and practitioners alike. Former SEC Commissioner Jackson has reported preliminary empirical evidence that the valuations of multiclass companies with sunset provisions exceeds those without time-based sunsets starting as soon as two years after the IPO.[132] Likewise, Professors Bebchuk and Kastiel have presented empirical evidence that the adverse impact of multiclass governance increases over time, and have advanced sunset provisions as a possible solution.[133] Indeed, empirical evidence from a number of studies suggests that while multiclass stock may create value at and shortly after the IPO stage, that value disappears over time.[134] Professors Cremers, Lauterbach, and Pajuste similarly find that multiclass firms are valued higher at the IPO, but that the multiclass premium is eroded between seven and nine years after the IPO as founders become less innovative, involved, or effective.[135] Professors Kim and Michaely likewise find that over time operating margins, productivity, and innovation decline more than single-class companies.[136] In part because of empirical findings like these, which show that the benefits of a multiclass structure decrease over time, time-based sunsets are an attractive solution.

However, time-based sunsets have been increasingly criticized as an artificial bright line that is "overly simplistic" and ill-suited for public company governance.[137] This one-size-fits-all approach can be problematic because the value and utility of a multiclass structure will depend on factors that are not known at the time of the IPO.

---

companies and thus be excluded from the Sample, which focuses on the current state of multiclass governance. A similar consideration applies to event-based sunsets. While not directly tied to time, event-based sunsets are more likely to occur the longer a company is public because the likelihood of the event occurring increases. *See infra* Section II.B.3. (discussing event-based sunsets). For a discussion of the increasing adoption of sunsets in recent decades, s*ee, e.g.,* Winden, *supra* note 17, at 950–51 (finding that only two multiclass companies in his sample that went public prior to 2010 had a time-based sunset, as compared to over 32% of dual-class companies that went public from 2010–2017).

[130] Companies with these shorter sunsets include Bloom Energy; Braze, Inc.; Clear Secure, Inc., Rivian Automotive, Inc.; Seer; and The Trade Desk, Inc.

[131] Blend Labs, Inc.'s charter provides for an expiration of the dual class stock under certain events or "the close of business on the date that is the fifty (50) year anniversary of the Effective Date."

[132] *See* Jackson, Jr., *supra* note 15.

[133] *See* Bebchuk & Kastiel, *supra* note 14, at 590 (finding that "as time passes, the potential costs of a dual-class structure tend to increase while the potential benefits tend to erode").

[134] *See, e.g.*, Cremers, Lauterbach & Pajuste, *supra* note 95, at 5; *see also* Kim & Michaely, *supra* note 95, at 3.

[135] *See* Cremers, Lauterbach & Pajuste, *supra* note 95, at 2, 5–6.

[136] *See* Kim & Michaely, *supra* note 95, at 3.

[137] Fisch & Solomon, *The Problem of Sunsets*, *supra* note 17, at 1063.

2. Retention and Extension Votes

Some time-based sunsets attempt to remedy this rigidity through a shareholder vote to extend the multiclass structure beyond the sunset deadline (a "shareholder retention vote"). This retention vote would allow existing shareholders, on a one-share, one-vote basis, to vote to retain or extend the multiclass structure. Effectively, this vote gives shareholders the option to preserve the structure if they believe that the founder is enhancing the company's value, and the option to get rid of it if the founder is not increasing corporate value or if the agency costs (or social costs[138]) are too high. If the shareholders vote against retention, the shares will automatically convert into a single class.

The shareholder retention vote presents a number of concerns, however. Public shareholders will invariably benefit from eliminating a multiclass structure. It is well established that control is a valuable commodity in corporate law.[139] When a sunset expires and collapses the multiclass structure to a single-class structure, it will have the effect of transferring control from a founder or other insiders to the public shareholders. As a result, public shareholders are inherently conflicted in any retention vote because they will be balancing the value of obtaining more control against the value of extending the multiclass structure. In addition, the public shareholders may lack sufficient information to adequately evaluate whether to retain the multiclass structure, both at the IPO stage and at the time of the retention vote.

While theoretically a promising approach, shareholder retention votes are unlikely to succeed given the strong incentives that most shareholders have to shift voting power — and thus control — from the founders and other insiders to themselves by voting against retaining a multiclass structure. Furthermore, the duration of time before any such retention vote would take place, often seven or ten years, can be "an eternity" in the life of a new company, and may be far too long to provide an adequate insurance policy against a founder's flawed vision.[140] Ultimately, an arbitrary time limit established at

---

[138] For a discussion of the negative externalities or "social costs" that dual-class can create, see generally Gregory H. Shill, *The Social Costs (and Benefits) of Dual-Class Stock*, 75 Alabama L. Rev. 223 (2023).

[139] *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 47 (Del. 1994) ("The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of 'minority' stock." (quoting Paramount Commc'ns Inc. v. Time Inc., Nos. 10866, 10670, and 10935, 1989 WL 79880, at *23 (Del. Ch. July 14, 1989))); In re Books-A-Million, Inc. S'holders Litig., No. 11343, 2016 WL 5874974, at *13 (Del. Ch. Oct. 10, 2016) ("Financial markets in widely traded corporate stock accord a premium to a block of stock that can assure corporate control.").

[140] Fisch & Solomon, *The Problem of Sunsets*, *supra* note 17, at 1063.

the IPO stage is a "noisy proxy for assessing the desirability of retaining the dual class structure."[141]

An alternative, but related, approach involves a firm seeking to extend the multiclass structure by amending the charter. For example, in the recent case of *City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc.*,[142] the multiclass company The Trade Desk had a sunset in its charter that was rapidly approaching. If the company and its shareholders did not act soon, Trade Desk would automatically convert to a single-class company.[143] As a result, Trade Desk's board and shareholders ultimately approved an amendment that would extend the multiclass structure.[144] Given the procedural safeguards in place for this amendment process, the *Trade Desk* court found that this amendment was permissible.[145] However, amending the charter in such a manner can lead to less predictability in multiclass governance and greater pricing uncertainty at the time of the IPO.

As a result, another alternative is instead to establish in the charter the circumstances that would result in an automatic extension of the sunset. Companies can identify in their charters at the IPO stage the requirements for any extension of the multiclass structure. Professors Berger, Fisch, and Solomon, for example, argue that extensions conditioned on economic or noneconomic factors can promote value in multiclass companies.[146] Such metrics may include financial metrics like market capitalization or earnings targets, or nonfinancial metrics like operational milestones or sustainability certifications.[147] In addition, the charter should establish the mechanics of any extension, for example special committees, independent approvals, or other terms.[148] While extension mechanisms, and procedures, could relate to time-based sunsets, they can also apply to another type of sunset provision: event-based sunsets.

---

[141] *Id.*

[142] No. CV 2021-0560, 2022 WL 3009959 (Del. Ch. July 29, 2022).

[143] The Trade Desk sunset was not triggered by time, but rather by the occurrence of a certain event: when "the number of outstanding shares of Class B Common Stock represent less than ten percent (10%) of the aggregate number of shares of the then outstanding Class A Common Stock and Class B Common Stock." *Id.* at *2. This type of sunset is an event-based sunset triggered by dilution of interest. For a discussion of these sunsets, see *infra* Section II.B.3.

[144] *Trade Desk*, 2022 WL 3009959 at *6–7. In exchange for agreeing to extend the multiclass structure, the low-vote class benefitted from various governance amendments to the charter. *See id.*

[145] *Id.* For a discussion of the proper standard of review in multiclass extensions, *see generally* Goshen & Hamdani, *supra* note 9; Berger, Fisch & Solomon, *Extending Dual Class Stock, supra* note 18.

[146] *See* Berger, Fisch & Solomon, *Extending Dual Class Stock, supra* note 18, at 39 (discussing extensions and proposing that the standards for sunset extensions be established in the charter at the IPO).

[147] *See id.*

[148] Professors Berger, Fisch & Solomon argue that such procedures should not be limited to the *MFW* standard. *See id.* at 40.

3. Event-Based Sunsets

As a result of the concerns that arise from time-based sunsets, some firms have focused instead on particular events that decrease the desirability of multiclass governance. Indeed, no charters in the Sample contain only a time-based sunset; any charter with a time-based sunset also contains an event-based sunset. Some of the most common and significant events are the substantial dilution of the founder's stake, transfer or sale of the high-voting stock, and death, incapacitation, or departure of the founder.[149] While the passage of time increases the likelihood of these events occurring, it is the event and not the time that is the trigger.

Nevertheless, the proportion of multiclass companies that are publicly traded today with an event-based sunset, like those with a time-based sunset, will naturally skew lower than the proportion of firms adopting these sunsets. That is because the Sample examines the current state of multiclass companies. Triggering events are more likely to occur the longer a company is public. Thus, some older companies with event-based sunsets may have already converted to single-class companies and thus be excluded from the Sample.

Among companies in the Sample with a sunset provision, Figure 1 below details the prevalence of each type of sunset provision across the Sample and among those that went public in the past four years:

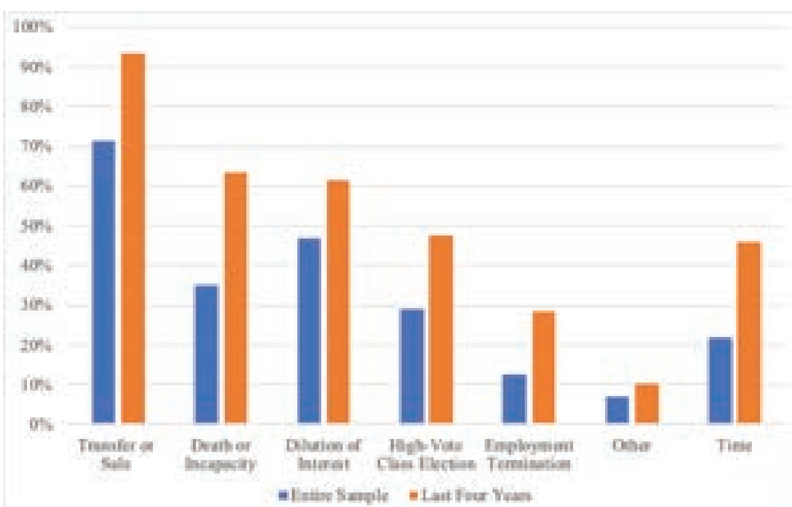

FIGURE 1: PREVALENCE OF SUNSETS IN MULTICLASS CHARTERS

[149] While typically the high-vote shares are held by the founder, they could also be held by an insider or other individual. Or, as previously discussed, the equivalent of "high vote" power can be held through other contractual mechanisms in a formally single-class company. This Article uses "founder" to refer to high-vote shareholders generally.

