

# THE NON-TRANSFERABILITY OF SUPER VOTING POWER: ANALYZING THE “CONVERSION FEATURE” IN DUAL-CLASS TECHNOLOGY FIRMS

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## ABSTRACT

*Snap Inc.’s IPO in 2017 is one recent example of a U.S. corporation going public in the footsteps of Alphabet and, to a certain extent, Facebook with different classes of common stock, including non-voting as well as super voting stock. Dual-class structures are very controversial, as demonstrated by the recent decision not to list dual-class companies in major stock indexes, such as the S&P 500. On the other hand, competition among stock exchanges around the world has recently led Hong Kong and Singapore to revisit their listing requirements in order to attract more innovative technology firms.*

*This Article focuses on one special feature of this “new generation” of controlling shareholders, namely the “founder-specific” nature of their shares, which is usually expressed in a conversion feature in the certificate of incorporation. In general, this “conversion feature”—as understood in this Article—stipulates that the super voting power is lost upon certain kinds of transfers. This Article demonstrates that the non-transferability of super voting power has positive as well as negative effects and proposes a corporate governance solution to mitigate these disadvantages. In doing so, the Article takes a broad comparative perspective, looking not only at jurisdictions that have traditionally employed dual-class structures but also at jurisdictions that are currently revisiting their dual-class policy and at jurisdictions with other compelling approaches toward restrictions on the transferability of shares.*

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## INTRODUCTION AND DEFINITIONS

Dual-class share structures are one of the most controversial issues in the corporate governance debate of the twenty-first century. In particular, there is a growing amount of literature on whether disparate voting rights should be perpetual or

whether there should be mandatory sunset provisions.<sup>1</sup> Although there is a voluminous body of literature on dual-class structures in general, there has been surprisingly little research on one specific charter provision often found in dual-class corporations, namely the conversion of super voting stock into inferior stock upon certain kinds of transfers.<sup>2</sup> This Article will focus on this charter provision, thereby filling the gap in the literature.

This “conversion feature” — the term I will use throughout the Article — leads to the non-transferability of super voting power and is particularly common among U.S. technology firms.<sup>3</sup> In fact, a recent study found that only thirteen of the sixty-eight corporations that went public after Google’s IPO in 2004 allow for the free transferability of super voting shares, whereas thirty of the fifty corporations that went public before Google still allow this transferability.<sup>4</sup> Moreover, while only 5% of the dual-class firms of the twentieth century include a conversion upon the death of the founder, 22% of the dual-class firms of the first decade of the twenty-first century and 54% of the dual-class firms of the second decade of the twenty-first century include this conversion feature.<sup>5</sup> This increase clearly shows that the

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1. See generally Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585 (2017) (arguing in favor of mandatory sunset clauses); David Berger et al., *Why Dual-Class Stock: A Brief Response to Commissioners Jackson and Stein*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 22, 2018), <https://corpgov.law.harvard.edu/2018/02/22/why-dual-class-stock-a-brief-response-to-commissioners-jackson-and-stein/> (arguing in favor of more liberties for dual-class structures); Robert J. Jackson, *Perpetual Dual-Class Stock: The Case Against Corporate Royalty*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 16, 2018), <https://corpgov.law.harvard.edu/2018/02/16/perpetual-dual-class-stock-the-case-against-corporate-royalty/> (analyzing the decreasing value of perpetual dual-class shares).

2. See generally Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 5, 2017), <https://corpgov.law.harvard.edu/2017/08/05/sunrise-sunset-an-empirical-and-theoretical-assessment-of-dual-class-stock-structures/> (presenting “the first empirical analysis . . . of the initial and terminal provisions . . . found in the charters of dual class companies”).

3. See, e.g., Snap Inc., Amended and Restated Certificate of Incorporation of Snap Inc. (Form EX-3.1) (Jan. 26, 2017) [hereinafter *Amended Certificate of Incorporation of Snap Inc.*], <https://www.sec.gov/Archives/edgar/data/1564408/000119312517029199/d270216dex32.htm>.

4. See Winden, *supra* note 2, at 27.

5. *Id.* at 23.

non-transferability of super voting power—be it *inter vivos*<sup>6</sup> or *mortis causa*<sup>7</sup>—is a distinguishing characteristic of modern U.S. technology firms.

Before elaborating on the structure of this Article in more detail, it is necessary to provide some background and definitions on dual-class structures in general. Broadly speaking, dual-class structures are characterized by the existence of different classes of shares, one with more and the other with fewer voting rights relative to the shares held.<sup>8</sup> Therefore, dual-class structures deviate from the default rule of proportionate voting in corporate law, which entitles each share to one vote.<sup>9</sup> There are, of course, several ways to introduce an unequal voting system, such as by imposing multi-voting shares (with multiple votes per share), non-voting shares (with no voting rights at all), or priority shares (with special decision or voting rights).<sup>10</sup> This Article focuses on dual-class structures which include shares with super voting power (also called

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6. *What Is Inter Vivos?*, L. DICTIONARY, <https://thelawdictionary.org/inter-vivos/> (last visited Dec. 15, 2018) (defining *inter vivos* as “between the living” or “from one living person to another”).

7. *What Is Mortis Causa?*, L. DICTIONARY, <https://thelawdictionary.org/mortis-causa> (last visited Dec. 15, 2018) (defining *mortis causa* as “[b]y reason of death” or “in contemplation of death”).

8. See Anita Anand, *Governance Complexities in Firms with Dual Class Shares*, 3 ANNALS CORP. GOVERNANCE 1, 9–10 (2018).

9. See, e.g., DEL. CODE ANN. tit. 8, § 212(a) (2002) (enabling each share to be entitled to one vote unless otherwise provided).

10. Shen Junzheng, *The Anatomy of Dual Class Share Structures: A Comparative Perspective*, 46 H.K. L.J. 477, 479–80 (2016); see also TARA GRAY, ECON. DIV., LIBRARY OF PARLIAMENT (CAN.), DUAL CLASS SHARE STRUCTURES AND BEST PRACTICES IN CORPORATE GOVERNANCE 3 (2005), <http://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0526-e.pdf> (classifying dual-class shares in Canada into non-voting shares, multi-voting shares, subordinate-voting shares, limited-voting shares, and restricted voting shares); INSTITUTIONAL S’HOLDER SERVS. ET AL., REPORT ON THE PROPORTIONALITY PRINCIPLE IN THE EUROPEAN UNION 14–15 (2006), [http://ec.europa.eu/internal\\_market/company/docs/shareholders/study/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf) (taking a broader approach toward control enhancing mechanisms in Europe that do not follow the proportionality principle and subdividing them into multi-voting right shares, non-voting shares, non-voting preferred shares, pyramid structures, priority shares, depository certificates, voting right ceilings, ownership ceilings, supermajority provisions, golden shares, partnerships limited by shares, cross-shareholding, and shareholders agreements).

multiple or augmented voting power).<sup>11</sup> In general, dual-class structures come with advantages as well as disadvantages. The most-cited advantages include allowing the founders to exercise their superior leadership skills and focus on long-term success.<sup>12</sup> The most-cited disadvantages are entrenchment, which isolates the controlling shareholders from the market for corporate control, and low equity holdings, which means that the controlling shareholders only bear a small financial risk compared to their amount of control.<sup>13</sup> Whether dual-class structures are harmful or beneficial is an unresolved issue, with a list of empirical studies pointing in both directions.<sup>14</sup>

As already mentioned, this Article focuses on a particular strand of this debate that has received insufficient attention: the non-transferability of super voting power, mostly found in dual-class technology firms, and the effects of this conversion feature. The Article is structured as follows: Part I analyzes the conversion features of three paradigmatic U.S. technology firms, namely Snap Inc., Facebook Inc., and Alphabet Inc.<sup>15</sup> In doing so, the Article reveals important differences between the conversion features of these corporations, especially regarding the treatment of family members, and analyzes the advantages and disadvantages of these differences. Furthermore, the Article takes a broader perspective and shows that there are not only positive but also negative effects related to the non-transferability of super voting power in general. On the one hand, the conversion feature has the advantages of functioning as a “natural” sunset provision and aligning the founder’s long-term incentives with those of the corporation. Conversely, the

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11. See Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 *YALE L.J.* 948, 956–57 (2014) (explaining the shift from restricted voting to *pro rata* voting to augmented voting).

12. Bebchuk & Kastiel, *supra* note 1, at 609–11; cf. Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 *COLUM. L. REV.* 767, 796–97 (2017) (analyzing how firms may maximize value by selecting a dual-class structure that gives managers greater control).

13. Bebchuk & Kastiel, *supra* note 1, at 602.

14. Anand, *supra* note 8, at 61–83.

15. Hereinafter, this essay refers to these corporations as Snap, Facebook, and Alphabet, without using the appendix “Inc.”

conversion feature also prohibits efficiency-enhancing changes in control.

The Article goes on in Part II to compare the dual-class share structures of Snap, Facebook, and Alphabet with the “older” generation of controlling shareholder corporations in the United States, namely the newspaper industry. The Article shows that conversion features have not been common among newspaper companies in the United States, and points to efficiency-enhancing changes of control that have been made possible in these businesses.

Part III then compares the conversion features of U.S. technology firms with corporate governance models found in other jurisdictions. It analyzes not only jurisdictions which have traditionally allowed multi-voting shares, such as Canada and Sweden, but also jurisdictions which are currently revisiting their policies regarding dual-class structures, such as Hong Kong and Singapore. The Article will reveal how influential the conversion features used by U.S. technology firms have been. It also takes a broader perspective and analyzes jurisdictions that do not allow for multi-voting shares but, nonetheless, have compelling approaches toward possible restrictions on the transferability of shares, such as Germany and Austria. In particular, the Article proposes introducing a modification to the current conversion feature that would allow for the transfer of super voting stock but is contingent upon the approval of the corporation.

#### I. RELEVANT CLAUSES IN THE CERTIFICATES OF INCORPORATION OF U.S. TECHNOLOGY FIRMS

The purpose of the following sections is to provide an overview of a recent trend found in U.S. dual-class technology firms. In particular, this trend consists of the conversion of super voting shares into a “minor” class of shares with less or

no voting power upon certain kinds of transfers, leading to the loss of super voting power.<sup>16</sup>

### A. *Method of Comparison*

In order to allow a meaningful comparison of the certificates of incorporation examined, this Article classifies them according to three questions: (1) which classes of common stock are there and who holds them?, (2) what is the main difference between the several classes of common stock, especially with respect to voting rights?, and (3) how does the certificate of incorporation ensure the non-transferability of super voting power and how strict are these provisions?

The comparison focuses on three technology firms, Snap, Facebook, and Alphabet, which are listed from newest to oldest according to their “original” IPO date.<sup>17</sup> When it comes to dual-class share structures in the United States, Alphabet and Facebook are probably the most well-known examples.<sup>18</sup> An examination of Snap’s certificate of incorporation demonstrates the currency of dual-class structures.

### B. *Snap*

This overview will begin with the most recent, and still controversial, IPO of Snap, which took place in March 2017.<sup>19</sup> As reflected in Article IV.1 of Snap’s Amended and Restated Certificate of Incorporation, there are three classes of authorized common stock: 3 billion shares of Class A Common

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16. See Winden, *supra* note 2, at 23, 27 (discussing the increasing use of conversion features by U.S. technology firms since Google’s IPO).

17. Alphabet comes before Facebook because Alphabet’s predecessor, Google, had its IPO in 2004, whereas Facebook’s IPO took place in 2012. See, e.g., *If You Had Invested Right After Google’s IPO*, INVESTOPEDIA, <https://www.investopedia.com/articles/active-trading/081315/if-you-would-have-invested-right-after-googles-ipo.asp> (last updated Aug. 15, 2015); *If You Had Invested Right After Facebook’s IPO (FB, TWTR)*, INVESTOPEDIA, <https://www.investopedia.com/articles/markets/081415/if-your-would-have-invested-right-after-facebooks-ipo.asp> (last updated Aug. 14, 2015).

18. Anand, *supra* note 8, at 7.

19. See, e.g., Shawn Tully, *Why the Snap IPO Was a \$1.1 Billion Disaster for Snapchat*, FORTUNE (Mar. 2, 2017), <http://fortune.com/2017/03/02/snapchat-ipo-snap-disaster/> (discussing the controversy of Snap underpricing its shares).