Among companies with a sunset provision that went public in the last four years (2020-2023), charters contain event-based sunsets for the transfer or sale of the holder's stock (94%); death or incapacitation of the founder (63%); dilution of the holder's interest (61%); election by the high-vote class (47%); and termination of employment (28%). Each of these is discussed further below:

(i) Sale or Transfer of Holder's Interest. One of the most common event-based sunsets occurs upon the transfer of the founder's voting shares. Some multiclass companies allow the high-vote shareholders to transfer these shares to others, whether by sale, gift, or inheritance. Mark Zuckerberg, for example, may transfer his high-vote Facebook stock to his heirs.[150] When a founder is able to freely transfer their high-vote stock, many of the core justifications for control—such as a founder's ability to pursue their innovative vision and the unique benefit that the founder brings—fall away. On the contrary, such transfers of high-vote stock may negatively impact firm value and the public shareholders depending on the recipient of that high-vote stock. As such, this form of event-based sunset converts high-vote shares to low-vote shares when the founder transfers their high-vote stock.

(ii) Death or Incapacitation of Holder. For many of the same reasons, a multiclass company may be subject to a sunset when a founder dies, is incapacitated, or leaves the company. Such sunsets are often subject to a waiting period, typically 12 months, after the death or incapacitation. These sunsets may be critical to prevent an incapacitated founder from harming the company—through action or inaction—particularly at a time when the company may be more vulnerable and without leadership or direction.

Perhaps the most well-known example supporting the utility of incapacity-based sunsets is Sumner Redstone. Mr. Redstone controlled both CBS and Viacom into his nineties.[151] After a number of years, he reportedly became incapacitated and unable to speak coherently or move.[152] After Mr. Redstone's incapacitation, his daughter attempted to assert her father's voting power and was met with resistance from the company's board, resulting in costly litigation, restructuring, and executive departures.[153] A sunset provision triggered by death, incapacitation, or departure of the founder could prevent this situation.

While such a sunset may seem common sense in light of the justifications provided for multiclass companies, historically they have been relatively rare. Only 5% of multiclass charters adopted in the twentieth century had these sunsets.[154] However, they have dramatically increased in frequency, with 57% of multiclass companies that went public in 2010-2017 incorporating such

[150] *See* Facebook, Inc., Prospectus (May 17, 2012).
[151] *See* Fisch & Solomon, *The Problem of Sunsets*, *supra* note 17, at 1089–90.
[152] *Id.*
[153] *Id.*
[154] *See* Winden, *supra* note 17, at 875.

provisions in their charters.[155] As shown in Figure 1, the proportion of multiclass companies with death or incapacitation sunsets has also increased in 2020-2023 to 63%. Further complicating these provisions is the definition for "incapacitation," which is often broadly defined to require the total disability of the holder.[156]

(iii) Dilution of Founder's Interest. Many charters contain a provision that automatically converts all high-vote shares to low-vote shares when the equity owned by the high-vote class (or certain holders within that class) falls below a certain threshold. Most commonly, firms use a 10% trigger for dilution sunsets, which provide that the structure will sunset when the Class B shares represent less than 10% of the total shares outstanding.[157] While 10% triggers are most frequently used, triggers commonly range between 5% and 25%.[158] Firms also take different approaches to assessing the threshold, with some using the proportion of total common stock, some the number of outstanding shares, and others the proportion of voting power.[159]

Dilution-based sunsets are relatively common, and increasingly so.[160] Why is that? One of the hallmarks of a typical multiclass company is the wedge—the divide between the founder's voting power and their economic interest. The wedge can be problematic; when a founder's economic stake is reduced but their voting control remains high, the founder is incentivized to extract private benefits from the company. In a recent article, Professors Bebchuk and Kastiel provide support for this view, finding that increased wedge size correlates with decreased firm value.[161] An increased wedge might result in a founder transferring wealth from the firm to themselves, or result in a reduction of the founder's engagement in operations.[162] Dilution-based sunsets can help address this concern.

[155] *Id.*

[156] *See* Fisch & Solomon, *The Problem of Sunsets*, *supra* note 17, at 1091.

[157] *See, e.g.*, Lennar Corporation, Restated Certificate of Incorporation ("If at any time (i) the number of outstanding shares of Class B Common Stock is less than 10% of the number of outstanding shares of Class A Common Stock and Class B Common Stock taken together . . . the Class B Common Stock will automatically be converted into, and become for all purposes, shares of Class A Common Stock, and the Corporation will no longer be authorized to issue Class B Common Stock.").

[158] *Compare, e.g.*, Liberty Tax, Amended and Restated Certificate of Incorporation (5% trigger) *with* P10, Inc., Amended and Restated Certificate of Incorporation (25% trigger). Some firms used other thresholds; however, these are less common. *See, e.g.*, Peloton Interactive Inc., Restated Certificate of Incorporation (providing that Class B stock will automatically convert into Class A stock on the date when "the outstanding shares of Class B Common Stock represent less than one percent (1%) of the aggregate number of shares of Class A Common Stock and Class B Common Stock then outstanding").

[159] *See, e.g.*, IAC/InteractiveCorp., Amended and Restated Certificate of Incorporation (triggered by "less than twenty percent (20%) of the *total voting power*") (emphasis added).

[160] Among companies that went public in 2017, for example, only 35% of multiclass companies had a dilution-based sunset. *See* Winden, *supra* note 17, at 872 (finding that 48 out of 139 dual-class companies from 2017 and earlier have a dilution sunset).

[161] *See* Bebchuk & Kastiel, *supra* note 14, at 603.

[162] Fisch & Solomon, *The Problem of Sunsets*, *supra* note 17, at 1086.

(iv) High-Vote Class Election. The high-vote class, voting as a separate class, can also voluntarily elect to convert the high-vote class into the low-vote class. This differs from an individual high-vote holder voluntarily electing to convert their own shares into low-vote stock.[163] Rather, the high-vote class, through a class vote, can convert the entire class—even those who dissented. While some charters require only majority approval from the high-vote class to do so, many require at least two-thirds support and some require as much as 90% of high-vote shareholders voting in favor.[164] The low-vote class generally does not get to vote on this matter.

(v) Employment Termination. Generally, the high-vote holders are the founder and other insiders of the company. As such, they often have a role within the company as an executive, director, consultant, or other employee. An employment event-based sunset provides that when the high-vote holder is no longer providing services to the firm, that holder's stock will automatically convert into low-vote stock.[165] Firms often construe employment broadly to include capacity as an employee, consultant, or director.[166] In addition, many charters provide for a grace period, or delay, before the sunset occurs of between 60 and 180 days.[167]

Much of the same rationale from other event-based sunsets naturally applies in this context. When a founder or other insider has been granted the high-vote shares, in part, because of the value they bring to the firm — through their innovative vision, subject matter expertise, brand-name recognition, or otherwise —their departure from the firm means this value is lost. They are also less likely to invest the same time, effort, and diligence into the company and their voting decisions as a shareholder because their employment is no longer tied to the firm. Therefore, there is less justification in them having shares with extra voting power compared to the other shareholders.

---

[163] Generally, an individual is free to convert their high-vote stock into low-vote stock and charters often expressly provide the mechanism for doing so. An individual's choice to convert their stock will typically not directly impact the other high-vote holders.

[164] *Compare, e.g.*, Samsara Inc., Amended and Restated Certificate of Incorporation (Jan. 13, 2021) (requiring approval by "the holders of a majority of the then outstanding shares of Class B Common Stock, voting as a separate class") *with* Revolve Group, Inc., Certificate of Incorporation (Jun. 6, 2019) (requiring the "affirmative vote or written election of the holders of at least sixty-six and two-thirds percent (66-2/3%) of the outstanding shares of Class B Common Stock, voting as a single class") *and* Bentley Systems, Incorporated, Amended and Restated Certificate of Incorporation (Sept. 22, 2020) (requiring "consent of the holders of at least ninety percent (90%) of the then outstanding shares" of the high-vote class).

[165] *See, e.g.*, Seer, Inc., Amended and Restated Certificate of Incorporation (Dec. 8, 2020) (providing that each share of Class B Common Stock will automatically convert into Class A Common after "90 consecutive days during which such Class B Stockholder does not directly, or, in the case of a Class B Stockholder that is not a natural person, through a member, nominee or designee, provide services to the Corporation as an employee, consultant or director").

[166] *See, e.g.*, *id.*

[167] *See, e.g.*, *id.*; *see also* Spire Global, Inc., Restated Certificate of Incorporation (Aug. 16, 2021) (providing for a date "no less than 61 days and no more than 180 days" after employment termination).

(vi) Other Event-Based Sunsets. The categories above represent the most common types of event-based sunsets. They are illustrative examples of the forms an event-based sunset may take. But they are not all-inclusive. A small but notable proportion of event-based sunsets address other types of events. These less common events include termination of marriage;[168] exclusion from stock exchanges;[169] breach of a noncompete/non-solicitation agreement;[170] material adverse change in liquidity of the low-vote class or common stock;[171] felony conviction;[172] and termination of a voting trust and agreement.[173] Theoretically, a company could include virtually any event as a trigger for a sunset provision. As such, some commentators have speculated about the possibility of a sunset provision triggered by a breach of fiduciary duty.[174]

C. *Outcome-Based Limits*

Despite the proliferation of discourse on structural limits, relatively little commentary has addressed outcome or treatment-based provisions. So-called "equal treatment" provisions require that the low-vote class of shareholders is treated (at least[175]) equally as well as the high-vote class, typically with regard to financial compensation.[176] There are a number of different types of equal treatment provisions. The broadest of these is a general equal treatment provision, which requires that each shareholder is treated equally unless expressly provided otherwise in the charter or under applicable law.

[168] *See, e.g.*, Aurora Innovation, Inc., Certificate of Incorporation (Nov. 3, 2021); Lyft, Inc., Restated Certificate of Incorporation (Apr. 2, 2019); Roblox Corp., Amended and Restated Certificate of Incorporation (Mar. 2, 2021).

[169] *See, e.g.,* Bel Fuse Inc., Restated Certificate of Incorporation (Aug. 10, 1998); Unifirst Corp., Amendments to Restated Articles of Incorporation (Jan. 21, 1993). Exclusion may be tied to one or more stock exchanges and may require board resolution before collapsing the multi-class structure.

[170] *See, e.g.*, Clear Secure, Inc., Second Amended and Restated Certificate of Incorporation (June 29, 2021); Oscar Health, Inc., Amended and Restated Certificate of Incorporation (Mar. 2, 2021).

[171] *See, e.g.*, Hovnanian Enterprises, Inc., Restated Certificate of Incorporation (Mar. 28, 2019); Invacare Corp., Second Amended and Restated Articles of Incorporation (Feb. 27, 2009).

[172] *See, e.g.*, Moelis & Co., Amended and Restated Certificate of Incorporation (Apr. 21, 2014).

[173] *See, e.g.*, Palantir Technologies, Inc., Amended and Restated Certificate of Incorporation (Sept. 22, 2020).

[174] *See id.*; *see also* Winden, *supra* note 17, at 852 n.150. These have not been embraced in practice.

[175] For a discussion of disparate treatment provisions that *favor* the low-vote shareholders, see *infra* Section II.C.3.

[176] *See* Petrucci, *supra* note 19 (empirically examining the features and patterns of these agreements and arguing that they can increase or decrease corporate value); Kirby Smith, *The Agency Costs of Equal Treatment Clauses*, 127 YALE L.J. F. 543, 551 (2017) (arguing under various theories of control that equal treatment provisions create agency costs and disincentivize the controller from selling the company).

Like sunsets, equal treatment provisions can also be tied to particular events, such as a merger or liquidation.

Referring to these provisions as equal treatment provisions is perhaps an oversimplification. Many of these provisions have different terms or levels of equality. For example, some provisions require the exacting standard of "identical" treatment of the classes, which implies that the classes receive the same type and form of any consideration. Other provisions may only require the "same amount" of consideration. Various other provisions like "equal" and "pro rata" are also commonplace. Courts take differing approaches in interpreting the degree of equality such terms warrant, with some holding that these terms require different standards of equality.[177]

Equal treatment provisions have been praised as important protection for public shareholders in multiclass companies and as powerful tools to align incentives between the classes to maximize overall corporate value.[178] However, equal treatment agreements can also harm corporate value by disincentivizing a founder from giving up control. By virtue of having control of the company through holding the high-vote stock, the founder can often extract private benefits. At times, this may be transparent and increase corporate value — for example, the ability to pursue long-term idiosyncratic visions.[179] Other times, the controller may extract value at the minority's expense through self-dealing behavior.

---

[177] *See, e.g.*, Lee v. Norfolk S. Ry. Co., 802 F.3d 626, 632 (4th Cir. 2015) (discussing the definition of "same" as "[i]dentical or equal; resembling in every relevant respect" (quoting *Black Law's Dictionary*)"); Miss. Poultry Ass'n v. Madigan, 992 F.2d 1359, 1364 (5th Cir. 1993) (stating that "any fair reading of the dictionary definition of 'the same' overwhelmingly demonstrates that 'the same' is congruent with 'identical'"); United States ex rel. Holloway v. Heartland Hospice, Inc., 960 F.3d 836, 850 n.11 (6th Cir. 2020) (providing that "'[s]ame' means identical"); United States v. Washington, 994 F.3d 994, 1005 (9th Cir. 2020) (Collins, J., dissenting) (defining "same" as "[i]dentical or equal; resembling in any relevant respect"), vacated and remanded, 142 S.Ct. 1976 (2022); Catalyst Pharms., Inc. v. Becerra, 14 F.4th 1299, 1307–08 (11th Cir. 2021) (providing that "same" means "being one without addition, change, or discontinuance: identical; being the one under discussion or already referred to"); Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1382-83 (Fed. Cir. 2001) (explaining that the ordinary meaning of "identical" is either "exactly the same or the same with minor differences" and selecting the latter") (quoting *Merriam Webster's Collegiate Dictionary*).

[178] That is because generally the controller's incentives are to maximize the controller's share, regardless of the impact on the minority shareholders. As such, they are incentivized to take actions like pursuing and supporting transactions that maximize the compensation for the high-vote class (not necessarily transactions that maximize the compensation for the company as a whole). Under Delaware law, a merger requires approval of "a majority of the outstanding stock of the corporation entitled to vote." DEL. CODE ANN. Tit. 8, § 251(c) (2023). Because of the dual-class structure, a controller has effective control of the vote. Or they might oppose and decline to pursue transactions that fail to provide them with outsized compensation, even if such transactions are favorable for the company as a whole. In requiring that each class of stockholders is treated equally—for example, by receiving the same amount and form of consideration per share in a transaction—equal treatment provisions incentivize all shareholders, including the controller, to maximize the total deal value. Thus, they can operate as value-enhancing mechanisms.

[179] *See generally* Goshen & Hamdani, *supra* note 9.

As an example, take the *Delphi* case. Robert Rosenkranz was the founder and controller of Delphi Financial Group, Inc. (Delphi), a financial services holding company.[180] Delphi had two classes of common stock: Class A stock with one vote per share held by the public and Class B stock with ten votes per share held by Rosenkranz and his affiliates.[181] For decades, Rosenkranz Asset Management (RAM), a company founded by Rosenkranz, had been providing consulting services to Delphi.[182] Delphi's shareholders criticized the agreements as "nothing but a device for Rosenkranz to skim money from Delphi for work Delphi could have provided for itself at lower cost" and a usurped corporate opportunity.[183] These agreements have been characterized by the Delaware Court of Chancery as having no clear benefit for Delphi, "perhaps because the contracts are . . . sham agreements through which Rosenkranz has [been] skimming money from Delphi since the Company's inception."[184] It is doubtful that an independent board would continue to facilitate such contracts, thus a controller like Rosenkranz could not be guaranteed these benefits once no longer in control of the corporation.[185]

Because of private benefits like these, a founder will value their controlling stake greater than they would a non-controlling stake. As such, a founder can credibly and in good faith threaten to veto deals that fail to compensate them for the loss of control — and loss of the associated ancillary benefits of control. It is well established that the "private benefits of control can . . . lead to an inefficient lock-in, where a more efficient buyer (who can generate a higher stream of cash-flows) is unable to purchase the control block from the controlling shareholder."[186] Equal treatment provisions can magnify this lock-in effect and lead to a controller holding onto control longer than necessary or efficient.[187]

Thus, the controller may veto deals that are favorable for the company and other shareholders precisely because equal treatment of all shareholders is

[180] In re Delphi Fin. Grp. S'holder Litig., No. CIV.A. 7144-VCG, WL 729232 (2012), at *8–10 (Del. Ch. Mar. 6, 2012).

[181] *Id.* at *1–3. As a result of this structure, Rosenkranz held 12.9% of the outstanding shares and controlled 49.9% of the Delphi vote. *Id.* (noting that because of the Delphi charter and a voting agreement with Delphi, Rosenkranz's total voting power, regardless of his stock ownership, was capped at 49.9%).

[182] *Id.* at *8–10.

[183] *Id.* at *2.

[184] *Id.* The Court of Chancery would emphasize that even Delphi's and Rosenkranz's counsel "seemed unclear as to exactly what tangible value the RAM Contracts bring to Delphi." *Id.*

[185] *Id.* at *1. The RAM contracts were terminable upon thirty days' notice from either RAM or Delphi.

[186] Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53, 76–77 (2018).

[187] Petrucci, *supra* note 19 (arguing that equal treatment agreements can lead to founder entrenchment); Smith, *supra* note 169, at 550 (arguing that controllers have strong incentives to refuse to sell their shares and that equal treatment agreements can "exacerbate this lock-in effect").

insufficient to compensate for the loss of control. *Delphi* provides an illustrative example of this dilemma. Delphi's charter, like many charters, included an equal treatment provision requiring that each class receive the same consideration in the sale of the company.[188] When an interested buyer made a favorable offer to purchase Delphi, Rosenkranz threated to veto that deal unless he received greater compensation than the other shareholders.[189] By all accounts, this threat was credible because of the private benefits of control, such as the RAM contracts.[190] Eventually, the other shareholders agreed to amend the company's charter to remove the equal treatment provision because a deal with inequitable consideration was more beneficial than no deal.[191] The Delaware Court of Chancery found it reasonably likely Delphi's shareholders would be able to show at trial that "in negotiating for disparate consideration and only agreeing to support the merger if he received it, Rosenkranz violated duties to the stockholders."[192] Without the ability to amend a charter, a primary criticism of equal treatment provisions is that they may prevent efficient deals from occurring.

Nevertheless, equal treatment provisions are commonplace. Within the Sample, 99% of companies have an equal treatment provision of some sort in their charter (n=322). Most charters have multiple forms of equal treatment provisions. Table 2 indicates the prevalence of equal treatment provisions by type within the Sample:

TABLE 2: EQUAL TREATMENT (ET) PROVISIONS BY TYPE

Type	**Sample Language**	**#**	**Prop.**
General ET	Except as otherwise expressly provided, shares of Class A Common Stock and Class B Common Stock shall have the same rights and privileges and rank equally, share ratably, and be identical in all respects as to all matters.	226	70%
Dividend ET	Shares of Class A Common Stock and Class B Common Stock will be treated equally, identically, and ratably, on a per share basis, with respect to any dividends or distributions.	314	97%

[188] *Delphi*, 2012 WL 729232, at *3 ("[I]n the case of any distribution or payment ... on Class A Common Stock or Class B Common Stock upon the consolidation or merger of the Corporation with or into any other corporation ... such distribution payment shall be made ratably on a per share basis among the holders of the Class A Common Stock and Class B Common Stock as a single class.").

[189] *Id.*

[190] *See id.*

[191] *Id.*

[192] *Id.* The parties would eventually settle for $49 million, the overwhelming majority of the $55 million control premium that Rosenkranz had extracted. *See* Delphi, 2012 WL 729232.

Type	**Sample Language**	**#**	**Prop.**
Liquidation ET	In the event of any voluntary or involuntary liquidation, dissolution, or winding up, the holders of Common Stock shall be entitled to receive the remaining assets ratably in proportion to the number of shares held.	288	89%
Transaction ET	In the event of a merger, consolidation, or third-party tender offer, the holders of each share of Class A Common Stock and Class B Common Stock shall be entitled to receive the same consideration on a per share basis.	203	62%

The proportion of companies with an equal treatment provision in their charters is higher among more recent IPOs. Among companies that went public in the last four years, 72% have a general equal treatment provision, 96% have a dividend equal treatment provision, 96% have a liquidation equal treatment provision, and 80% have a transaction equal treatment provision. Each of the different types of equal treatment provisions will be considered in turn.