Stock, 700 million shares of Class B Common Stock, and about 260 million shares of Class C Common Stock.<sup>20</sup> Article V.1.15 of the Certificate defines “Qualified Stockholders” as including the initial registered holders of Class B and Class C Common Stock, as well as permitted transferees.<sup>21</sup> Whereas Class C Common Stock is reserved for the co-founders, CEO Evan Spiegel and CTO Bobby Murphy, and Class B Common Stock for executives and early investors, only Snap’s Class A Common Stock is traded on the New York Stock Exchange.<sup>22</sup>

The most significant difference between Snap’s three classes of common stock can be found in their voting rights as defined in Article V.3.1 of the Certificate of Incorporation.<sup>23</sup> While Class A Common Stock does not have any voting rights, Class B Common Stock is entitled to one vote per share and Class C Common Stock to ten votes per share.<sup>24</sup> This feature is the reason why Snap will not have a chance to be included in the S&P 500 firms according to the index’s policy change announced in July 2017.<sup>25</sup>

The central question for the purposes of this Article is how Snap’s Certificate of Incorporation ensures that the super voting power given to Class C Common Stock—and to some extent also to Class B Common Stock—cannot be transferred to parties other than the initial shareholders. The Certificate differentiates between “Permitted Transfers” in Article V.1.14 and “Transfers” in Article V.1.18.<sup>26</sup> The main difference between these two categories is that transfers other than permitted transfers lead to the automatic conversion of the shares and, therefore, to the loss of super voting power, according to Article

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20. Amended Certificate of Incorporation of Snap Inc., *supra* note 3, at 1.

21. *Id.* at 5.

22. See Kurt Wagner, *One Way Snapchat’s IPO Will Be Unique: The Shares Won’t Come with Voting Rights*, RECODE (Feb. 21, 2017, 8:30 AM), <https://www.recode.net/2017/2/21/14670314/snap-ipo-stock-voting-structure>.

23. See Amended Certificate of Incorporation of Snap Inc., *supra* note 3, at 8.

24. Wagner, *supra* note 22.

25. Trevor Hunnicutt, *S&P 500 to Exclude Snap After Voting Rights Debate*, REUTERS (July 31, 2017, 9:44 PM), <https://www.reuters.com/article/us-snap-s-p/sp-500-to-exclude-snap-after-voting-rights-debate-idUSKBN1AH2RV>.

26. See Amended Certificate of Incorporation of Snap Inc., *supra* note 3, at 6–7.



V.5(b)(ii) and Article V.6(a)(i).<sup>27</sup> By logical extension, the transfer of Class C Common Stock leads to the conversion into Class B Common Stock (holding one vote per share), and the transfer of Class B Common Stock leads to the conversion into Class A Common Stock (holding no voting rights).

Since Snap's stock structure includes three different classes of common stock, it is necessary to examine Class B and Class C Common Stock separately.<sup>28</sup> Class C Common Stock, which is held by the co-founders, will convert into Class B Common Stock upon the occurrence of certain triggering events as described in Article V.6(a) of the Certificate.<sup>29</sup> These triggering events include (1) the transfer (other than a permitted transfer) of shares, (2) the affirmative election of the holder, (3) the representation of less than 30% of Class C Common Stock by a founder, and (4) nine months after a founder's death.<sup>30</sup> It follows that the super voting stock converts not only upon its transfer, but also upon the voluntary decision of a founder, a triggering percentage of stock holdings, and a certain timeframe after the founder's death.

Class B Common Stock, which is owned by executives and early investors,<sup>31</sup> has a similar conversion feature according to Articles V.5(a) and (b) of the Certificate. However, there are three main differences with respect to the conversion feature of Class C Common Stock. First, Class B Common Stock will convert automatically into Class A Common Stock at the "Final Conversion Date," which is defined in Article V.1.7 of the Certificate as "following the IPO Date, the date fixed by the Board that is no less than 61 days and no more than 180 days following the date that no shares of Class C Common Stock are

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27. *Id.* at 9–10.

28. *See id.* at 2–11 (discussing how there can be no conversion feature regarding Class A Common Stock found in Snap's Certificate of Incorporation).

29. *Id.* at 10.

30. *Id.*

31. *See* Biz Carson, *Here's Who Is Going to Get Rich from the Snap IPO*, BUS. INSIDER (Feb. 2, 2017), <http://www.businessinsider.com/biggest-snapchat-shareholders-2017-1/#evan-spiegel-snap-cofounder-and-ceo-1> (providing an informative list of the owners of Class B Common Stock).

outstanding.”<sup>32</sup> The existence of a final conversion date of Class B into Class A Common Stock is the most important distinction with respect to Class C Common Stock.<sup>33</sup> Other differences between the conversion feature of Class B and Class C Common Stock include the lack of a minimum percentage requirement of stock representation for Class B Common Stock and the lack of a nine-month period after the qualified stockholder’s death for Class B Common Stock.<sup>34</sup>

What applies equally to both classes of Snap’s voting common stock is the definition of “Transfer” in Article V.1.18 and “Permitted Transfer” in Article V.1.14 of the Certificate.<sup>35</sup> The category of permitted transfers can be summarized as transfers from a qualified shareholder, i.e., the founders or executives and early investors, to a separate legal entity, such as a trust, provided that the qualified shareholder “has sole dispositive power and exclusive Voting Control with respect to the shares of Class B Common Stock or Class C Common Stock.”<sup>36</sup> As soon as the qualified shareholder loses these exclusive rights to the separate legal entity, the shares automatically convert into a “minor” category and, therefore, lose the super voting power.<sup>37</sup> Moreover, the transfer by a founder, a permitted transferee, or a qualified trustee to the other founder, a permitted transferee, or a qualified trustee also qualifies as a permitted transfer.<sup>38</sup> Transfers other than permitted transfers are defined broadly and include voluntary as well as involuntary transfers by operation of law.<sup>39</sup> Beyond that, entering into a binding agreement with respect to voting control also constitutes a transfer.<sup>40</sup>

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32. See Amended Certificate of Incorporation of Snap Inc., *supra* note 3, at 3.

33. *Id.* at 9.

34. *Id.* at 9–10.

35. *Id.* at 4, 7.

36. *Id.* at 4.

37. *Id.* at 4, 9–10.

38. *Id.* at 5.

39. *Id.* at 6.

40. *Id.*

### C. Facebook

Whereas Snap has realized its plan of introducing common stock with no voting rights, Facebook has recently abandoned the idea of issuing a new, non-voting Class C Common Stock.<sup>41</sup> As provided in Article IV.1 of Facebook's Restated Certificate of Incorporation from April 2012, there are currently two classes of common stock: 5 billion shares of Class A Common Stock and 100 million shares of Class B Common Stock.<sup>42</sup> According to Facebook's recent Schedule 14A filing, Class B Common Stock is mainly owned by Chairman and CEO Mark Zuckerberg, whereas a comparably minor proportion of Class B Common Stock is owned by other executive officers and directors.<sup>43</sup> Similar to Snap's super voting stock, Class B Common Stockholders in Facebook have the right to ten votes per share according to Article IV.3.2 of the Certificate of Incorporation.<sup>44</sup>

Facebook's Certificate of Incorporation also includes a conversion feature in Article IV.3.8(b) which, generally speaking, stipulates the automatic conversion of Class B Common Stock into Class A Common Stock upon the occurrence of a transfer other than a permitted transfer.<sup>45</sup> However, in comparison to Snap's conversion feature, Facebook's Certificate provides a much broader definition of "Permitted Transfer" in Article IV.4.8 and "Permitted Entity" in Article IV.4.7.<sup>46</sup> In particular, the definition of "Permitted Transfer" includes the transfer of Class B Common Stock from a qualified stockholder to one or more family members, to a

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

42. See Facebook, Inc., Restated Certificate of Incorporation (Form EX-3.3) (Apr. 23, 2012) [hereinafter Certificate of Incorporation of Facebook], <https://www.sec.gov/Archives/edgar/data/1326801/000119312512175673/d287954dex33.htm>.

43. Facebook, Inc., Proxy Statement (Form DEF 14A) (Apr. 14, 2017) [hereinafter Facebook Proxy Statement].

44. See Certificate of Incorporation of Facebook, *supra* note 42, at 2.

45. *Id.* at 4.

46. *Id.* at 7–8.

permitted entity, and/or to a living trust.<sup>47</sup> The term “Permitted Entity” is also defined in a broader sense as, *inter alia*, trusts, limited liability companies, and corporations.<sup>48</sup> Moreover, permitted beneficiaries or owners are not only qualified shareholders, but also their family members or other permitted entities.<sup>49</sup> This possibility of transfers to family members allows for the creation of the type of inherited corporate control that is common in continental Europe and emerging markets.<sup>50</sup>

However, as widely reported by the media at the end of 2015, Mark Zuckerberg is planning to donate most of his shares over a long-term period for philanthropic purposes.<sup>51</sup> According to Facebook’s SEC disclosure, Mark Zuckerberg has established the Chan Zuckerberg Initiative, LLC for this purpose, which is to remain under his control.<sup>52</sup> Moreover, the SEC disclosure states that Mark Zuckerberg intends to not give up his voting control in Facebook, although he is giving away most of his shares.<sup>53</sup> The latter attitude has led to the controversy about the creation of a new class of non-voting common stock, as mentioned earlier. Mark Zuckerberg’s original plan was to issue non-voting Class C Common Stock as a dividend for Class A and Class B Common Stock.<sup>54</sup> Due to the threat of shareholder lawsuits, however, Facebook’s Board changed its opinion and now there is the possibility that Mark Zuckerberg’s control

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47. *Id.* at 7.

48. *Id.*

49. *Id.*

50. See, e.g., John Armour et al., *What Is Corporate Law?*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 1, 29–33 (Reinier Kraakman et al. eds., 3d ed. 2017) (analyzing the dispersed ownership in the United States and the United Kingdom in comparison to the controlling shareholder systems in other countries).

51. Vindu Goel & Nick Wingfield, *Mark Zuckerberg Vows to Donate 99% of His Facebook Shares for Charity*, N.Y. TIMES (Dec. 1, 2015), <https://www.nytimes.com/2015/12/02/technology/mark-zuckerberg-facebook-charity.html>.

52. *Our Approach*, CHAN ZUCKERBERG INITIATIVE, <https://chanzuckerberg.com/about> (last visited Dec. 15, 2018).

53. Facebook, Inc., Current Report (Form 8-K) (Dec. 1, 2015).

54. Kathleen Chaykowski, *How Facebook Is Making Sure Zuckerberg Stays in Control Forever*, FORBES (Apr. 27, 2016, 6:35 PM), <https://www.forbes.com/sites/kathleenchaykowski/2016/04/27/how-facebook-is-making-sure-zuckerberg-stays-in-control-forever/#32b66726e97c>.

might be diluted in the future if he continues to donate more of his shares.<sup>55</sup>

#### D. *Alphabet*

Google Inc.'s IPO in 2004 is often referred to as the most influential model for other technology firms going public with a dual-class structure.<sup>56</sup> Google underwent a major change in its corporate structure in 2015, leaving Alphabet as the new holding corporation of Google.<sup>57</sup> One of the most important changes in Google's capital structure over the intervening years was the introduction of non-voting Class C Common Stock in 2012 in order to secure the long-term influence of the co-founders, Larry Page and Sergey Brin.<sup>58</sup>

According to Article IV, section 1 of Alphabet's current Certificate of Incorporation, there are three classes of common stock: 9 billion shares of Class A Common Stock, 3 billion shares of Class B Common Stock, and 3 billion shares of Class C Common Stock.<sup>59</sup> As stated in Alphabet's recent Schedule 14A filing, the main owners of Class B Common Stock are the co-founders, Larry Page (CEO and director) and Sergey Brin (president and director).<sup>60</sup> Other executive officers and directors only hold a minor share of Class B Common Stock.<sup>61</sup> Class B Common Stock is entitled to ten votes per share, while Class A Common Stock only has one vote per share and Class C

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55. Heath, *supra* note 41.