1. General Equal Treatment

General equal treatment provisions require that each shareholder is treated equally unless expressly provided otherwise in the charter or under applicable law. These provisions are common, appearing in approximately 70% of multiclass charters. While the particular phrasing can vary between charters, one illustrative example of this form of equal treatment agreement is as follows: "Except as otherwise expressly provided herein or required by applicable law, shares of Class A Common Stock and Class B Common Stock shall have the *same rights and privileges and rank equally, share ratably, and be identical in all respects as to all matters*."[193] Many general provisions take a similar form, however the degree of equality required may vary from "identical" and "equal" to "same" rights, powers, and privileges.[194]

2. Specific Equal Treatment

Charters may also have an equal treatment provision that is triggered by one or more specific developments or events.[195] Specific equal treatment provisions typically address the most important events in a corporation's lifespan.

[193] Zoom Video Communications, Inc. Amended and Restated Certificate of Incorporation Art. IV.D.2. (Apr. 23, 2019).

[194] For a discussion of these varying terms, and their significance, see Petrucci, *supra* note 19, at 635.

[195] Many charters have multiple specific equal treatment provisions within them, each of which also varies with regard to the degree of equality they provide—for example, "equal"

The most common specific provisions are for (i) dividends or distributions; (ii) liquidation, dissolution, or winding up; and (iii) mergers, acquisitions, or other similar corporate transactions.[196]

(i) Dividends & Distributions. Most dual-class charters (97%) require that any dividends or distributions be paid at least in equal amount to the low-vote shareholders.[197] Like other forms of equal treatment provisions, these vary by the degree of equality required. The majority of dividend-based equal treatment provisions provide an exception for dividends payable in Class A or Class B stock (85%). Many also provide an exception for when the low-vote class, voting as a separate class, approves disparate treatment (36%).

(ii) Liquidation, Dissolution, and Winding Up. Approximately 89% of multiclass charters have a liquidation-based equal treatment provision. Much like other forms of equal treatment, these vary in the degree of equal treatment they require, most often requiring pro rata distributions. Often, these requirements apply to both voluntary and involuntary liquidation events. Like other forms of equal treatment, liquidation equal treatment provisions also contain a number of exceptions, most commonly for the approval of each class (39%).

(iii) Mergers, Acquisitions, and Other Similar Transactions. Lastly, among the most consequential—and variable—of the specific equal treatment provisions are those relating to mergers, acquisitions, and other similar transactions. These transaction-specific equal treatment arrangements, occurring in 62% of charters, typically provide that shareholders will receive the same consideration in transactions. These provisions vary along three main features: the covered transactions, the degree of equality afforded, and the exceptions. Most commonly, the provision specifies two or more transactions to which it applies, sometimes accompanied by a catch-all term like "all similar transactions." While some transactions, like mergers, acquisitions, and consolidations, are virtually ubiquitous in these provisions, others, like asset sales, reorganizations, and tender offers, are covered in only a minority of cases.[198]

Much like other forms of equal treatment provisions, these also vary in the degree of equality required, ranging from "pro rata" and "identical" treatment to "same amount or value" and "same form" of consideration.[199] Transaction-based equal treatment is also rife with exceptions. Most common among these include exceptions for inequitable treatment consistent with existing voting differences in the charter (67%); approval by the low-vote class

---

versus "identical" versus "substantially similar." *See id.* at 659-660, and Part III.B. (discussing the differences between various equality qualifiers).

[196] *Id*. at Part II.

[197] *See id.* at 664. For an in-depth discussion of these dividends provisions, see Geeyoung Min, *Governance by Dividends*, 107 Iowa L. Rev. 117, 171 (2021) (examining dividend rights of multiclass companies).

[198] *See* Petrucci, *supra* note 19, Section II.C.1. (discussing the prevalence of each type of transaction).

[199] *See id*. (discussing the prevalence of each equality qualifier).

of shareholders (61%); and employment, consulting, severance, or other similar agreements (27%).

3. Unequal Treatment

Of course, absolute equality and absolute freedom from equality are not the only outcomes for the shareholders. Some provisions, termed "unequal treatment agreements," can offer a middle ground that does not require rigid equality.[200] While relatively rare, these provisions are structured nearly identically to equal treatment provisions except that they provide for a precise degree of unequal treatment. This unequal treatment can favor either class of shareholders. For example, the W.H. Brady Co. charter has a liquidation provision that requires the no-vote class of shareholders receive $10 per share before any amount is paid to the voting class.[201] A similar approach is taken with dividends, where the charter requires that nonvoting shareholders receive $0.20 per share before further dividends are paid.[202] On the other hand, Biglari Holdings' charter provides, in part, that in a merger the nonvoting class "shall receive the same form of consideration and one-fifth (1/5) of the amount, on a per share basis, as the consideration, if any, received by holders of the [voting class]."[203] For the purposes of examining contractual limits of control, this Article includes unequal treatment provisions as outcome-based limits when they expressly favor the low-vote class.[204]

While at first glance unequal treatment provisions may seem economically inefficient for many of the same reasons as their equal treatment counterparts,[205] they can remedy many of the concerns presented by a traditional equal treatment provision. First, when the bargained-for inequality is included in the charter from the outset, the low-vote stockholder is on notice

---

[200] *See id.*

[201] *See* W.H. Brady Co. Restated Articles of Incorporation Art. III (Mar. 2, 1984).

[202] *See id.*

[203] *See* Biglari Holdings, First Amended and Restated Articles of Incorporation Annex II-3. (Jan. 18, 2023).

[204] It should be noted, however, that even when an unequal treatment provision favors the high-vote class (like Biglari Holdings), it can still benefit the low vote class more than the absence of any provision. That is because (1) low-vote holders can price the disparate treatment into the amount they are willing to pay and (2) in the absence of the unequal treatment provision, the controller has free reign to receive disparate treatment exceeding that amount. However, to more conservatively examine the contractual limits on control, these high-vote favorable instances were not coded as limits for the purposes of this Sample.

[205] Indeed, the approach to unequal treatment agreements in some charters would decrease a controller's willingness to alienate their shares, for example by proving for a fixed value (rather than proportion) paid to one class or by favoring the low-vote class. *See, e.g.*, The Cato Corporation, Amended and Restated Certificate of Incorporation, Art. IV.B(6) (May 21, 2020) ("In the event of . . . a merger or consolidation of the Corporation . . . holders of [low-vote] Class A Common Stock shall be entitled to receive out of the net assets of the Corporation, the amount of $1.00 per share, prior to any distribution to be made with respect to [high-vote] Class B Common Stock.").

about potential unequal treatment and can adjust the value they are willing to pay accordingly. Second, when a provision ties the compensation of the high-vote shares to a fixed proportion of the total compensation, the controller has an incentive to maximize the consideration as a whole. Lastly, the high-vote stockholder is incentivized to pursue and accept transactions that they would not be willing to support if receiving only their pro-rata share. Thus, by connecting the consideration of each class to one another without mandating complete equality, an unequal treatment provision can function as a value-maximizing limit on treatment of the low-vote class. Of course, these provisions are not without issues, including the difficulty of assessing the appropriate degree of inequality (especially at the time of the IPO) and managing the perception of these provisions by prospective investors.

III. Implications

This Article will now turn to the implications of the network of contractual limits of control. First, it will reorient the discussion of control limits in the context of the broader contractual landscape. Next, it will leverage economic, contractual, and negotiation theory to conduct an economic analysis of the contractual limits of control. Then, it will examine the implications of these limits on the role of practitioners, regulators, and other corporate actors. Lastly, it will address the impact of this analysis on the multiclass debate more broadly. While the focus remains on multiclass governance—in substance, regardless of form—it has far-reaching implications for controllers more generally.

A. The Corporate Contract: Reframing the Limits on Control

Contract law plays an integral part in corporate law and theory. The prevailing theory of corporate law is a contractual one: the corporation as a "nexus of contracts."[206] Each individual contract in this nexus is in turn treated like any other legally enforceable contract. General principles of contract drafting, interpretation, and enforcement therefore apply. These principles are widely accepted,[207] but often overlooked in the discourse on contractual limits

[206] For a discussion of the firm and network of contracts, see Easterbrook & Fischel, *supra* note 12, at 1429–30; William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 Yale L.J. 1521 (1982); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 Geo. Mason U. L. Rev. (1989); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3J. Fin. Econ. 305 (1976); R.H. Coase, *The Nature of the Firm,* 4 Economica (n.s.) 386 (1937). *But see* Michael Klausner, *Corporate Law and Networks of Contracts*, 81 Va. L. Rev. 757, 782 (1995) (noting that the absence of meaningful variation in charters supports "at least some rethinking of the contractarian theory").

[207] *See supra* note 12.

of control. The charter, as perhaps the most important contract in this nexus, is itself a legally enforceable contract. Thus, it must be treated as such.

In the prior Part, the Article established a taxonomy of contractual limits of control and incorporated data from an original, hand-coded database on various provisions. Each limit is valuable in isolation, and many of these limits are common in modern multiclass governance. But a focus on each limit, or category of limits, in isolation necessarily creates an imperfect understanding of the contractual limits of control.

Why does it matter that each limitation is just one provision in the charter? Or that the charter is but one of many corporate contracts? Put differently, what is the issue with considering only a few control limits in isolation? As a threshold matter, failure to consider the entire contract means overlooking a number of contractual limits of control when evaluating a given firm.

Using the three-tiered taxonomy established in the prior Part, more than two-thirds of all corporate charters studied had all three forms of limits: process-based limits, structure-based limits, and outcome-based limits.[208] Notably, the accumulation of control limits is even more potent at a granular level. Across these categories, more than 14 different control limits were examined,[209] with the average charter containing at least 7 contractual limits on control. In short, most charters contain a significant number of limits that target the processes, structure, and outcome of the multiclass firm.

By failing to consider the network of contract limits, including their interaction and accumulation, our understanding of multiclass companies is necessarily incomplete. Let us suppose, for example, that corporate law required time-based sunsets. Indeed, as discussed in Parts I and II, many prior commentators, proxy advisors, and regulators have argued for mandatory time-based sunsets. Assume that, out of concern about multiclass structures harming low-vote shareholders, corporate law required that any multiclass charter state that after seven years the company would automatically convert to a single-class company. There are a few issues with looking at that provision in isolation and failing to treat the charter as an entire contract. Most straightforward, doing so does not account for the other ways in which a company limits the controller's ability to exercise that control. If Firm A has only one limit, a time-based sunset, it would pass this threshold. If Firm B has no time-based sunset, but over

[208] Process-based limits were considered (reducing voting inequality, class-specific approvals, supermajority voting requirements), along with structural limits (time-based and event-based sunsets), and outcome-based limits (general ET, specific ET, and unequal treatment). The overall interaction of these limits is likely even broader if accounting for non-charter-based limitations, such as the various shareholder agreements.