56. Compare, e.g., Bebchuk & Kastiel, *supra* note 1, at 591 (describing other "hot" technology firms as following Google's lead), with Tian Wen, Comment, *You Can't Sell Your Firm and Own It Too: Disallowing Dual-Class Stock Companies from Listing on the Securities Exchange*, 162 U. PA. L. REV. 1495, 1497 (2014) (pointing out that other companies now have similar capitalization structures).

57. Google Inc., Current Report (Form 8-K) (Aug. 10, 2015).

58. Steven Davidoff Solomon, *New Share Class Gives Google Founders Tighter Control*, N.Y. TIMES (Apr. 13, 2012, 9:17 AM), <https://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/>.

59. Alphabet Inc., Restated Certificate of Incorporation (Form EX-3.1) (Oct. 2, 2015) [hereinafter Restated Certificate of Incorporation of Alphabet Inc.], <https://www.sec.gov/Archives/edgar/data/1652044/000119312515336577/d82837dex31.htm>.

60. Alphabet Inc., Proxy Statement (Form DEF 14A) (Apr. 28, 2017).

61. *Id.*

Common Stock does not have any voting rights according to Article IV, section 2 of the Certificate of Incorporation.<sup>62</sup> Both Class A and Class C Common Stock are traded on the NASDAQ stock exchange.<sup>63</sup>

The basic structure of Alphabet's conversion feature is similar to Snap's, as already outlined.<sup>64</sup> According to Article IV, section 2(f)(iii) of the Certificate, each share of Class B Common Stock shall automatically convert into one share of Class A Common Stock upon a transfer, other than certain stipulated transactions.<sup>65</sup> In particular, the permitted transfers include the transfer from one founder to the other founder—under Article IV, section 2(f)(iii)(1)—or from a Class B Common Stockholder to a permitted entity, such as a trust, while the Class B Common Stockholder either needs to be the sole beneficiary or hold the sole dispositive power and exclusive voting right, under Article IV, section 2(f)(iii)(2).<sup>66</sup>

Alphabet's Certificate of Incorporation expressly deals in Article IV, section 2(f)(iv) with the consequences of the death of one or both founders.<sup>67</sup> In principle, Class B Common Stock will convert into Class A Common Stock upon the death of the shareholder.<sup>68</sup> However, if one founder transfers his voting control—effective upon his death—to the other founder, the shares convert nine months after the transferring founder's death or as soon as the transferee founder loses voting control over the shares.<sup>69</sup> Moreover, if both founders die simultaneously, the shares also convert after nine months or as soon as the voting control is lost.<sup>70</sup>

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62. See Restated Certificate of Incorporation of Alphabet Inc., *supra* note 59, at 5–7.

63. *What's the Difference Between Alphabet's GOOG and GOOGL?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/052615/whats-difference-between-googles-goog-and-googl-stock-tickers.asp> (last updated Dec. 4, 2018).

64. See Amended Certificate of Incorporation of Snap Inc., *supra* note 3; see also Restated Certificate of Incorporation of Alphabet Inc., *supra* note 59.

65. See Restated Certificate of Incorporation of Alphabet Inc., *supra* note 59, at 5–7.

66. *Id.* at 5–6.

67. *Id.* at 8.

68. *Id.*

69. *Id.*

70. *Id.*

### *E. Comparison and Implications*

After examining the charter provisions ensuring the non-transferability of super voting power, it is now time to point out and evaluate the differences among Snap's, Facebook's, and Alphabet's conversion features. Beyond that, I would like to argue that the conversion feature, in general, has positive as well as negative effects, resulting in its Janus-faced nature.

#### *1. Analysis and evaluation of the differences*

What can be seen from the conversion features of the three studied technology firms is that there is a big difference between the permitted transfers in Snap and Alphabet on the one hand and Facebook on the other.<sup>71</sup> Whereas Snap and Alphabet only allow for transfers to controlled entities and for beneficial ownership—both are really transfers in form, but not in substance—without triggering the loss of super voting power, Facebook offers more exceptions.<sup>72</sup> In particular, Facebook permits the transfer of super voting shares to other family members, while these transfers are not directly mentioned in Snap's or Alphabet's certificates of incorporation.<sup>73</sup> Therefore, the corporate structure in Snap and Alphabet is more founder-specific than the one in Facebook. This distinction can also be seen by the fact that the names of both Snap's and Alphabet's founders are expressly defined in the certificates of incorporation, whereas this is not the case in Facebook's charter.<sup>74</sup>

Beyond that, there is another stunning difference in the conversion features of Snap and Alphabet on the one hand and Facebook on the other. In Snap and Alphabet, the super voting

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71. For these differences, see Winden, *supra* note 2, at 22–32 (analyzing death and incapacity sunsets as well as transfer sunsets).

72. See Amended Certificate of Incorporation of Snap Inc., *supra* note 3, at 4–7; see also Restated Certificate of Incorporation of Alphabet Inc., *supra* note 59, at 4.

73. See Certificate of Incorporation of Facebook, *supra* note 42, at 7.

74. See Amended Certificate of Incorporation of Snap Inc., *supra* note 3, at 3 (defining Evan Spiegel and Robert Murphy as founders); see also Restated Certificate of Incorporation of Alphabet Inc., *supra* note 59, at 4 (defining Larry Page and Sergey Brin as founders).

common stock converts into voting common stock with one vote per share and, therefore, still has more power than the non-voting common stock.<sup>75</sup> This is especially important in Snap since only its non-voting common stock is publicly traded—a fact which distinguishes Snap not only from Facebook but also from Alphabet. Consequently, if both of Snap’s founders transfer their shares, the acquirer in practice has control because he is the only one with voting rights. Given that Snap does not have traded voting shares, the conversion of super voting stock into voting stock does not make much difference because Snap’s heirs and/or transferees will have entrenched control nonetheless. It follows that Snap’s conversion feature does not have the same effects—be it the positive or the negative ones—as the conversion features employed in Facebook or Alphabet. Of course, this logic can be applied only once because as soon as the acquirer wants to sell the shares, they also convert into non-voting common stock.<sup>76</sup> On the other hand, if Mark Zuckerberg transfers his shares to a non-authorized party, they convert into voting common stock with one vote per share and, therefore, do not have any special rights which might go beyond those of the publicly traded common stock.

Given the differences between the conversion features in Snap, Facebook, and Alphabet, one might argue that a narrow definition of permitted transfers, which does not include family members, is superior from a policy perspective.<sup>77</sup> After all, one particularly prevalent justification for dual-class structures in

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75. See Amended Certificate of Incorporation of Snap Inc., *supra* note 3, at 8–9; see also Restated Certificate of Incorporation of Alphabet Inc., *supra* note 59, at 5.

76. This conversion would finally leave Snap with no voting stock at all. Whether this situation will ever occur and whether it has been taken into account by the drafters of Snap’s charter is unclear. Moreover, it is unclear whether the existence of a corporation without any voting stock is in accordance with Delaware corporate law, which would apply to Snap as a Delaware corporation. Although Snap is permitted to issue non-voting stock per se, it is not clear whether the absence of any voting stock is in accordance with the DGCL which at least requires shareholder voting for directorial elections, *see, e.g.*, DEL. CODE ANN. tit. 8, §§ 211–12 (2018), fundamental transactions, *see, e.g.*, DEL. CODE ANN. tit. 8, §§ 242, 251, 271, and shareholder resolutions and proposals, *see, e.g.*, 17 C.F.R. § 240.14a–8 (2018) (stating the federal securities regulations).

77. See Winden, *supra* note 2, at 65, 68 (stating that high-votes should convert upon any transfer by the founder, but also at the founder’s death or incapacity).



the United States is the idea that dual-class structures ensure that the original founders—with their specific visions—can keep their influence in the corporation.<sup>78</sup> This justification for dual-class structures indicates that the conversion feature should not include family members, as the shareholders have placed their trust in the founders, not in their families. Moreover, the family members often lack the necessary business expertise.<sup>79</sup> This explains why the founders have adopted a dual-class structure in conjunction with a conversion feature that does not apply equally to family members. Beyond that, imposing a narrow definition of permitted transfers, which does not include family members, leads to a “natural” end of both super voting power and inequality in the corporate structure because even founders are not immortal.<sup>80</sup> A recent study found that dual-class shares with sunset provisions lose less value over time than the ones with perpetual dual-class shares, which is a strong argument for including at least this kind of “natural” sunset provision.<sup>81</sup>

On the other hand, one could argue that there are other justifications for allowing dual-class structures, such as the idea that dual-class structures induce controlling shareholders to take their companies public without losing control.<sup>82</sup> This interpretation does not necessarily preclude the transfer of control to family members if this transferability is valued by the original founders. Moreover, the non-transferability of super voting power even to a small circle of family members might be

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78. See, e.g., Bebchuk & Kastiel, *supra* note 1, at 585 (stating that the dual-class structure allows the founders to retain a lock of control while holding only a minority of the equity capital); Junzheng, *supra* note 10, at 477 (stating that dual-class structures facilitate long-term business strategies).

79. See Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1668 (2006) (explaining the gravity of generations).

80. See Bebchuk & Kastiel, *supra* note 1, at 619 (mentioning the founder’s death as a triggering-event sunset).

81. See Jackson, *supra* note 1 (analyzing the valuation of 157 dual-class corporations over the last fifteen years).

82. See Winden, *supra* note 2, at 49 (pointing out that restrictions on dual-class structures might discourage founders from going public).

opposed to the principal long-term focus of dual-class structures. The imposition of a dual-class structure “should allow the company to focus on ‘long-term goals’ and to maximize the ‘long-term’ interests of the shareholders.”<sup>83</sup> However, if the founders are not permitted to transfer their shares to the next generation, it follows that the so-often highlighted long-term focus of dual-class structures does not really mean “long-term” over several generations, but rather “long-term” over the founders’ lifespan. One could argue that dual-class firms, such as Facebook, which allow the transferability of super voting shares to a specific group of family members,<sup>84</sup> are more long-term focused and pursue more consequently their own reasoning behind imposing a dual-class structure.<sup>85</sup>

## 2. *Positive and negative effects of the conversion feature in general*

As already noted, the existence of a conversion feature in dual-class structured firms has the advantage of functioning as a form of sunset provision.<sup>86</sup> Thereby, the conversion of super voting stock into an inferior class of stock upon certain kinds of transfers—be it *inter vivos* or *mortis causa*—can be categorized as a form of “triggering-event sunset.”<sup>87</sup> After all, the transfer leads to the loss of super voting power of the transferred shares and, therefore, a way of sunseting the dual-class structure. However, there are nonetheless important differences. First, the conversion does not take place at a predetermined date, as with “fixed-time sunsets,” or at a predetermined ownership-

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83. For the importance of the “long-term” focus in dual-class firms, see Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53, 54 (2017) (highlighting Google’s IPO in 2004 and the letters of the founders).

84. Certificate of Incorporation of Facebook, *supra* note 42, at 6 (defining as a family member the spouse, parents, grandparents, lineal descendants, siblings, and lineal descendants of siblings of a qualified stockholder).

85. See Ronald J. Gilson, *Controlling Family Shareholders in Developing Countries: Anchoring Relational Exchange*, 60 STAN. L. REV. 633, 643 (2007) (arguing that intergenerational transfer makes decisions more long-term focused).

86. See Winden, *supra* note 2, at 17–18 (discussing different types of sunset provisions that act as conversion features).

87. Bebchuk & Kastiel, *supra* note 1, at 618–20.

percentage, as with “ownership-percentage sunsets.”<sup>88</sup> Second, the “sunset” only relates to the transferred shares and not to the dual-class structure in general.<sup>89</sup> Therefore, whether the dual-class structure as a whole will come to an end depends on how many super voting shares are actually transferred.

Beyond that, the fact that the founders cannot transfer their super voting power leads to the “lock-in” of their interests, which incentivizes the founders to stay with the corporation and pursue long-term value (at least over their lifetimes).<sup>90</sup> Scholars have argued that short-term exit options reduce the controlling shareholder’s incentives to stay with the firm and pursue long-term value.<sup>91</sup> The non-transferability of super voting power, as stipulated in the conversion feature, eliminates these short-term exit options. The conversion feature is an instrument which aligns the interests of the founders and the corporations, thereby working as a substitute for the founders’ lack of equitable stakes in the corporation.<sup>92</sup> In light of this argument, the conversion feature is a form of protection for the minority shareholders against the founders. First, the conversion feature protects minority shareholders by preserving the identity of the founders, which are presumably trusted. Second, if the founders’ interests are aligned with the corporation, chances are higher that long-term shareholder value will be enhanced.