[209] These include changes to voting inequality, class-specific approval requirements, supermajority voting requirements, time-based sunsets, dilution sunsets, transfer sunsets, death/incapacity sunsets, class election sunsets, employment termination sunsets, general ET, transaction ET, dividend ET, and liquidation ET. Included in the analysis are also limits coded as "other" that are relatively rare, like end of marriage or felony conviction sunsets.

a dozen other limits of control, it would fail to satisfy this requirement despite providing much greater protection to the low-vote shareholders.

There is another concern as well with a siloed approach: Disregarding the other terms of the charter would induce firms (which are controlled by the high-vote holders) to offset the "cost" of one limit with other provisions. For example, they may include a provision that pays out dividends to the high-vote class before any dividends are paid to the low-vote class through an unequal treatment provision. By looking at one feature of the charter in a silo—the time-based sunset provision in this example—we are overlooking the consequences on other provisions. One cannot target a single term in a contract with the expectation that doing so will make a party better off unless one accounts for the ripple effect that changing the term will have on other provisions. Because so many terms in the charter are part of the contract limits on control, it is virtually always possible for the controller to contract around any drawbacks from a single limit. This challenge is exacerbated given the use of a range of contracts beyond the charter, such as shareholder agreements, that also include contractual grants (and limits) of control.

Moreover, not all limits are created equal. If a firm is otherwise flourishing under the control of the founder and insiders, a time-based sunset could actually hurt corporate value by shifting control to uninformed public shareholders. In this instance, a time-based sunset is harmful to corporate value while instead something like a dividend equal treatment provision could be much more meaningful. It is difficult to predict ex ante the value of provisions ex post, but the general principle that the value of each limit varies still holds.

Thus, we have been having an incomplete conversation on the value of multiclass governance. By broadening the approach to focus on the entire contract, and across the full landscape of contracts, there are meaningful implications for the economic consequences, the role of practitioners, policymakers, and prospective investors, as well as the multiclass debate more broadly.

B. An Economic Analysis of Contractual Limits on Control

An economic analysis of the network of contractual limits is useful for a variety of reasons. Perhaps most saliently, doing so provides insight into the economic value of control limits separate from any moral or social value in protecting the low-vote shareholders. Instead, the focus is primarily on maximizing overall corporate value and value creation. First, this Part will discuss negotiation theory and the basic principles of value creation in contract negotiation. Next, it will analyze the ways in which charters, and terms limiting control in them, can address information asymmetries and allocate risk. Lastly, it will examine the incentives created by multiclass structures and how contractual limits can reduce moral hazard.

1. Value Creation and Cross-Term Negotiation

At first glance, negotiation theory and its economic consequences appear to have little relevance to corporate charters. That is to say, a company will have a charter already prepared when it goes public, and the only signatory to that charter will be a representative of the company. So, who exactly is on the other side of the negotiation? While there is some variation, the process of taking a company public generally proceeds as follows. Before a company has its initial public offering (IPO), it is a private company that typically has just a few shareholders and is controlled by the founder. In preparation for the IPO, the company will make any changes to its capital structure and governance necessary to comply with the SEC and stock exchange requirements. Some of these changes may require approval from the company's pre-IPO shareholders, most or all of whom will become members of the high-vote class following the IPO.

During a company's IPO, it offers equity securities on a public market and transitions from a private company to a public company. The company typically hires an investment bank to serve as an underwriter of the offering, and the bank will assemble a group of other investment banks to help market and sell the offered securities. Eventually, the company will file a registration statement and prospectus disclosing various information about the company to prospective investors. This information will include the charter that establishes the governance for the company. The public will then be able to purchase the stock. The market price of the shares at the IPO will, in theory, reflect the effectiveness of the firm's governance structure and the pre-IPO shareholders will benefit from a good governance structure by being able to sell more shares at a higher price. Presumably, therefore, the firm at the IPO, under the direction of pre-IPO leadership, will adopt the optimal governance mechanisms for that firm.[210]

So, we return to the question: Who is at the negotiation table? Underwriters play a meaningful role most directly, in that they will be less willing to purchase the stock and agree to market and re-sell it to the public if the terms of that stock (as established in large part through the corporate charter) are not attractive. The attractiveness of the stock in turn depends on its terms, which in turn impact its value and interest to the public shareholders. In law and economics terms, demand is the range of prices and amount the public shareholders would be willing to pay. The terms of the charter can cause a change in the demand. If there are similar "goods" (i.e. other prospective investments) with

---

[210] For a discussion of contracting and the design of optimal agreements, see, e.g., Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1327–28 (2013); Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1, 7 (2021); Robert E. Scott, Stephen J. Choi & G. Mitu Gulati, *Revising Boilerplate: A Comparison of Private and Public Company Transactions*, 2020 WIS. L. REV. 629, 629 (2020).

more favorable charter provisions for the public shareholders, then investors will simply shift to purchase stock of another company instead. Companies are, in a sense, searching for a market equilibrium to sell the most shares at the highest price given the demand, which will be a function of the control limits in the charter. Significant time is spent during the due diligence process assessing the attractiveness of the stock and how it varies based on its terms. Although the underwriters and prospective investors are not signatories to the charter, they indirectly sit across the negotiation table. When it comes to non-charter contractual limits, the connection is even more express.[211]

Thus, negotiation theory warrants consideration in assessing control limits. A basic model of negotiation involves a process focused solely on one term, such as the price of an item. These are so-called "fixed pie" or "zero sum" negotiations because one side obtaining more necessarily means the other side has less. This basic model is appropriate only in the narrow range of circumstances where the only matter for negotiation is one term.

In many negotiations, however, there are multiple terms that must be agreed upon. For example, there may be a negotiation on not only price, but also quantity. In most corporate transactions, there are hundreds of terms to negotiate. It is possible to negotiate each issue one at a time. Less experienced negotiators often take an issue-by-issue approach to reach an agreement on each issue before moving on. But this approach is suboptimal. Effective negotiators create value by trading *across* terms. Because parties value certain terms differently, they can concede on a term they value less in exchange for a gain on a term they value more. When doing so, parties adopt a general understanding that nothing is decided until all matters are decided.

There are many economic and non-economic factors at-issue in a charter. What classes of stock will the company have and what are their voting rights? Are there any sunsets, equal treatment requirements, or other limits on an individual's ability to control the company? How much are public shareholders willing to pay for the stock as a result? Each of these could be negotiated in isolation, but doing so creates problems for the firm in that an inability to agree on any one issue may bring the IPO process to a halt.

Instead, effective negotiators negotiate across issues. For example, if a founder cares deeply about keeping a family-run business in the family, then the founder would be reluctant to agree to a time-based sunset or event-based sunsets that would prevent them from passing their shares to a family member.[212] To attract investors, however, the founder may be willing to include other limits on their ability to control the company.[213] For example, perhaps

[211] For shareholder agreements, for example, the particular insider shareholders sit across the negotiation table.

[212] As a result of these concerns, the founder may avoid going public in the first place.

[213] While ideally this process will occur at the IPO stage, it can (and should) also apply any time the charter is amended. Indeed, in *Trade Desk* the public shareholders agreed to amend

public shareholders can be guaranteed equal treatment in financial matters like dividends and merger consideration. Or perhaps the charter could include an event-based sunset that only applies to the transfer of shares outside of the family. The specific negotiation across provisions will vary with the interests of the founder and concerns of the underwriters and investors. This is merely one of many potential trade-offs across terms to create value.

2. Information Asymmetries and Allocation of Risk

Information about what is being exchanged is often imperfect. There is information that one, or both parties, do not know. Often, there is asymmetric information about the value of a company at the IPO. The founder and other insiders of the company will know more about its business than the prospective public investors. When potential investors lack information about the value of the company, they will be less likely to purchase stock and less willing to purchase as much stock at a given price. In part, this is a function of reactive devaluation—a belief by the prospective buyer that the sellers have better information and would not agree to sell the stock unless the price were favorable.[214] These imperfections resulting from asymmetric information can prevent a value-creating deal from being made.

There are a number of ways that companies can reduce information asymmetries when they go public. Most saliently, they can directly disclose the information to prospective investors. For the discussions with underwriters, this can be done contractually through using due diligence, representations and warranties, and disclosure schedules in an underwriting agreement. For the public investors, this will be done through the information conveyed in public filings like the registration statement and prospectus. In both cases, for parties to be able to rely on the information shared, it must be credible. That is to say, if the information is false, the company (or its founder or insiders) will face meaningful consequences. Often this is not an issue for information conveyed in connection with an IPO because there are a number of serious consequences of false information resulting from contractual rights like

a charter to extend a sunset in exchange for other governance limits, like a time-based sunset and director election rights. *See* City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc., No. CV 2021-0560-PAF, 2022 WL 3009959 (Del. Ch. July 29, 2022). For a discussion of *Trade Desk*, see *supra* text accompanying notes 141–43. However, not all mid-stream changes through charter amendments are permissible. *See In re* Delphi Fin. Grp. S'holder Litig., No. CIV.A. 7144-VCG, 2012 WL 729232 (Del. Ch. Mar. 6, 2012) (finding that amending a charter to opportunistically remove an equal treatment provision likely violated fiduciary duties); *see also* text accompanying notes 16–67.

[214] Reactive devaluation does not occur in all deals, nor should it. If a deal is possible, there will be a range of mutually beneficial outcomes. For example, if a seller is willing to sell their car for $1,000 or more and a buyer is willing to pay up to $1,500 for that car, there is a range where a deal will be value-creating for both of them: between $1,000 and 1,500 for the car. In negotiation parlance, this is called the "zone of possible agreement."

indemnification and personal liability, and from the regulatory regime relating to securities fraud. To further increase the credibility of information, third parties may be called upon to provide information, such as third-party audits of financial statements and opinions by legal or financial advisors.