On the other hand, a strictly construed conversion feature also renders efficiency-enhancing changes in control practically impossible.<sup>93</sup> Although the conversion feature does not prohibit

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88. *Id.* at 618, 620.

89. Winden, *supra* note 2, at 22–24, 27–28.

90. The idea of a “lock-in” effect has already been pointed out in the literature, albeit in a somewhat different context. Prior literature has discussed the “lock-in” effect regarding the non-transferability of private benefits of control. Choi, *supra* note 83, at 60.

91. *Id.* at 58–59.

92. That the founders can retain control of the firm although not having “skin in the game” in the form of equitable stakes is one of the most frequently cited problems with dual-class firms in general. *See, e.g.*, Bebchuk & Kastiel, *supra* note 1, at 602 (discussing two fundamental problems with dual-class firms: entrenchment and low equity holdings).

93. *Id.* at 602 (stating that entrenchment of control is another frequently cited problem regarding dual-class shares).

a transfer of super voting shares per se, there are few incentives to engage in such a transfer for either the potential acquirers or the founders. The acquirers would not be interested in buying the founders' shares because these shares lose their special preferences at the time of the transfer, thereby making it effectively impossible to buy super voting power. In some rare circumstances, acquirers might be interested in buying the founders' shares if they believe that the performance of the firm will improve by a significant margin as soon as the original founders leave. This improvement might be caused by the elimination of the founders' private benefits of control,<sup>94</sup> but it could also be based on the departure of the founders who may have become unqualified to lead the corporation over time.<sup>95</sup>

The founders would not be interested in selling their shares—even if they were interested in giving up their control in the corporation—because there is most likely no control premium that would make the transfer financially attractive. There will probably be no control premium for the sale of the founders' shares because the acquirer does not get control merely by buying these shares.<sup>96</sup> All in all, the conversion feature builds on the presumption that no person other than the original founder is qualified to lead the corporation, thereby preventing all changes in control per sale of shares including those transactions that might actually be advantageous for the corporation.

Of course, one could argue that if the founders really wanted to transfer their shares without triggering the conversion

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94. See generally Gilson, *supra* note 79 (distinguishing between pecuniary and non-pecuniary private benefits of control).

95. See generally Jackson, *supra* note 1 (analyzing the decreasing value of perpetual dual-class shares).

96. See GILBERT E. MATTHEWS, AM. SOC'Y OF APPRAISERS, VALUATION OF SHARES OF COMPANIES WITH A DUAL CLASS STRUCTURE 23 (2016), [https://www.researchgate.net/profile/Gilbert\\_Matthews/publication/309126813\\_Valuation\\_of\\_Shares\\_of\\_Companies\\_with\\_a\\_Dual\\_Class\\_Structure/links/5800135708ae32ca2f5db988/Valuation-of-Shares-of-Companies-with-a-Dual-Class-Structure.pdf](https://www.researchgate.net/profile/Gilbert_Matthews/publication/309126813_Valuation_of_Shares_of_Companies_with_a_Dual_Class_Structure/links/5800135708ae32ca2f5db988/Valuation-of-Shares-of-Companies-with-a-Dual-Class-Structure.pdf) (stating the automatic conversion into low-vote or one-vote shares as a reason why high-vote shares might not receive a control premium). *But see, e.g.,* Wen, *supra* note 56, at 1511–15 (discussing examples where the controlling shareholder in a dual-class firm received a premium in the case of unification or merger).

feature, they could simply amend the certificate of incorporation so as to allow a broader range of transactions. Neither Snap's nor Facebook's certificates of incorporation include any particular provision about how the articles relevant to the conversion feature can or cannot be amended. Since both are Delaware corporations, section 242(b) of the Delaware General Corporation Law (DGCL) applies, which requires the board of directors to propose, and the shareholders to vote, on charter amendments.<sup>97</sup> The requirement of board approval for charter amendments distinguishes U.S. corporate law from many other jurisdictions, which is especially important in the context of fiduciary duties because the board of directors helps to constrain opportunistic amendments.<sup>98</sup> Therefore, the inclusion of a conversion feature in the certificate of incorporation outside the United States might be less credible if it is subject to shareholder amendments without board approval.

Unlike Snap and Facebook, Alphabet has an express provision dealing with the amendment of the conversion feature. According to Article XII(i), the amendment of Article IV, section 2 requires the unanimous consent of the Board of Directors and the affirmative vote of the entitled majority of the shareholders. Especially important for purposes of this Article is the unanimous consent of the Board, because consent would also include independent directors.

Regardless of these differences in the certificates of incorporation, the question arises whether the alteration or elimination of the conversion feature would "alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely," thereby triggering a class vote according to section 242(b)(2) of the DGCL.<sup>99</sup> One could argue

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97. DEL. CODE. ANN. tit. 8, § 241 (2018).

98. John Armour et al., *The Basic Governance Structure: The Interests of Shareholders as a Class*, in *THE ANATOMY OF CORPORATE LAW* 49, 57 (Reinier Kraakman et al. eds., 3d ed. 2017) (comparing decision rights of shareholders and directors in several jurisdictions).

99. See DAVID A. DREXLER ET AL., *DELAWARE CORPORATE LAW AND PRACTICE* § 32.04 (2018) (describing the case law regarding DGCL §242(b)(2)).

that the alteration or elimination of the conversion feature changes the powers of the other classes of common stock and affects them adversely because they might be controlled for a longer time and by a different person than the founders. On the other hand, section 242(b)(2) has been construed narrowly by prior case law in a way that does not include indirect effects of the charter amendment on other classes of shares.<sup>100</sup> For example, in *Hartford Accident & Indemnity Co. v. W.S. Dickey Clay Mfg. Co.*, the Supreme Court of Delaware held that as long as only the relative position of the shares is changed, such as by increasing the number of shares that have priority over dividends, no class vote is required.<sup>101</sup>

Although there is most likely no class vote necessary to amend the conversion feature, there still might be restrictions resulting from the controlling shareholders' contractual and/or fiduciary duties. As the Delaware Court of Chancery pointed out in *In re Delphi Financial Group Shareholder Litigation*, the corporate charter is a contract between the corporation's stockholders and, therefore, includes an implied covenant of good faith and fair dealing.<sup>102</sup> In *Delphi*, there were two classes of common stock similar to the already studied technology firms. Moreover, the Certificate also included a conversion feature and an equal treatment clause. Since the controlling stockholder, Robert Rosenkranz, insisted on receiving a control premium during merger discussions with another corporation,<sup>103</sup> the equal treatment clause had to be amended.<sup>104</sup> The minority shareholders subsequently asked a court of equity for an injunction against the merger. Although the court found injunctive relief inappropriate because of the availability of monetary damages and because the stockholders and corporations stood to benefit greatly from the merger, it still

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100. *Id.*

101. 24 A.2d 315, 421–23 (Del. 1942).

102. No. 7144-VCG, 2012 Del. Ch. LEXIS 45, at \*59 (Del. Mar. 6, 2012).

103. *Id.* at \*3–5.

104. *Id.* at \*16–19. Note that the conversion feature as stipulated in the examined U.S. technology firms does not hinder the founders from entering into a merger agreement, but only from the transfer of super voting power which is attached to their shares.

found that there was a reasonable likelihood of success on the merits.<sup>105</sup> In particular, the court pointed to the expectation the shareholders had in the Certificate of Incorporation when purchasing stock and to the coercive way in which the charter amendment took place.<sup>106</sup> When the shareholders afterward sued Rosenkranz for disgorgement, the case settled for \$49 million.<sup>107</sup>

Case law, therefore, suggests that controlling shareholders (i.e., the founders) do not have unfettered discretion when amending the certificate of incorporation, especially when amending provisions such as the equal treatment clause.<sup>108</sup> Building on the contractual framework of corporate charters and bylaws, recent literature even proposes stronger judicial oversight of both charter and bylaw amendments.<sup>109</sup> In particular, it suggests that courts should apply the duty of good faith and fair dealing to charter and bylaw amendments, thereby declaring amendments invalid or unenforceable if they are (procedurally or substantively) unfair or made in bad faith.<sup>110</sup> This reasoning can also be applied to other provisions in the certificate, such as the conversion feature. Therefore, the founders cannot simply amend the conversion feature to circumvent the non-transferability of super voting power, but must abide by contract law principles, especially the duty of good faith and fair dealing.

Although the court in *Delphi* did not expressly mention the fiduciary principles applicable under *Weinberger v. UOP, Inc.*, one could also argue that the elimination of the equal treatment clause in the certificate is an exclusive benefit for the controlling shareholder, which leads to the applicability of the entire

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105. *Id.* at \*43.

106. *Id.* at \*61.

107. Christopher C. McKinnon, *Dual-Class Capital Structures: A Legal, Theoretical & Empirical Buy-Side Analysis*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 81, 85 (2015).

108. See *In re Delphi*, 2012 Del. Ch. LEXIS 45, at \*56–58.

109. Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 38–43 (2018).

110. *Id.*

fairness test.<sup>111</sup> The entire fairness test under *Weinberger*—as opposed to the business judgment rule under *Sinclair Oil Corp. v. Levien*<sup>112</sup>—applies if the controlling shareholder receives a special benefit to the exclusion of the other shareholders. While the reasoning of *Weinberger* most likely would have applied in the *Delphi* case because the controlling shareholder received an exclusive benefit due to the elimination of the equal treatment clause, one cannot conclude that the entire fairness test equally applies to all charter amendments. Rather, only those charter amendments that exclusively benefit founding shareholders would be subject to the entire fairness test.

If the charter amendment alters or eliminates the conversion feature, so as to allow for the transferability of super voting power to third parties, this amendment might be considered as a special benefit conferred to the controlling shareholder in light of the control premium. Eventually, there is not much difference between the elimination of the equal treatment clause and the elimination of the conversion feature if both charter amendments allow the controlling shareholder to receive a control premium. By contrast, the elimination of the conversion feature only permitting transfers to heirs—and not to third parties—does not appear as problematic. All in all, given the grey areas between *Weinberger* on the one hand and *Sinclair Oil Corp.* on the other, the applicability of fiduciary principles to charter amendments regarding the conversion feature seems to be more controversial than the applicability of contractual principles, such as the duty of good faith and fair dealing.

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111. Under the *Weinberger* roadmap, a controlling shareholder who enters into a self-dealing transaction needs to impose an independent negotiating committee of disinterested directors, fully disclose the self-dealing transaction, and get approval of the majority of the minority shareholders in order to satisfy the procedural part of the entire fairness test. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703–04, 710–11 (Del. 1983).

112. See 280 A.2d 717, 720 (Del. 1971) (applying the business judgment rule instead of the entire fairness test because the payment of dividends affects all shareholders the same).



### 3. *Interim conclusions*

All in all, the non-transferability of super voting power as stipulated in the conversion feature of the examined technology firms has both positive and negative consequences. In general, the non-transferability of super voting power has the advantage of limiting the time frame of the dual-class structure and can be seen as a modified form of sunset provision. The conversion feature also incentivizes the founders to care about the long-term value of the firm because of the lock-in effect of their shares and, therefore, leads to the protection of minority shareholders. On the other hand, the conversion feature has the disadvantage of making efficiency-enhancing changes in control less likely, even if the founders—or at least one founder—would like to transfer their shares. Whether the non-transferability of super voting power should extend to family members is an equally debatable issue with both benefits and potential costs. Whereas imposing a strict definition of permitted transfers matches with the idea that the shareholders have placed their trust only in the founders themselves and not in their heirs, allowing for intergenerational transfers might enhance the founders' long-term focus.

## II. THE OLDER GENERATION OF CONTROLLING SHAREHOLDERS IN THE UNITED STATES

As already examined by Ronald J. Gilson, controlling shareholders through dual-class structures are common in major newspaper corporations in the United States, such as the corporations that own the *New York Times*, the *Washington Post*, and the *Wall Street Journal*.<sup>113</sup> Therefore, controlling shareholders in the newspaper business are a representative example of the older generation of controlling shareholders in the United States.

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113. Gilson, *supra* note 79, at 1666.

A. *The Importance of Nonpecuniary Private Benefits of Control*

Before analyzing the dual-class structure of these newspaper corporations in more detail, I would like to point out one possible explanation for the existence of controlling shareholders in the newspaper business. According to Gilson, this pattern can be explained by the nonpecuniary private benefits—as opposed to monetary private benefits—that arise from the control of a major national newspaper, especially the potential influence on the public and on culture.<sup>114</sup> Given Gilson’s explanation for why controlling shareholders can be found in the newspaper business, it is not surprising that controlling shareholders are now the new standard in technology firms. After all, technology firms have the ability to shape our modern culture to an even greater extent than the “older generation” of newspaper corporations.<sup>115</sup> The existence of nonpecuniary private benefits of control can be understood as an alternative explanation for why controlling shareholders are increasingly common in U.S. technology firms.<sup>116</sup>

B. *The New York Times*

The oldest of the three newspaper corporations examined here, the New York Times Company, has a dual-class structure, consisting of Class A and Class B Common Stock.<sup>117</sup> According to the third chapter of its Amended Certificate of Incorporation from 1998, there are 300 million shares of Class A Common Stock and 849,602 shares of Class B Common Stock.<sup>118</sup> As stated in the risk factors of the New York Times Company’s 10-K filing, Class B Common Stock is held to 90% by a family trust,

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114. *Id.*

115. *See, e.g.,* Anne Sheehan, *Letter from JANA Partners & CalSTRS to Apple, Inc.*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 19, 2018), <https://corpgov.law.harvard.edu/2018/01/19/joint-shareholder-letter-to-apple-inc/> (discussing the influence of smartphones on children).

116. *See supra* Introduction and Definitions (explaining that the conventional argument for why controlling shareholders are common within U.S. technology firms is based on the pursuit of the founder’s long-term vision).

117. N.Y. Times Co., SEC No-Action Letter, 2008 WL 192481 (Jan. 15, 2008).

118. *Id.*

consisting of the descendants of Adolph S. Ochs who bought the *New York Times* in 1896.<sup>119</sup> Furthermore, Class B Common Stock has special voting preferences because Class A Common Stock can only elect 30% of the Board of Directors, whereas the balance is elected by Class B Common Stock according to the fourth chapter of the Certificate of Incorporation.<sup>120</sup>

The New York Times Company's Certificate of Incorporation only includes a voluntary conversion feature, meaning Class B Common Stock can at any time be converted into Class A Common Stock upon the option of the holder thereof.<sup>121</sup> There is no involuntary conversion feature in the Certificate of Incorporation which would become effective upon certain stipulated transfers of Class B Common Stock.<sup>122</sup> The already mentioned risk factors in the New York Times Company's 10-K filing, however, show that the trustees are directed to retain the Class B Common Stock held in trust and to vote such stock against any merger, sale of assets, or other transaction pursuant to which control of the corporation passes from the trustees, unless they determine that the primary objective of the trust<sup>123</sup> can be better achieved by such a transaction.<sup>124</sup>

Therefore, a transfer of the New York Times Company's Class B Common Stock is generally possible and will not lead to a conversion of the shares according to the Certificate of Incorporation. Nevertheless, due to the limitations of the trustees' rights, a transfer is only expected to take place in exceptional circumstances.

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119. N.Y. Times Co., Annual Report (Form 10-K) (Feb. 22, 2017), [https://www.sec.gov/Archives/edgar/data/71691/000007169117000003/a2016form10-k\\_q4 project.htm](https://www.sec.gov/Archives/edgar/data/71691/000007169117000003/a2016form10-k_q4 project.htm).

120. N.Y. Times Co., *supra* note 117, at \*6; *see also* Junzheng, *supra* note 10, at 479–80 (describing the different types of dual-class structures); Winden, *supra* note 2, at 57 (discussing processes for minority shareholders to elect directors).

121. *See* N.Y. Times Co., *supra* note 117, at \*8.

122. *See id.*

123. N.Y. Times Co., Proxy Statement (Form DEF 14A) (Mar. 7, 2017), <https://www.sec.gov/Archives/edgar/data/71691/000007169117000007/a2017proxystatement.htm> (explaining that the primary objective of the trust is to “maintain the editorial independence and the integrity of [t]he New York Times and to continue it as an independent newspaper, entirely fearless, free of ulterior influence and unselfishly devoted to the public welfare”).

124. N.Y. Times Co., *supra* note 123, at 13.

*C. The Washington Post*

The *Washington Post*, in its current corporate structure, is wholly owned by Nash Holdings LLC, which is in turn wholly owned by Amazon founder and CEO, Jeff Bezos.<sup>125</sup> Prior to the securities purchase in 2013, the *Washington Post* had been wholly owned by the Washington Post Company,<sup>126</sup> now renamed Graham Holdings Company.<sup>127</sup> This corporate structure reveals that only the shares in Graham Holdings Company have been publicly traded, but not the shares in the *Washington Post* itself.<sup>128</sup> Moreover, the securities sale from the Washington Post Company to Jeff Bezos is evidence of the possibility of a change of control in newspaper corporations without triggering the conversion feature.<sup>129</sup>

The Certificate of Incorporation of the Washington Post Company from 2003 largely resembles that of the New York Times Company discussed earlier.<sup>130</sup> According to the fourth chapter of the Certificate, there are two classes of common stock, whereby the publicly traded Class B Stock only has the right to elect 30% of the Board of Directors.<sup>131</sup> Class A Stock, which has been owned by the members of the Graham family,

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125. See Neil Irwin & Ylan Q. Mui, *Washington Post Sale: Details of Bezos Deal*, WASH. POST (Aug. 5, 2013), [https://www.washingtonpost.com/business/economy/details-of-bezos-deal-to-buy-washington-post/2013/08/05/968a2bc4-fe1b-11e2-9711-3708310f6f4d\\_story.html?utm\\_term=.e09b7365ad41](https://www.washingtonpost.com/business/economy/details-of-bezos-deal-to-buy-washington-post/2013/08/05/968a2bc4-fe1b-11e2-9711-3708310f6f4d_story.html?utm_term=.e09b7365ad41).

126. See Paul Farhi, *Washington Post Closes Sale to Amazon Founder Jeff Bezos*, WASH. POST (Oct. 1, 2013), [https://www.washingtonpost.com/business/economy/washington-post-closes-sale-to-amazon-founder-jeff-bezos/2013/10/01/fca3b16a-2acf-11e3-97a3-ff2758228523\\_story.html?utm\\_term=.95253e1386ad](https://www.washingtonpost.com/business/economy/washington-post-closes-sale-to-amazon-founder-jeff-bezos/2013/10/01/fca3b16a-2acf-11e3-97a3-ff2758228523_story.html?utm_term=.95253e1386ad).

127. Debbi Wilgoren, *Washington Post Co. Renamed Graham Holdings Company to Mark Sale of Newspaper*, WASH. POST (Nov. 18, 2013), [https://www.washingtonpost.com/business/washington-post-co-renamed-graham-holdings-company-to-mark-sale-of-newspaper/2013/11/18/57fbc7fe-5060-11e3-9e2c-e1d01116fd98\\_story.html?utm\\_term=.b0a56b2ac140](https://www.washingtonpost.com/business/washington-post-co-renamed-graham-holdings-company-to-mark-sale-of-newspaper/2013/11/18/57fbc7fe-5060-11e3-9e2c-e1d01116fd98_story.html?utm_term=.b0a56b2ac140).

128. See Irwin & Mui, *supra* note 125.

129. See generally Wash. Post Co., Securities Purchase Agreement (Oct. 1, 2013), <https://www.sec.gov/Archives/edgar/data/104889/000010488913000040/dex21.htm> (detailing the new structure of voting power established by the purchase of the Washington Post Company).

130. Wash. Post Co., Annual Report (Form 10-K) (Dec. 25, 2016) (demonstrating the structure of this company's Certificate of Incorporation).

131. *Id.* at 4.

has the right to elect the remaining 70% of the Board.<sup>132</sup> Moreover, the Certificate of Incorporation only includes a voluntary conversion feature, triggered either upon the individual decision of a Class A Stockholder or upon the affirmative vote of a majority of Class A Stockholders.<sup>133</sup>

The purchase of the Washington Post Company by Jeff Bezos is a good example of how a change in control can enhance a corporation's efficiency. Since 2013, readership of the *Washington Post* has dramatically increased and its content has become suitable for the new era of digital information.<sup>134</sup>

#### D. *News Corp., Dow Jones, and the Wall Street Journal*

The purchase of Dow Jones & Company by News Corporation in 2007 (renamed "News Corp." in 2013) is another example of a family-owned newspaper corporation being sold to an outsider.<sup>135</sup> Dow Jones & Company was controlled by the Bancroft family for more than a century,<sup>136</sup> although a member of the family had not sat on the Board since 1932.<sup>137</sup> At the time of the sale in 2007, the Bancroft family owned 64% of the voting stock, held by at most twenty family members.<sup>138</sup> The most

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132. See *id.*; see also Robert Barnes & David A. Fahrenthold, *The Grahams: A Family Synonymous with the Post and with Washington*, WASH. POST (Aug. 5, 2013), [https://www.washingtonpost.com/politics/the-grahams-a-family-synonymous-with-the-post-and-with-washington/2013/08/05/94f26d04-fe1a-11e2-96a8-d3b921c0924a\\_story.html?utm\\_term=.675a38d32ca1](https://www.washingtonpost.com/politics/the-grahams-a-family-synonymous-with-the-post-and-with-washington/2013/08/05/94f26d04-fe1a-11e2-96a8-d3b921c0924a_story.html?utm_term=.675a38d32ca1) (explaining the Graham family's influence and its decision to sell its shares in the Washington Post Company).

133. See Wash. Post. Co., *supra* note 129, at 5.

134. Eugene Kim, *How Amazon CEO Jeff Bezos Reinvented the Washington Post, the 140-Year-Old Newspaper He Bought for \$250 Million*, BUS. INSIDER (May 15, 2016, 8:55 AM), <http://www.businessinsider.com/how-the-washington-post-changed-after-jeff-bezos-acquisition-2016-5/#i-didnt-know-anything-about-the-newspaper-business—but-i-did-know-something-about-the-internet-bezos-told-business-insider-in-a-2014-interview-that-combined-with-the-financial-runway-that-i-can-provide-is-the-reason-why-i-bought-the-post-2>.

135. See Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1, 2–3 (2010) (explaining the background of News Corp. and its move from Australia to the United States).

136. *Id.* at 2 n.2.

137. Stephen Armstrong, *Meet the Bancrofts, the Media Clan Who Sold Out to Murdoch*, GUARDIAN (Aug. 2, 2007, 2:46 AM), <https://www.theguardian.com/media/2007/aug/02/pressandpublishing.usnews>.

138. *The Family Behind the Wall Street Journal*, CNBC (May 1, 2007, 2:49 PM), <https://www.cnbc.com/id/18419421>.

important asset of Dow Jones & Company is the *Wall Street Journal*, which is now under the indirect control of media mogul Rupert Murdoch, the controlling shareholder of News Corp.<sup>139</sup>

News Corp.'s capital structure is distinguishable from that of the New York Times Company and the Washington Post Company because it relies on different instruments in order to ensure the control of Rupert Murdoch.<sup>140</sup> First of all, there are several classes of common stock, whereby the publicly-traded Class A Common Stock only has voting rights for certain kinds of transactions, while Class B Common Stock has regular voting rights.<sup>141</sup> Moreover, the Certificate of Incorporation includes a so-called "stockholder rights agreement," also known as a "poison pill," which is mentioned in the corporation's risk factors.<sup>142</sup> Finally, Section 4(e) of News Corp.'s Certificate of Incorporation includes an equal treatment clause which requires that an offer be made to both classes of common stock. On the other hand, the Certificate does not include a conversion feature, be it upon the individual decision of a controlling shareholder or upon certain kinds of transfers.