Sometimes both parties lack information about the value of the company. When there is symmetric uncertainty, the parties must either find ways to obtain information or allocate the risk of those uncertainties. Information may be discoverable, typically by the company through time and effort. At times, these efforts may be worth it to provide certainty and extract greater IPO value as a result. Other times, these efforts may not be worth it because the time and cost is excessively high. Moreover, some uncertainties cannot be determined at the time of the IPO. For example, what value will the founder bring to the company *after* it goes public? It is impossible to know the exact value the founder will bring, nor could the company credibly assert such a value at the time of the IPO.

Investors can, and often do, have different assumptions about future growth of the company, because of information asymmetries, differences in judgment, or other factors. If the founder forecasts significant growth, then they are unlikely to be willing to sell at a price that reflects less growth. If the public investors do not share the founder's optimism, then they will not be willing to pay a high enough price for the founder to agree to sell. When information cannot be reasonably ascertained, it is costly to public investors to purchase stock with the risk of the unknown.

Contractual limits on control can help allocate risks of the unknown to create value in an IPO. For example, a founder may be confident that the company will flourish under their control and want to receive extra compensation for bringing such value to the company. The inability to do so would result in the founder keeping the company private. In contrast, the public investors are less confident about the future performance of the company and value the founder will bring. If the founder would have unrestricted control, prospective investors will not invest at all or will only pay a fraction of the price. Equal treatment provisions or a time-based sunset would ordinarily be a deal-breaker to the founder, who wants to preserve control and receive disparate financial benefits in exchange for bringing long-term value to the company. Instead, perhaps the company could incorporate a retention vote provision in the charter. If the public shareholders are pleased with the founder's contribution, they will theoretically vote to retain the multiclass structure.[215] Or, the charter could contain a time-based sunset provision but also enumerate various post-IPO metrics that, if obtained, will automatically extend the multiclass structure.[216]

---

[215] For a discussion of the incentives public shareholders have in a retention vote, see *supra* section II.B.2.

[216] For a discussion of extensions, see *supra* section II.B.2.

Alternatively, a charter could provide that certain limits on control apply depending on post-IPO performance. For example, there could be an event-based sunset triggered by low performance of the company (relative to its peers). There could be a retention vote that only occurs if the company fails to achieve certain metrics. Or there could be a requirement that no dividends be paid to the high-vote class until the low-vote class has received a certain amount of dividends or stock price has exceeded a certain threshold. While tying the governance of the company to post-IPO performance in such a manner would be a novel approach in this area of corporate law, it is not without precedent in other areas of corporate law.[217]

Contingent control limits such as these can help bridge the gap between the parties' assumptions and valuations of the company at the time of the IPO. They create value by taking advantage of differences in expectations. Of course, they are also subject to many of the same criticisms as their counterparts in other areas of corporate law. It can be difficult to agree on the proper metrics to use and how that metric will be measured. For example, if there is a limit based on financial metrics, should it use the stock price or market capitalization of the company? Is it based on performance relative to peers, an average over a period of time, or something else? What incentives does this create for the controller and other shareholders?[218] As a result of challenges like these, contingent limits can be difficult to draft.

Contractual limits on control can also serve a powerful signaling function. This power is magnified when there is a contingent control limit based on post-IPO performance because the founder loses significant value if their signals on predicted performance are inaccurate. If the founder is incorrect in their forecast, then they sold the company for less than it was worth given the limits on control and price of stock as a result of their signals. However, contractual limits on control serve a powerful signaling function more generally as well. An equal treatment provision signals that the founder intends to treat the public shareholders relatively well (i.e., equally) despite having control. It may also signal that the founder expects to make (or extract) significant value from day-to-day control of the company. A sunset provision tied to dilution of the founder's interest signals that the founder will continue to hold a significant equity stake and therefore be less likely to focus on unrelated endeavors or act in a manner that will harm corporate value.

---

[217] For example, in mergers and acquisitions the parties can bridge valuation gaps through the use of earnouts and contingent value rights (CVRs). These contractual provisions require that a buyer make additional payments to the acquired company shareholders after an acquisition if the company meets specified goals. These goals can be financial metrics or they can be based on external events like regulatory approval for a drug or obtaining a patent.

[218] For a discussion of incentives, and the ways in which they can be aligned, see *infra* section III.B.3.

3. Reducing Moral Hazard

Contractual limits on control create incentives. These incentives can be positive. If there is a retention vote provision in the charter, then a controller will have the incentive to dedicate time and effort to growing the business so the shareholders will vote to retain the multiclass structure. If the governance structure is retained, the controller maintains control. However, contractual limits on control can also create perverse incentives. For example, time-based sunsets specify a date on which a founder will lose control. This sharp cutoff creates an incentive for founders to use their control to maximize personal benefits before that date occurs, even if doing so is at the cost of long-term corporate value and harms the minority shareholders.[219] The likelihood that a founder will engage in short-termism—such as excessive risk-taking or conservative behavior, self-dealing, or other opportunistic behavior—increases the closer the company moves towards the expiration date.[220] A founder may simply sell their controlling stake at a premium or extract other private benefits as the sunset approaches.[221] This transfer is concerning for the public shareholders as it can erode firm value.

Moral hazard occurs when a party has the incentive to act in self-interest contrary to the intent of the charter and interests of the shareholders as a whole. As illustrated in the prior paragraph, limits on control can reduce moral hazard in some circumstances, but they can also contribute to it in others. The key to economically efficient limits on control is to understand the incentives created by each limit and to mitigate them accordingly. Continuing from the last example, consider a company that has a time-based sunset provision, which creates an incentive for the controller to engage in short-termism. How can this incentive be reduced?

One method to combat moral hazard in this context is to include an equal treatment provision in the charter. By requiring that each class of shares is treated equally, an equal treatment provision reduces the controller's incentive to sell the company immediately before a sunset because they would be receiving the same consideration, theoretically, as after the sunset is triggered. Before the sunset, they would be subject to the equal treatment provision and need to ensure that each class of shareholders receives the same consideration per share. After the sunset, there would no longer be a multiclass company; rather, there would be just one class of stock which would receive a certain

---

[219] John C. Coffee, Jr., *Dual Class Stock: The Shades of Sunset*, CLS BLUE SKY BLOG (Nov. 19, 2018), http://clsbluesky.law.columbia.edu/2018/11/19/dual-class-stock-the-shades-of-sunset/ [https://perma.cc/R9HK-4MM2].

[220] Fisch & Solomon, *The Problem of Sunsets*, *supra* note 17, at 1083–84.

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

amount of consideration per share. Therefore, when there is an equal treatment provision, a controller will enter into such transactions before the sunset expiration only when the transaction is value maximizing.

Of course, equal treatment provisions can also create problematic incentives when standing alone. Because a founder selling their shares gives up control (and the private benefits they enjoy as a result of control), founders may be reluctant to do so without additional consideration.[222] This lock-in effect increases when a controller is subject to an equal treatment provision whereby they cannot receive a premium for giving up their controlling stake.[223] Thus, an equal treatment provision can lead to a controller using their majority voting power to block otherwise favorable transactions, as threatened in *Delphi*.

With regard to this dilemma, time-based sunset provisions can mitigate the drawbacks of an equal treatment provision. Because of the eventual conversion from multiclass to single class under a time-based sunset, there is no such lock-in effect. After seven or ten years the stock will convert from dual class to single class and the founder will lose their controlling stake. Whether a founder sells before that time (and, being subject to an equal treatment provision, receives the same consideration as the low-vote shareholders when doing so), or a founder sells after the sunset expires (and receives the same consideration as the other shareholders by virtue of having become a low-vote shareholder), the founder can no longer perpetually hold out and preserve control at the cost of the company and minority.

Moreover, the analysis is further complicated by the existence of "unequal treatment agreements." Unequal treatment provisions establish a fixed proportion or amount of disparate treatment in the charter at the time of the IPO. These provisions can favor the high-vote class, for example by embedding a control premium into the charter for any transactions. They can also favor the low-vote class by allocating risk onto the controller. For example, a provision can state that if there is a liquidation event or dividend then the high-vote class will receive nothing. By embedding a control premium into the charter (e.g., for transactions) or allocating risk to the high-vote class (e.g., for liquidation), shareholders can price the unequal treatment ex ante into their willingness to pay for the shares. These unequal treatment provisions can also reduce the lock-in effect for transactions by allowing the controller to obtain a control premium when they eventually sell their shares.

But unequal treatment provisions have a number of drawbacks. Most notably, there is difficulty in determining the appropriate premium or allocation

---

[222] *See* Choi, *supra* note 186, at 76–77; Petrucci, *supra* note 19, at Section III; Smith, *supra* note 176, at 550.

[223] *See* Petrucci, *supra* note 19, at Section III.

to include in the charter. While financial advisors, legal advisors, and the market can provide critical information to help determine the appropriate value, there is the additional challenge of the perception of these agreements. On their face, unequal treatment agreements can seem like shareholder-hostile clauses (either for low-vote or high-vote shareholders), even more so than the absence of an equal treatment agreement. While unequal treatment provisions may be promising, the logistical challenges in pricing—and marketing—them cannot be overlooked.

Moreover, a concern that arises with both equal and unequal treatment provisions is the limitation of the situations to which they apply. Without an event-based sunset, a controller can simply sell their shares on the market, outside of the sale of the company, to capture a premium. By doing so, a controller can circumvent a time-based sunset (by selling prior to the expiration) and an equal treatment provision (by selling through a transaction structure that is not covered under the language of the clause). Event-based sunsets, for example ones that convert the high-vote stock to low-vote stock upon sale or transfer of that stock, can function in conjunction with an equal treatment provision to enhance its effectiveness and limit a controller's ability to circumvent the drafters' intent.

Of course, the incentives created by each limit on control vary, as do the ways in which moral hazard can be reduced. In each instance, however, what matters is not the individual limit—be it voting ratios, sunsets, equal treatment, or something else entirely—but the interaction. This interaction is not merely theoretical; nearly all charters (99%) have multiple control limits. Thus, it is critical to consider their interaction and accumulation, instead of simply evaluating their terms in isolation.

As illustrated above, the interactions across contract provisions have a meaningful impact on governance, control, and the wellbeing of public shareholders. Not only is the interaction between control limits widely overlooked, but so too is the overall accumulation of control limits. Even if one or two limits, in isolation, are an insufficient limit on control, the totality of all limits may serve as an appropriate governance mechanism to limit control.