#### E. Comparison and Implications

All in all, the conversion feature—as currently used by many technology firms in the United States—is mostly unprecedented in family-owned newspaper corporations. The difference lies in the importance of family structures in newspaper corporations, whereas the focus of new technology firms—especially Snap and Alphabet—is primarily on the founders alone. Beyond that, there can only be found a voluntary conversion feature in the studied newspaper corporations, while the conversion feature in the new

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139. See Richard Pérez-Peña, *News Corp. Completes Takeover of Dow Jones*, N.Y. TIMES (Dec. 14, 2007), <http://www.nytimes.com/2007/12/14/business/media/14dow.html>.

140. See News Corp., Annual Report (Form 10-K) (Aug. 12, 2016) (documenting Murdoch's approximate 39% ownership interest in News Corp.).

141. News Corp., Amended and Restated Certificate of Incorporation (Form 8-K) (June 27, 2013).

142. News Corp., *supra* note 140, at 27–28.

technology firms applies automatically to a wide range of transfers. The last point has been especially proven by the recent changes of control in the previously family-owned *Washington Post* and *Wall Street Journal*. As can be seen from the purchase of the *Washington Post* by Jeff Bezos, a change in control can be efficiency-enhancing.<sup>143</sup> Moreover, although the *Wall Street Journal* has recently come under criticism due to its alleged politicization, its success has not diminished.<sup>144</sup>

### III. RESTRICTIONS ON THE TRANSFERABILITY OF SHARES IN OTHER JURISDICTIONS

While dual-class structures are now increasingly common in the United States, they have traditionally been more prevalent in other jurisdictions around the world.<sup>145</sup> Since the examined technology firms in the United States use multi-voting shares to secure their founders' control, this comparison focuses primarily on those jurisdictions that allow for these kinds of dual-class structures. Canada<sup>146</sup> and Sweden<sup>147</sup> are good examples of major jurisdictions which have a long-standing tradition of allowing multi-voting shares. The purpose of this comparison is to analyze whether jurisdictions that have traditionally allowed dual-class structures permit the transferability of super voting power and which policies can be found in practice. Furthermore, I will examine recent

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143. See Monica Nickelsburg, *Washington Post Profitable and Growing for Two Years Under Jeff Bezos' Ownership*, GEEK WIRE (Jan. 9, 2018, 9:59 AM), <https://www.geekwire.com/2018/washington-post-profitable-growing-two-years-jeff-bezos-ownership/> (describing Bezos's hands-off managerial approach and the newspaper's growth).

144. See David Leonhardt, *The Struggle Inside the Wall Street Journal*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/opinion/the-struggle-inside-the-wall-street-journal.html>.

145. See Bebchuk & Kastiel, *supra* note 1, at 594–95.

146. See, e.g., Stephanie Ben-Ishai & Poonam Puri, *Dual Class Shares in Canada: An Historical Analysis*, 29 DALHOUSIE L.J. 117, 120–42 (2006) (analyzing the historical development of dual-class shares in Canada); GRAY, *supra* note 10, at 2–3 (pointing out the importance of dual-class firms for Canada and also offering a distinction between the different types of dual-class structures).

147. See, e.g., INSTITUTIONAL S'HOLDER SERVS. ET AL., *supra* note 10, at 18 (pointing out that 80% of the corporations in Sweden use multiple voting shares and also distinguishing the different forms of dual-class structures).

developments in Asia, particularly in Tokyo, Hong Kong, and Singapore, where dual-class structures are increasingly important due to the liberalization of listing requirements.<sup>148</sup> Additionally, I compare the U.S. dual-class structure with those jurisdictions that typically have controlling shareholders, even if they do not allow dual-class structures in the form of different classes of common stock. These jurisdictions are nonetheless important for the purposes of this Article because, despite the differences, restrictions on the transferability of shares are common, especially using the so-called “Vinkulierung” in Germany<sup>149</sup> and Austria.<sup>150</sup>

#### A. Jurisdictions Traditionally Allowing Multi-Voting Shares

Canada not only has a long-standing tradition of allowing dual-class structures and multi-voting shares, but these ownership structures are also becoming increasingly important nowadays.<sup>151</sup> Dual-class firms include many “icons of the Canadian corporate establishment,” such as “Bombardier, Power Corp., Rogers Communications, Onex, and Canadian Tire.”<sup>152</sup> Dual-class structures are not reserved for certain kinds of industries, but range “from holding companies of insurers, real estate investments or communications assets to retailers

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148. See generally Flora Xiao Huang, *Dual Class Shares Around the Top Global Financial Centres*, 2 J. BUS. L. 137 (2017) (discussing recent developments especially in Hong Kong, Singapore, and Tokyo).

149. See Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6 1965, Bundesgesetzblatt, Teil I [BGBl I] at 1089, last amended by Article 5 Amendment Act, May 10, 2016 BGBl I at 1142, § 12 (Ger.) (prohibiting multi-voting shares in general) and § 68 (Ger.) (allowing restrictions of the transferability of registered shares), <https://www.gesetze-im-internet.de/aktg/>.

150. See Bundesgesetz über Aktiengesellschaften [AktG] [Federal Law on Joint Stock Companies] Bundesgesetzblatt I [BGBl I] No. 114/1997, § 12 (Austria) (prohibiting multi-voting shares in the same wording as the corresponding German statute) and § 62 (Austria) (allowing restrictions of the transferability of registered shares in a similar wording as the corresponding German statute), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002070>.

151. See Matthew Merkley, *Multiple Voting Shares: Don't Call It a Comeback*, BLAKES (Sept. 2, 2015), <http://www.blakes.com/English/Resources/TrendsInsights/Pages/details.aspx?AnnouncementID=78> (pointing out that dual-class shares have been a fixture of Canada's corporate structure over the last 60 years).

152. Anand, *supra* note 8, at 7.



and restaurants, and from manufacturers of electronics, semi-trailers, snowmobiles or bicycles to resource and children’s entertainment companies.”<sup>153</sup> Recent companies going public with a dual-class structure in Canada include Cara, Aritzia, Freshii, and Stingray.<sup>154</sup> These companies are located in the food, fashion, and entertainment industries.<sup>155</sup> In 2015, 85 out of 1487—or roughly 5.72%—of the firms that were listed on the Toronto Stock Exchange (TSX) had a dual-class structure and contributed to roughly 12% of the overall TSX market capitalization, which shows their economic significance.<sup>156</sup> Although there are certainly other jurisdictions, such as Sweden, which have far more dual-class firms, these numbers show the similarity between the frequency of dual-class structures in Canada and the United States.<sup>157</sup>

Dual-class structures have been used as a financing device in Canada since the 1940s, with an important increase by the late 1970s and early 1980s.<sup>158</sup> Since the current rules regulating dual-class structures in Canada date back to the 1980s without any significant changes over the last twenty-five years, the Canadian Coalition for Good Governance, a group of institutional shareholders, released a “Dual Class Share Policy” in September 2013.<sup>159</sup> These guidelines analyze the history, advantages, and disadvantages of dual-class structures, and also include principles on the monetization of multi-voting shares and on payments to the controlling shareholder upon the collapse of the dual-class structure.<sup>160</sup>

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153. Merkley, *supra* note 151.

154. Anand, *supra* note 8, at 7.

155. *Id.*

156. *Id.* at 190–91.

157. See Bebchuk & Kastiel, *supra* note 1, at 594 (stating that 9% of the S&P 100, 6.4% of the S&P 500, 8.4% of the Russell 1000, and 8.2% of the Russell 3000 firms had a dual-class structure in 2016).

158. See Ben-Ishai & Puri, *supra* note 146, at 118.

159. See generally CANADIAN COAL. OF GOOD GOVERNANCE, DUAL CLASS SHARE POLICY (2013), [https://www.ccg.ca/site/ccgg/assets/pdf/dual\\_class\\_share\\_policy.pdf](https://www.ccg.ca/site/ccgg/assets/pdf/dual_class_share_policy.pdf) (laying out the organization’s policy on dual class shares).

160. *Id.* at 2–4, 12–13.

In particular, the policy suggests that a “holder of MV [Multi-Voting] Shares should not be allowed to monetize the holder’s MV Shares by entering into a derivative transaction.”<sup>161</sup> The policy explains that while the holders of multi-voting shares shall be allowed to transfer their shares, these multi-voting shares shall automatically convert into subordinate voting shares upon their transfer, except for the transfer to certain prior stipulated permitted entities. Apparently, this policy resembles, to a significant extent, the conversion features in Snap, Facebook, and Alphabet discussed in Part I. One must note, however, that monetization is not synonymous with transferability, as monetization does not include the transfer to heirs by will or force of law. Therefore, the policy suggested by the Canadian Coalition for Good Governance allows for intergenerational transfers, whereas many U.S. technology firms, such as Snap and Alphabet, do not.

The Canadian Coalition of Good Governance’s reasoning behind not allowing the monetization of multi-voting shares is the further incongruity between the shareholder’s equity and control rights and the possible misalignment of interests.<sup>162</sup> Moreover, the policy states that “[n]o premium should be paid to the owner of MV Shares upon a collapse of the DCS structure.”<sup>163</sup> To fully understand this last policy point, one must consider that Canadian law, in general, requires the acquirer in takeover-bids to dual-class firms to make an offer on the same terms to all classes of shareholders (so-called “coattail” rights).<sup>164</sup>

Although the principles of the Canadian Coalition of Good Governance expressly prohibit the monetization of multi-voting shares, Canadian corporate practice does not seem to follow this guideline. According to a recent study by Anita Anand, forty-one of the examined Canadian dual-class firms

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161. *Id.* at 12.

162. *Id.* at 4.

163. *Id.* at 13.

164. Anand, *supra* note 8, at 23.

had a sunset provision in place, whereas forty-four did not.<sup>165</sup> As such, only twelve firms employed other sunset clauses, including the non-transferability of multi-voting shares.<sup>166</sup> Beyond that, only five dual-class firms used specific agreements that prevented the founder or majority shareholder from transferring his or her shares.<sup>167</sup> Therefore, the Coalition's policy on imposing a conversion feature does not seem to have had much influence so far, but it remains to be seen whether this will change in the future.

While multi-voting shares are important in Canada, they are not employed by a majority of Canadian corporations. By contrast, 80% of all Swedish companies actually use multi-voting shares.<sup>168</sup> This is by far the highest percentage of all countries in the European Union which allow for multi-voting shares.<sup>169</sup> Interestingly, this is not even the highest percentage in Swedish history: during the 1990s, around 85% of all listed Swedish corporations employed multi-voting shares.<sup>170</sup> In 2004, Sweden finally made a small step toward a better proportionality between equity and control rights in implementing a maximum ratio of 10:1 for multiple voting shares.<sup>171</sup>

Unlike the efforts by the Canadian Coalition for Good Governance, there are no comparable movements toward the prohibition of monetization of multi-voting shares in Sweden. Rather, the articles of association of the three largest

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165. *Id.* at 221.

166. *Id.* at 222.

167. *Id.* at 225.

168. INSTITUTIONAL S'HOLDER SERVS. ET AL., *supra* note 10, at 18.

169. *See id.*

170. ROLF SKOG, STOCKHOLM INST. FOR SCANDINAVIAN LAW, THE EUROPEAN UNION'S PROPOSED TAKEOVER DIRECTIVE, THE "BREAKTHROUGH" RULE AND THE SWEDISH SYSTEM OF DUAL CLASS COMMON STOCK 301 (2004), <http://www.scandinavianlaw.se/pdf/45-17.pdf>.

171. GUIDO FERRARINI, INST. FOR LAW & FIN. (GER.), ONE SHARE—ONE VOTE: A EUROPEAN RULE? 22 (2006), [https://www.ilf-frankfurt.de/fileadmin/\\_migrated/content\\_uploads/ILF\\_WP\\_047.pdf](https://www.ilf-frankfurt.de/fileadmin/_migrated/content_uploads/ILF_WP_047.pdf).

corporations in Sweden,<sup>172</sup> Volvo,<sup>173</sup> Ericsson,<sup>174</sup> and H&M,<sup>175</sup> have dual-class structures with multi-voting shares absent limits on their transferability. Out of the remaining ten largest Swedish corporations, only Skanska,<sup>176</sup> Electrolux,<sup>177</sup> and SCA<sup>178</sup> provide for a voluntary conversion of multi-voting shares upon the decision of the controlling shareholder, but do not include an automatic conversion upon certain kinds of transfers. Moreover, the Swedish Corporate Governance Code, which expressly addresses the outstanding Swedish corporate ownership structure, does not mention any restrictions on the transferability of multi-voting shares.<sup>179</sup> However, this trend might change after Spotify Technology S.A.'s IPO. Spotify has its principal operational office in Stockholm, although it is registered in Luxembourg.<sup>180</sup> The Spotify founders, Daniel Ek and Martin Lorentzon, carry so-called "beneficiary certificates," which have no economic rights but provide the founders with

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172. *These Are Now the 10 Biggest Companies in Sweden*, BUS. INSIDER NORDIC (Dec. 4, 2017, 1:06 PM), <https://nordic.businessinsider.com/these-are-the-10-biggest-companies-in-sweden-->.

173. VOLVO, ARTICLES OF ASSOCIATION FOR AKTIEBOLAGET VOLVO (2013), <https://www.volvogroup.com/content/dam/volvo/volvo-group/markets/global/en-en/investors/corporate-governance/AB-Volvo-Articles-of-Association.pdf>.

174. *See* ERICSSON, ARTICLES OF ASSOCIATION OF TELEFONAKTIEBOLAGET LM ERICSSON STOCKHOLM (Apr. 2016), <https://www.ericsson.com/assets/local/about-ericsson/corporate-governance/documents/articles-of-association/lme-articles-of-association-2016.pdf>.

175. *See Articles of Association*, H&M GROUP (May 3, 2016), <https://about.hm.com/en/about-us/corporate-governance/articles-of-association.html>.

176. Skanska, the fifth largest corporation in Sweden, does include a conversion of multi-voting shares, but only upon the voluntary decision of the controlling shareholder. *See* SKANSKA AB, ARTICLES OF ASSOCIATION OF SKANSKA AB (2016), [https://group.skanska.com/498f20/globalassets/corporate-governance/articles-of-association/articles-of-association-skanska-ab\\_2016.pdf](https://group.skanska.com/498f20/globalassets/corporate-governance/articles-of-association/articles-of-association-skanska-ab_2016.pdf).

177. Electrolux, the seventh largest Swedish corporation, uses a voluntary conversion feature in Article 5 of its Articles of Association. *See* ELECTROLUX, ARTICLES OF ASSOCIATION OF AKTIEBOLAGET ELECTROLUX 1 (2018), <https://www.electroluxgroup.com/en/articles-of-association-1218/>.

178. SCA, the eighth largest Swedish corporation, uses a voluntary conversion feature for multi-voting shares in Point 6 of its Articles of Association. *See* SVENSKA CELLULOSA AKTIEBOLAGET SCA, ARTICLES OF ASSOCIATION 1 (2017), [https://www.sca.com/globalassets/sca/investerare/bolagsstyrning/sca-articles\\_of\\_association\\_5\\_april\\_2017\\_en.pdf](https://www.sca.com/globalassets/sca/investerare/bolagsstyrning/sca-articles_of_association_5_april_2017_en.pdf).

179. SWEDISH CORP. GOVERNANCE BD., THE SWEDISH CORPORATE GOVERNANCE CODE (2016), [http://www.corporategovernanceboard.se/UserFiles/Archive/486/The\\_Swedish\\_Corporate\\_Governance\\_Code\\_1\\_December\\_2016.pdf](http://www.corporategovernanceboard.se/UserFiles/Archive/486/The_Swedish_Corporate_Governance_Code_1_December_2016.pdf) (failing to mention restrictions on transferability of multi-voting shares).

180. Spotify Tech. S.A., Registration Statement (Form F-1) (Feb. 28, 2018).

additional voting power.<sup>181</sup> According to the Articles of Association, these beneficiary certificates are non-transferable and shall automatically convert for no consideration upon the sale or transfer of the shares they are linked to.<sup>182</sup>

### *B. Jurisdictions Have Recently Imposed Policy Changes*

Although the Tokyo Stock Exchange (TSE) has permitted IPOs of dual-class corporations since 2008, it was not until 2014 that Cyberdyne became the first dual-class corporation to use this legal structure.<sup>183</sup> The Japanese Companies Act does not permit the use of multi-voting shares per se, but the same result of weighted voting rights can be reached by employing a so-called “unit share system.”<sup>184</sup> Therefore, the holders of Class B Cyberdyne Stock, founder Yoshiyuki Sankai and related foundations, only own 41.7% of all outstanding shares, while having 87.7% of all voting rights.<sup>185</sup>

For the purposes of this Article, the most important TSE listing requirement is the mandatory conversion upon the transfer of high-vote shares.<sup>186</sup> In particular, the TSE does not only require automatic conversion upon the transfer to a third party, but also upon the death of the high-vote shareholder.<sup>187</sup> Whereas the non-transferability of super-voting power emerged as the result of voluntary private ordering in the United States, it was incorporated as a listing requirement in Japan. Thereby, Koji Toshima described the mandatory conversion as follows: “While it is not expressly required by the U.S. rules, Google and its followers have similar terms in their

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181. *Id.* at 147.

182. *Id.*

183. Koji Toshima, *Cyberdyne’s Dual Class IPO*, INT’L FIN. L. REV., Dec.–Jan. 2015, at 43, <http://www.mhmjapan.com/content/files/00017537/Cyberdyne%E2%80%99s%20dual-class%20IPO.pdf>.

184. *See id.* (explaining that Cyberdyne has one-hundred shares in each unit of common stock and ten shares in each unit of Class B, leading to Class B stockholders having ten times more voting rights than common stockholders).

185. *Id.*

186. *Id.* at 44.

187. *Id.*

articles of incorporation, and the TSE introduced such conversion features as a mandatory requirement.”<sup>188</sup> The rationale for imposing a mandatory conversion can be found in the New Listing Guidebook of the TSE, which argues that shareholders with lower voting rights have invested in the dual-class corporation on the basis that a particular person in management holds unlisted stock with more voting rights.<sup>189</sup> Therefore, the TSE’s reasoning seems to build on the fact that investors have placed their trust only in one particular person, namely the original founder. Beyond the mandatory conversion upon transfer, the TSE tightened its listing requirements for dual-class corporations in 2014 by requiring the necessity and appropriateness of the dual-class structure to make sure that a certain person maintains influence in the corporation and by the implementation of a mandatory sunset clause when the necessity ceases to exist.<sup>190</sup>

Driven by the international competition between stock exchanges to attract innovative technology companies and by the fear of losing another big player, such as Alibaba in 2014, Hong Kong<sup>191</sup> and Singapore<sup>192</sup> have revisited their listing requirements regarding dual-class structures. In Hong Kong, dual-class structures traditionally have been allowed by corporate law but prohibited by the Hong Kong Stock Exchange (HKEx).<sup>193</sup> These listing requirements were changed, however, in April 2018, and now allow corporations with different voting

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188. *Id.*

189. TOKYO STOCK EXCH., NEW LISTING GUIDEBOOK 2017, at 145 (2017), <https://www.jpix.co.jp/english/equities/listing-on-tse/new/guide/tvdivq0000002g9b-att/bv22ga0000001ufs.pdf>.

190. Toshima, *supra* note 183, at 45.

191. Jennifer Hughes, *Hong Kong to Push Ahead with Controversial Dual-Class Shares*, REUTERS (Dec. 15, 2018), <https://www.reuters.com/article/us-hkex-regulation/hong-kong-to-push-ahead-with-controversial-dual-class-shares-idUSKBN1E90UR>.

192. Andrea Tan, *Singapore Exchange Takes on Hong Kong with Dual-Class Shares*, BLOOMBERG (Jan. 22, 2018), <https://www.bloomberg.com/news/articles/2018-01-22/singapore-exchange-eyes-startup-ipos-with-dual-class-shares>.

193. See Flora Xiao Huang, *Dual Class Shares Around the Top Global Financial Centres*, 2 J. BUS. L. 137, 146–48 (2017).

rights to go public in Hong Kong.<sup>194</sup> In Singapore, the Companies Act was amended in 2014 to allow for multi-voting and non-voting shares in public corporations.<sup>195</sup> Furthermore, in June 2018 the Singapore Stock Exchange (SGX) finally followed the HKEx, launching new rules for dual-class corporations.<sup>196</sup>

During the process of amending its listing requirements, the HKEx issued its 2014 “Concept Paper on Weighted Voting Rights,” which had the general purpose of collecting views on introducing weighted voting rights structures.<sup>197</sup> The paper also discussed the conversion features in U.S. corporations and in Chinese corporations listed in the United States, such as the conversion upon certain transfers or the death of the controlling shareholder.<sup>198</sup> In the 2015 “Conclusions to the HKEx Concept Paper,” it was held that a majority of the pro-responses found that there should be restrictions on weighted voting rights, e.g., on their transferability.<sup>199</sup> Only a small number stated that these restrictions should be applied on a purely voluntary basis, such as in the United States.<sup>200</sup> In fact, restrictions on transfer—defined as “the loss of superior voting rights on transfer of multiple voting shares to parties un-affiliated with the original holder”—received the most support from the respondents.<sup>201</sup> Unfortunately, there is no specific rationale in the 2015

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194. Benjamin Robertson, *Hong Kong Adds Dual-Class Shares, Paving Way for Tech Titans*, BLOOMBERG (Apr. 24, 2018), <https://www.bloomberg.com/news/articles/2018-04-24/hong-kong-approves-dual-class-shares-paving-way-for-tech-titans>.

195. Huang, *supra* note 193, at 152–54.

196. *Singapore Details Rules for Offering Dual-Class Shares, Follows Hong Kong*, REUTERS (June 26, 2018), <https://www.reuters.com/article/sgx-regulation/singapore-details-rules-for-offering-dual-class-shares-follows-hong-kong-idUSL4N1TS3E3>.

197. H.K. STOCK EXCHS. & CLEARING LTD., CONCEPT PAPER ON WEIGHTED VOTING RIGHTS 5 (2014), <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2011-to-2015/August-2014-Weighted-Voting-Rights/Consultation-paper/cp2014082.pdf>.

198. *Id.* at 47.

199. H.K. EXCHS. & CLEARING LTD., CONSULTATION CONCLUSIONS TO CONCEPT PAPER ON WEIGHTED VOTING RIGHTS 6, 32, 40 (2015), <http://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2011-to-2015/August-2014-Weighted-Voting-Rights/Conclusions/cp2014082cc.pdf>.

200. *Id.* at 6.

201. *Id.* at 32.

Conclusions for imposing these restrictions on transferability. However, the general reason given by the respondents for imposing restrictions on the use of weighted voting rights in the first place was to provide “appropriate corporate governance checks and balances.”<sup>202</sup> Building on this reasoning, the HKEx concluded that restrictions, in general, were necessary to mitigate the heightened investor protection risk related to weighted voting rights structures.<sup>203</sup>

### C. Jurisdictions Otherwise Permitting Restrictions on Transferability

Whereas transferable shares are a basic characteristic of business corporations,<sup>204</sup> all jurisdictions provide some mechanisms to allow certain restrictions on this principle.<sup>205</sup> The following section examines one particularly compelling method of allowing for restrictions on the transferability of shares, namely the so-called “Vinkulierung,” particularly common in Germany and Austria. The most important characteristic of this restriction on transferability is that the transfer of certain shares can be made contingent—in the certificate of incorporation—upon the approval of the corporation. This Article argues that this model could be adopted by other jurisdictions. In particular, the transfer of super voting shares by the founders to third parties could be made contingent upon the approval of the corporation. Before describing the proposal in more detail, this section analyzes the background of German and Austrian law regarding the “Vinkulierung.”

Although dual-class structures of common stock and multi-voting shares are not allowed in Germany,<sup>206</sup> there are other

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202. *Id.* at 33.