C. The Role of Various Corporate Players

1. Prospective Investors

Market forces from a more informed investor base will naturally operate as a check on extreme multiclass governance. Prospective investors assessing a multiclass firm should look not at a single limit in isolation, but rather the totality of contractual limits of control. It is the sum of these limits that can and should impact the discount a non-controlling investor will pay for their shares because such limits impact the risk of a controller behaving opportunistically or acting in a manner that harms the other shareholders.[224] Among retail investors, institutional investors, and other investors, the current focus is almost entirely on the use of sunset provisions. For example, The Council for Institutional Investors has advocated for the use of sunset provisions while overlooking process and outcome-based limits.[225] Reliance on one measure is a messy proxy for good governance more broadly. Moreover, reliance on solely a charter, or solely a shareholder agreement, will necessarily overlook the network of control limits across agreements. Considering the totality of control limits will allow investors to better price in the terms of the charter and establish expectations.

2. Policymakers

Regulatory efforts to adopt mandatory legal rules in multiclass governance are well-intentioned but ultimately misguided. As discussed in Part I, federal and state regulators, as well as proxy advisory firms, stock exchanges, and indices, generally oppose multiclass governance.[226] However, when there are exceptions, typically they are tied to whether a charter contains a sunset provision. For example, leading proxy advisor Glass Lewis typically recommends that investors vote against director nominees of multiclass companies.[227] However, they provide exceptions when there is a "reasonable" sunset of "seven years or less."[228]

Private ordering is a more optimal approach than mandatory limits for a number of reasons. Contractual terms can be narrowly tailored to the particular firm in question. The identity of the high-vote holder, role of the founder, firm industry, maturity at the IPO, and investor preferences will vary. These features present different risks and concerns and are particularly important in the multiclass context where the rationale for a multiclass structure varies so meaningfully with the founder, industry, and other features of the company. As Professor Macey puts it in what he terms the "policymaker's dilemma," mandatory rules by policymakers "do not benefit all shareholders

---

[224] *See* Adam C. Pritchard, *Tender Offers by Controlling Shareholders: The Specter of Coercion and Fair Price*, 1 Berkeley Bus. L.J. 83, 99 (2004) ("It does not take a zealous faith in the efficient capital market hypothesis to see that the risks of appropriation by the controlling shareholder will lead investors to discount the value of shares in a company that has a dominant shareholder.").

[225] *See, e.g.*, *Dual-Class Stock*, Council of Institutional Inv'rs, https://www.cii.org/dualclass_stock [https://perma.cc/EVT7-9K8H]; Letter from Kenneth A. Bertsch, Exec. Dir., Council of Institutional Inv'rs, to Ravi Ahuja, Chair, Nominating and Corp. Governance Comm., Roku, Inc., et al. (Sept. 12, 2017).

[226] *See generally* discussion *supra* Part I.

[227] *See, e.g.,* 2024 Benchmark Policy Guidelines, Glass Lewis, at 79.

[228] *Id.*

in all firms."[229] A one-size-fits-all approach is a suboptimal one. Regulatory approaches are simply too blunt of an instrument to capture the uniqueness of each company's governance.

In addition, one of the primary benefits of avoiding mandatory rules is that the resulting flexibility helps promote innovation.[230] Firms can change their governance rules over time, adapting to new circumstances and ideas. Encouraging innovation is generally seen as desirable, and default rules are one way to create the flexibility for firms to innovate. Mandatory rules can prevent custom tailoring, which in turn inhibits innovation and are thus ill-suited for most aspects of multiclass governance.

Moreover, the board and other IPO leadership, rather than policymakers, are better positioned to shape the governance of the firm. Corporate law generally defers to the board, hence the highly deferential business judgment rule. Corporate boards and managers are experts with better information about their firm and greater expertise in governance than a legislature. Directors and other leadership also have incentives that legislators do not to adopt value-maximizing rules because management almost always has a significant equity stake in the firm. Furthermore, under an economic theory of regulation, politicians may be more likely "to make politically motivated decisions rather than economically motivated" ones.[231] Thus, investors, markets, and firms will be better served if policymakers do not take a mandatory approach to the contractual limits of control.

However, there is still a role for policymakers to play. The value of private ordering does not mean there is no role for regulation and policymaking in multiclass governance. As a threshold matter, of course, the policymakers have an assessment to make on the value of multiclass governance as a whole and whether the economic and noneconomic factors are compatible with policy objectives. Countries take varying approaches to the permissibility of multiclass governance, with the U.S. among the more permissive.[232] Policymakers play a critical role in determining whether multiclass should

---

[229] Jonathan R. Macey, C*orporate Law and Corporate Governance: A Contractual Perspective*, 18 J. CORP. L. 185, 198 (1993).

[230] For a discussion of when corporate law should adopt mandatory versus enabling rules, see Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461 (1989). The question is whether the benefits of mandatory corporate law rules—such as increased efficiency from mandatory time-based sunsets—are greater than the costs associated with those rules. Those in support of mandatory rules emphasize that mandatory rules can help protect shareholder interests in a way that leaving it to the market alone will not. *See* Macey, *supra* note 217, 221 at 187–88; Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1556 (1989).

[231] Macey, *supra* note 217, at 205.

[232] *See, e.g.,* Paul Hodgson, *ISS Discusses Dual-Class Share Structures in Europe*, COLUMBIA BLUE SKY Blog (Feb. 13, 2023), https://clsbluesky.law.columbia.edu/2023/02/13/iss-discusses-dual-class-share-structures-in-europe/ [https://perma.cc/7B6F-SZ38] (discussing unequal voting structures in Europe); Min Yan, *The Myth of Dual Class Shares: Lessons from Asia's Financial Centres* 21 J. CORP. LEGAL STUDIES (2021).

be permissible in the U.S., as it currently is, and if there should be a floor or ceiling on the bounds of that class.

Assuming that multiclass continues to be a viable governance structure in the U.S., one of the most important functions of policymakers is the related disclosure regime. Companies going public disclose a substantial amount of information through filing a securities registration statement with the SEC before offering securities to the public. Included in this statement is a prospectus, which must be given to anyone who buys or is offered the securities. The prospectus contains information about the company, its finances, and its securities. Requiring this disclosure helps ensure public shareholders can make informed decisions about investing. For shareholders, that theoretically means reading the documents, identifying features, including control limits, and adjusting their willingness to pay accordingly. However, such filings are lengthy—often over 100 pages long.[233] There is some evidence that when corporations issue shares with inferior voting rights, those shares trade at a discount,[234] suggesting that shareholders are at least partly informed about the characteristics of their investment at the structural level. However, the likelihood of a shareholder reading such filings in their entirety is relatively small. In addition to the standard disclosure regime currently required, policymakers could require a condensed table or overview report about various features of the firm, such as a table with markings next to each control limit adopted by the firm. This approach would make it easier for investors to identify, and price, the value of multiclass stock.

Additionally, regulators and courts should continue to develop and maintain a robust body of corporate law to safeguard against bad actors. Much of this is already a staple in corporate law. State corporation codes contain a number of protections, such as requiring a class-specific vote when a class would be adversely affected by a change.[235] In addition, controlling shareholders owe fiduciary duties to the corporation and other shareholders, but only in limited circumstances.[236] Chief among these circumstances are when a controlling shareholder obtains a pecuniary benefit at the expense of the non-controlling shareholders, for example when the controller initiates a transaction to freeze out the remaining shareholders or engages in self-dealing

---

[233] *See, e.g.*, Google S-1 (169 pages), available at https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm.

[234] *See, e.g.*, Ronald C. Lease et al., *The Market Value of Control in Publicly Traded Corporations*, 11 J. FIN. ECON. 439, 458 (1983); Ronald C. Lease et al., *The Market Value of Differential Voting Rights in Closely Held Corporations*, 57 J. BUS. 443, 451 (1984); Greg A. Jarrell & Annette B. Poulsen, *Dual Class Recapitalizations as Antitakeover Mechanisms*, 20 J. FIN. ECON. 129, 129 (1988); *see also* Jeffrey N. Gordon, *Ties That Bond: Dual Class Common Stock and the Problems of Shareholder Choice*, 76 CAL. L. REV. 1, 22–26 (1988) (on recapitalizations).

[235] *See, e.g.*, DEL. CODE ANN. tit. 8, § 242(b)(2) (2023).

[236] *See, e.g.*, Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 666–67 (2022); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006).

behavior.[237] As a consequence, these transactions are often subject to Delaware's onerous entire fairness review unless certain procedural safeguards are put into place.[238] While controlling shareholder doctrine has been subject to much criticism,[239] courts and regulators can mitigate risks that might otherwise be present in multiclass governance through such doctrinal developments and related legislation.

Lastly, regulators could have a more meaningful role to play in adopting default rules for multiclass governance. Default rules, as opposed to mandatory ones, can be opted out of by a firm that includes a term in the charter specifying otherwise. To the extent regulators think a particular limit is generally beneficial, such as a time-based sunset, state corporate codes can simply establish that as a default. Generally, default terms should be either those that the parties would contract for had they bargained or the term the law wants to incentivize as best for corporate governance in light of the impact on firm value, investors, and externalities on society more broadly. By providing default terms and language, corporate codes and other legal norms can reduce the cost of writing and negotiating contracts. This is beneficial because it can lead to more efficient use of capital. Those that find it worth departing from the default rules presumably will only do so when it is more valuable to customize the agreement than to follow defaults. Thus, an alternative approach would be to include a default time-based sunset (or other control limit) in corporate codes unless the charter expressly states otherwise.

3. Practitioners

Given the importance of private ordering in multiclass governance, practitioners have a critical role to play. That is because they are the ones who ultimately draft the charter. As such, they advise clients on which limits to adopt and then draft the charters containing the limits. Generally, a tailored,

---

[237] *See id.*

[238] Courts will use a more deferential standard of review when certain procedural safeguards are in place, such as approval by a disinterested, independent special committee that fulfills its duty of care or an informed, uncoerced vote of the non-controlling stockholders — or at times, both. *See* DEL. CODE ANN. tit. 8, § 144(b) (2025) (recently amended provision of the DGCL providing a definition of "controlling stockholders" and a safe harbor for many controlling stockholder transactions); *see also* Kahn v. M&F Worldwide Corp. (MFW), 88 A.3d 635 (Del. 2014); Kahn v. Lynch Communications Systems, 638 A.2d 1110, 1113 (Del. 1995).

[239] For critiques of Delaware's controlling shareholder doctrine and proposals for alternative approaches, see Jill E. Fisch & Steven Davidoff Solomon, *Control and its Discontents*, 173 U. PENN. L. REV. 641 (2025) (arguing that outside of certain transactions, strict scrutiny is unwarranted and proposing an intermediate form of scrutiny when controllers have plausibly distorted a board's process); *Controller Confusion: Realigning Controlling Stockholders and Controlled Boards,* 133 HARV. L. REV. 1706 (2020) (arguing that in recent years courts have improperly focused on controlling shareholders rather than board independence and proposing an alternative analysis for determining controlling shareholder status).

private ordering approach means legal advisors should, to an extent, shape each charter based on the particular client in question.[240]

Now, law and economics theory suggests that companies, under the guidance of their legal advisor, will adopt limits on control that maximize corporate value. If control limits can increase efficiency, then, theoretically, companies that fail to adopt them will be penalized at the IPO by having stock worth significantly less.[241] Why then do companies not adopt control limits even more frequently and in a consistent manner? Sunset provisions vary significantly between five and fifty years with little discernable pattern between companies. General equal treatment provisions have very little variety between industries, founders, and companies while specific provisions vary widely between companies.

One possible theory rests on the idea that the efficiency of control limits depends on the features of the company and its controller. If a company's founder is the holder of the high-vote class, it seems plausible that some types of charter protections (for example, event-based sunsets upon their death) are more applicable than when the high-vote holders are not the face of the company. Other features like the bargaining power of the founder, the company's maturity at the IPO stage, the industry, and size could also impact the efficiency of each limit. Companies would therefore adopt different control models to account for these differences and maximize the value of the limits for the particular company in question.

Another theory is that the control limits adopted are influenced by a company's legal advisors. Control limits are drafted by the lawyers. Typically for charters and other transactional and governance documents, a law firm has one or more template (or "precedent") agreements of each contract stored in an internal document management system. For example, they may have a precedent charter for a single-class company and a precedent charter for a multiclass company. These might be actual charters from a recent IPO or they might be form charters with blanks or brackets for the company name and other information to be filled in. An attorney, typically an associate, will pull the template document and make the minimal revisions necessary to use the document for another client—for example, the name of the entity and number of shares issued and outstanding. While sometimes a charter will receive more nuanced treatment, a review of hundreds of charters reveals in many instances verbatim language in most provisions.

---

[240] *See* Easterbrook & Fischel, *supra* note 102, at 1418 ("No one set of terms will be best for all; hence the "enabling" structure of corporate law."); *id.* at 1428 (noting that aspects should be "worked out one firm at a time").

[241] Of course, it is well-known that markets can be inefficient and therefore fail to accurately price in the limits on control. If controllers do not receive the full benefit of conceding various contract limits—that is, a higher stock price at the IPO—then some controllers may be less willing to support control limits.

Uniformity can be beneficial—the more familiar a charter is to advisors, the more efficiently and cost-effectively it can be prepared for a company. The more familiar the charter, and its terms, are to courts, the less uncertainty there will be in ensuing litigation.[242] There may also be a "status quo bias" or "anchoring bias" incentivizing firms to preserve the standard terms.[243] It is all about striking the right balance. Moreover, if advisors are less experienced with multiclass IPOs, then they may be less likely to depart from precedent charters and fail to provide advice on limiting the powers of a controller. Together, inefficiencies in the market for legal services, founders with significant bargaining power, and less sophisticated "counterparties" in negotiation (here, indirectly the bankers, underwriters, and eventual market) can have a powerful effect on the terms of a charter. These theories are not mutually exclusive. It is likely a combination of corporate theories that results in the perplexing network of control limits among multiclass companies.

The method of preparing legal documents from precedent agreements is not without its benefits. Many attorneys bill by the hour, where each additional six-minute increment costs the client additional money. More time spent on a contract, such as by thoughtfully and narrowly tailoring the charter to a particular company, will necessarily increase the front-end costs to clients. Higher costs may drive clients to competitor firms that can offer the same service—preparing a corporate charter and taking the company public—for a lower fee. In addition, when taking a company public, it can be difficult to predict what terms might be optimal to govern the company post-IPO.[244]

Partially driving this outcome is a reliance on ex-post remedies for any shortcomings rather than addressing issues ex ante through contractual provisions. If a charter or other corporate document is in some way deficient, shareholders have a number of options for recourse. Most directly, perhaps, would be an amendment of the charter, which typically requires that the board adopts a resolution setting forth the amendment and a vote on that proposed amendment by the shareholders.[245] If directors refuse to do so or make proposals that shareholders do not approve of, shareholders can vote out the directors in the

[242] *See generally* Michael Klausner, *Corporate Law and Networks of Contracts*, 81 VA. L. REV. 757 (1995); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 349 (1996); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

[243] *See, e.g.*, Kahan & Klausner, *Path Dependence*, *supra* note 232, at 358–62.

[244] *See* Easterbrook & Fischel, *supra* note 102, at 1437 ("The contract that is optimal ex ante may not be optimal ex post.").

[245] DEL. CODE ANN. tit. 8, § 242(b)(2) (2023).

next election cycle.[246] However, recourse dependent on shareholder approval is likely to fail should the controller vote otherwise.[247]

Alternatively, shareholders can file a lawsuit alleging they have been harmed by an action (or lack of action), often relying on claims of breach of fiduciary duties or violation of securities laws. Public shareholders can file such suits against the directors and officers, and in some instances against the controlling shareholder.[248] Perhaps most simply, a dissatisfied shareholder can also vote with their feet by selling their shares. Across each of these strategies, it is an ex-post response to a perceived inadequacy.

By structuring critical aspects of corporate governance before any incident arises, directors and shareholders have greater flexibility and certainty, and reduced litigation risk. While in other corporate contexts, ex-post strategies can be attractive avenues, their utility is limited when a company has a controlling shareholder and multiclass structure, whereby a shareholder vote (especially a vote seeking to change the charter to alter the rights of a high-vote class) is reliant on the controller's agreement. Ex-ante charter structure can serve as a private ordering solution where the fundamental terms are not beholden to the future will of the controller.

The implications of the role of law firms in shaping contract terms are meaningful not only for contractual limits on control, but also for the legal profession more broadly.[249] There is a balance to be had between reliance on a template and individual tailoring for a particular client. It need not be an onerous and excessive undertaking. In many transactional matters, law firms have two or more precedents on file for transactions with different characteristics. For example, a firm experienced in M&A will often have a buyer-friendly precedent and seller-friendly precedent merger agreement. A similar process could be used for charters, shareholder agreements, and other control-related arrangements. For example, there could be a template for strong controllers and a template for controllers with weaker bargaining power or a template for family-run firms and a template for idiosyncratic visionaries. Without a sufficient degree of tailoring, the utility of a private ordering approach is all but lost.

---

[246] Of course, for some corporate actions shareholders have the right to vote directly on a given matter as well, such as a proposed sale of the company.

[247] While in other corporate contexts the shareholder vote is a powerful tool, in the multiclass context shareholder approval is largely dependent on the controller's consent.

[248] In some instances, such as conflicted transactions, a controlling shareholder owes fiduciary duties to the company and other shareholders. As such, they can be sued for failing to act in accordance with these duties.

[249] For a discussion of lawyer-client agency problems, and the effect of various features of law firms on contractual provisions, see John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 Cal. L. Rev. 1301 (2001); *see also* Tallarita, *supra* note 98.

D. The Multiclass Debate Revisited

Let us return, in brief, to where we started: the multiclass debate more broadly. Many of the concerns critics have raised about multiclass governance can be addressed through careful drafting of the charter, treating the charter as a whole, and understanding the broader accumulation and interaction of control limits across corporate contracts. For example, if the concern is perpetual managerial entrenchment, that can be mitigated through structural limits like a time-based sunset, event-based sunsets, and retention votes. If the concern is fairness and equity for low-vote shareholders, it can be mitigated through outcome-based limits like equal treatment provisions. If the concern is the controller imposing mid-stream changes against the low-vote class's will, that can be mitigated with process-based limits like class-specific approval requirements. And if the concern is that side agreements between certain insider shareholders and the corporation grant control rights with little transparency or oversight, shifting those control rights (and limits) to the charter can increase accountability.

On the other hand, proponents of multiclass may argue that such limits decrease the desirability of multiclass to founders and the value multiclass governance brings. Recall that proponents argue that multiclass structures protect founders from short-term market pressures, allowing entrepreneurial leaders to pursue unique or idiosyncratic visions.[250] It can also encourage otherwise ambivalent founders to go public[251] and protect corporate value from the will of uninformed public shareholders.[252] If the founder has a unique and innovative vision that they wish to insulate from short-term market pressure, then a requirement that the low-vote class separately approve certain actions would put the firm at the whims of the market. A similar critique arises if the concern is that uninformed public shareholders will hurt corporate value. But there is a natural response: The sheer range of contractual control limits allows customization. If the controller brings value because of their ability to influence the direction of the company, then process and structural limits are less desirable, while outcome-based limits ensuring equal (or better) treatment for the low-vote shares would presumably be value creating.

So, what does this mean for the multiclass debate? Each company and controller are unique, and a tailored, private ordering approach allows for optimal governance arrangements for a given company. Trading across terms creates value for the firm and its shareholders, treating the charter as an entire contract allows for greater flexibility in mitigating the drawbacks of

[250] *See, e.g.*, Fischel, *supra* note 79, at 137–38; Goshen & Hamdani, *supra* note 79.

[251] *See* Clayton, *supra* note 10.

[252] *See* Lund, *supra* note 11, at 506–20; Kastiel & Nili, *supra* note 11, at 99 (arguing that "uninformed retail investors could also support proposals that are not beneficial to the corporation").

multiclass governance, and situating the charter in the broader landscape of corporate contracts provides a more complete picture of the grants, and limits, on control. Thus, concerns about the value of multiclass governance may be overstated.

Conclusion

Control is a cornerstone of modern corporate governance. Companies have increasingly embraced the use of contractual limits of control in their charters, shareholder agreements, and other governance-related contracts. Yet academics and practitioners alike have overlooked the important effects that a network of limits on control have on governance. By treating the charter as a contract, the limits as a network within that contract, and the charter as one contract among the broader landscape of corporate contracts, multiclass governance can be made more efficient. The economic impact is considerable: Through negotiating across provisions and contracts, firms can create value, manage information asymmetries, and allocate risk. By situating control limits in the broader context of the corporate contracting landscape, party incentives can be better aligned and moral hazard reduced. As a result of the accumulation of control limits uncovered in this Article, the concerns associated with multiclass structures may be overstated. While the findings and analysis in this Article center on multiclass governance, they have meaningful implications for control in corporate law more broadly.