203. *Id.*

204. John Armour et al., *supra* note 50, at 10.

205. WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 90 (5th ed. 2016).

206. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBL I at 1089, last amended by Gesetz [G], July 17, 2017, BGBL I at 2446, § 12 para. 2 (Ger.), <https://www.gesetze-im-internet.de/aktg/>.



comparable financing devices, especially preferred stock without voting rights.<sup>207</sup> This category of shares was widely used in Germany in the late 1980s. Since then, preferred shares without voting rights have lost some of their relevance, especially due to the skepticism of foreign investors, the prohibition of preferred stock at the “Neuer Markt” (which was a segment of the Frankfurt Stock Exchange (FSE) in the early 2000s), and the FSE’s policy only to consider one category of stock (common *or* preferred) in calculating the market capitalization (which is in turn important for being admitted in stock indices).<sup>208</sup> According to German corporate law, preferred shares without voting rights can only make up half of the corporation’s capital stock.<sup>209</sup> The rationale behind this legislation is to prevent a minority of voting shareholders from controlling a majority of non-voting shareholders.<sup>210</sup> This reasoning shows that the relationship between voting common stock and non-voting preferred stock is similar to the relationship between different classes of common stock with different voting powers. The only distinction is that the preferred stock’s superior economic rights can be considered as a form of “compensation” for the lack of control.<sup>211</sup>

In Germany, the certificate of incorporation can provide that registered shares may only be transferred with the approval of the corporation.<sup>212</sup> As a default rule, it is up to the management board to express the corporation’s approval.<sup>213</sup> However, the certificate may also confer this power to the supervisory board or to the shareholders at the general meeting.<sup>214</sup> Finally, the

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207. *Id.* § 139.

208. Michael Arnold, § 139 *AktG Number 5*, in *MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 3 §§ 118–178* (Wulf Goette et al. eds., 4th ed. 2018).

209. AktG § 139 para. 2.

210. Michael Arnold, § 139 *AktG number 26*, in *MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 3 §§ 118–178* (Wulf Goette et al. eds., 4th ed. 2018).

211. *INSTITUTIONAL S’HOLDER SERVS. ET AL.*, *supra* note 10, at 7.

212. AktG § 68 para. 2.

213. *See* Armour et al., *supra* note 98, at 56–57 (noting that Germany uses a two-tier board structure consisting of a management and a supervisory board).

214. AktG § 68 para. 2.

certificate may also state reasons for the denial of approval.<sup>215</sup> This so-called “Vinkulierung,” which derives from the Latin word “vinculum” (meaning bond or link), is the only exception to the principle of free transferability of shares in German corporate law.<sup>216</sup> The “Vinkulierung” is very important in German corporate practice; not only privately held, but also publicly traded firms can be subject to this restriction on transferability.<sup>217</sup> The rationale behind imposing a “Vinkulierung” is to give the corporation control over the identity of new shareholders. This control might be especially important when the shareholders need to have certain qualifications (such as auditors, tax consultants, or lawyers), when the shares are linked to special preferences (such as “golden shares”), or when the corporation should be protected from strangers (such as in family corporations).<sup>218</sup>

Since the “Vinkulierung” only applies to contractual transfers of registered shares, it does not prevent transfers by operation of law, such as in the inheritance context.<sup>219</sup> This is a major difference compared to the conversion feature in U.S. technology firms, such as Snap and Alphabet. Moreover, in deciding about the approval of the transfer, fiduciary principles apply, which only allow for denial if it is necessary and appropriate. Thereby, the corporation’s and the selling shareholder’s interests need to be taken into account. Additionally, the acquirer’s interests can also be considered if the acquirer is already a shareholder of the corporation.<sup>220</sup> Finally, changes to the “Vinkulierung” are allowed, but require the amendment of the certificate of incorporation, which by

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215. *Id.*

216. Walter Bayer, § 68 *AktG Number 34*, in *MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 1 §§ 1–75* (Wulf Goette et al. eds., 4th ed. 2016).

217. *Id.*

218. Hans Christoph Grigoleit & Richard Rachlitz, § 68 *AktG Number 18*, in *AKTIENGESETZ KOMMENTAR: AKTG BAND 1 §§ 1–75* (Hans Christoph Grigoleit ed., 2013).

219. Walter Bayer, § 68 *AktG Number 52*, in *MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 1 §§ 1–75* (Wulf Goette et al. eds., 4th ed. 2016).

220. *Id.* at 72.

default means that three-fourths of the shareholders need to agree.<sup>221</sup>

Before discussing in more detail the Austrian corporate law regarding multi-voting shares, non-voting preferred shares, and restrictions on the transferability of registered shares, it is worth mentioning the close relationship between German and Austrian corporate law in general. This relationship can be explained mainly by historical reasons, dating back to the Second World War when Austria officially was a part of Germany.<sup>222</sup> Therefore, it is not surprising that the wording of the prohibition of multi-voting shares in Austria is exactly the same as in Germany.<sup>223</sup> However, there are also several differences between German and Austrian corporate law due to the changes made over the last seventy years.

In particular, Austrian corporate law only allows non-voting preferred shares to constitute one-third of the capital stock (as opposed to the German rule which allows for one-half).<sup>224</sup> The rationale behind this restriction is to prevent a small proportion of capital stock from being able to control the corporation.<sup>225</sup> Beyond that, there is also an important difference regarding the “Vinkulierung.”<sup>226</sup> In Austria, the approval of a transfer of registered shares may only be withheld for important reasons (as opposed to the German Corporate Code which does not impose any express limitations on the denial of the approval). The interpretation of “important reasons” is thus a highly controversial issue in Austria. On the one hand, some question

221. *Id.* at 51; *see also* AktG § 179 para. 2 (requiring the approval of three-fourths of the shareholders represented at the shareholder meeting for charter amendments).

222. Susanne Kalss, *Introduction Number 1*, in KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 1 §§ 1–75 (Peter Doralt et al. eds., 2d ed. 2012). The German Corporate Code (“Aktengesetz”), from 1937, was introduced in Austria in 1938 because of the “annexation” of Austria by the “Third Reich.” After the Second World War, the Corporate Code was adopted by the Second Republic of Austria due to the Transition of Legislation Act of 1945.

223. Bundesgesetz über Aktiengesellschaften [AktG] [Federal Law on Joint Stock Companies] Bundesgesetzblatt I [BGBl I] No. 114/1997, AktG § 12 para. 3 (Austria), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002070>.

224. AktG § 12a para. 2.

225. Maria Doralt, § 12a AktG Number 2, in KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 1 §§ 1–75 (Peter Doralt et al. eds., 2d ed. 2012).

226. AktG § 62 para. 2.

whether the mere fact that the acquirer does not belong to a certain group, such as a family, will suffice as an “important reason.”<sup>227</sup> On the other hand, others take a more liberal approach to the meaning of “important reasons,” including the protection of family corporations from external influence.<sup>228</sup>

#### D. Comparison and Implications

In general, Canada and Japan have relied far less on dual-class structures than Sweden. Both Canada and the examined jurisdictions in Asia are currently following (at least theoretically) the model of the non-transferability of super voting power, while Sweden is not (yet) taking this path. Recent developments in Tokyo, Hong Kong, and Singapore have shown how influential the corporate governance model of U.S. technology firms is. However, the rationale behind requiring or advising dual-class corporations to impose a conversion feature, à la Google, is not always clear and convincing.

The Canadian Coalition for Good Governance argues that the disproportionality of equity and control rights as well as the possible misalignment of interests require imposing a conversion feature.<sup>229</sup> This reasoning has two weak points. First, if disproportionality was the major concern for introducing the non-transferability of super voting power, there would be more efficient solutions, such as imposing so-called “ownership-percentage”<sup>230</sup> or “dilution”<sup>231</sup> sunsets, which expressly address this issue. Second, while the misalignment of interests is a general problem related to dual-class structures and multi-voting rights, it is not clear whether imposing a conversion

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227. Eva Micheler, § 62 AktG Numbers 24-26, in KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 1 §§ 1-75 (Peter Doralt et al. eds., 2d ed. 2012).

228. Thomas Haberer & Jörg Zehetner, § 62 AktG Number 56, in KOMMENTAR ZUM AKTIENGESETZ: AKTG BAND 1 §§ 1-75 (Peter Jabornegg & Rudolf Strasser eds., 5th ed. 2011).

229. See *supra* notes 162-64 and accompanying text.

230. See Bebchuk & Kastiel, *supra* note 1, at 620 (analyzing how an ownership percentage operates to preserve high-vote shares because a large equity stake aligns the interests between founders and common stockholders).

231. See Winden, *supra* note 2, at 20-21, 64-65 (stating that dilution sunsets aim to identify the point where an entrepreneur has “insufficient remaining commitment to the enterprise”).

feature is the right solution. As already discussed in Section I.E.2, the conversion feature also has negative effects because it further prevents efficiency-enhancing changes in control.<sup>232</sup>

Another rationale for requiring a mandatory conversion upon the transfer of the founders' shares is given by the TSE as described in Section III.B, namely the assumption that only the founders have the unique skills necessary to lead the company and maintain the trust of the investors. Although this reasoning is more convincing than that offered by the Canadian Coalition for Good Governance, there is no certainty (1) that the founders' superiority will remain the same, and (2) that there are not any possible successors at least as capable of managing the company.

Given the positive and negative effects of the conversion features currently employed by many firms in the United States and increasingly used in Asia, one might wonder whether there are possible improvements to mitigate the disadvantages related to the conversion feature. It might be helpful to take a broader view and compare the non-transferability of super voting power in dual-class firms with the "Vinkulierung" used in Germany and Austria. In particular, the transferability of super voting shares by the founders to a third party could be made contingent upon the approval of the corporation.<sup>233</sup> This solution has the advantage of aligning the founders' interests with the corporation's long-term interests because it makes short-term exit options more difficult. Moreover, it also functions as a "natural" sunset provision because if the corporation does not agree, the founders cannot transfer their super voting power to a third party.<sup>234</sup> Of course, the imposition of an automatic conversion upon transfer does not hinder the founders from keeping their voting power as long as they live.

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232. See *supra* notes 96–98 and accompanying text.

233. See Winden, *supra* note 2, at 65–67 (addressing the approach of giving shareholders the opportunity to vote on whether control could be passed on upon the death or incapacity of the founder).

234. *Id.*

Therefore, the automatic conversion upon transfer does not work as a substitute for other forms of sunset provisions.<sup>235</sup>

Finally, this solution protects minority shareholders while not rendering efficiency-enhancing changes in control practically impossible. In order to protect minority shareholders to the highest possible extent, the corporation's approval should not be given by the board of directors themselves, but rather by the majority of the minority shareholders.<sup>236</sup> In light of the increasing demand for mandatory conversion features upon the transfer of the founders' super voting power, legislatures and stock exchanges around the world should rethink their policies and at least *allow* for the transferability of super voting power if the corporation is willing to approve the transfer. Since the United States has traditionally followed a more liberal approach toward the imposition of conversion features, it might be interesting for the drafters of future certificates of incorporation to include the transferability of super voting power contingent upon the corporation's approval.

#### CONCLUSION

The non-transferability of super voting power is a distinguishing characteristic of U.S. technology firms, which cannot be found in the older generation of controlling shareholder corporations in the United States, such as the newspaper industry. Moreover, this kind of conversion feature is not common in Canada or Sweden, although Canadian institutional investors are considering this approach. On the other hand, the conversion feature has immense influence on the current developments in Asian jurisdictions, especially in Japan, Hong Kong, and Singapore. Prior literature in the United States primarily pointed to the advantages related to the non-transferability of super voting power, namely its function as a

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235. See Bebchuk & Kastiel, *supra* note 1, at 617–18.

236. Requiring the approval of the majority of the minority shareholders would also be consistent with the approach developed by Professors Bebchuk and Kastiel regarding time limits on dual-class structures. See *id.* at 618 (proposing a fixed-time sunset which could only be delayed upon the approval of the majority of the shareholders unaffiliated with the controller).

sunset provision. Beyond this reasoning, this Article has shown that non-transferability also has a positive “lock-in” effect which aligns the founders’ and the corporation’s long-term interests. However, there also might be negative effects related to the conversion feature, such as the prevention of efficiency-enhancing changes in control. In order to mitigate these disadvantages, this Article suggests taking a broader perspective and looking at how other jurisdictions deal with restrictions on the transferability of shares. Thereby, the “Vinkulierung” as found in Germany and Austria serves as a good starting point. Finally, this Article proposes introducing a modified conversion feature which allows for the transferability of super voting power contingent upon the corporation’s approval, whereby the final decision should rest with the majority of the minority shareholders.