SNAPCHAT'S GIFT: EQUITY CULTURE IN HIGH-TECH FIRMS

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ABSTRACT

Snap, Inc., the company that owns the platform Snapchat, controversially offered nonvoting common shares to the public in 2017. This Article asks what it means to invest in Snap or other (mostly technology-based) companies in which common shareholders collectively have little or no power to influence corporate policy. In particular, why do such investors expect to be compensated? This Article explores the familiar rationales for equity investing, including stock appreciation and dividends, and the logical shortcomings of those rationales in these circumstances. Adopting Henry Manne's "two systems" approach to corporate affairs through both law and economics, we show that corporation law fails to ensure that corporations return business profits to shareholders. A similar analysis of the market for corporate control concludes that, without shareholder voting, the market for corporate control also fails to ensure a return to shareholders.

Shareholders who invest in firms in the absence of legal or market mechanisms to secure a return on their investment, however, are not irrational. Instead, investors rely on cultural understandings of appropriate reciprocity. This Article employs Marcel Mauss's cultural anthropology classic, The Gift*, to explain the equity culture in which shareholders invest in Snap and other high-technology firms, and in which such firms operate. This Article concludes by suggesting some ramifications of understanding shareholding, and consequently management, in terms of equity culture.*

This Article also complements the substantial work of behavioral economics in explaining investor choice and organizational behaviors. The field of corporate finance traditionally has been organized around the figure of the rationally self-interested individual. Behavioral economics argues that people are not as rational *as orthodox corporate finance assumes. This Article argues that people in markets are not as* individual *as corporate finance assumes.*

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I. INTRODUCTION

At a *potlatch*,[1] leaders of the indigenous peoples of North America's west coast gave each other gifts. Although in some ways "voluntary," the honor of the giver and the recipient depended on exchanges. Failure to accept the gift could be spiritually dangerous[2] and tantamount to a declaration of war.[3] Failure to reciprocate with a gift of equal or greater value would mean losing the competition for honor.[4]

In his 1925 book *The Gift: The Form and Reason for Exchange in Archaic Societies*, Marcel Mauss identified "archaic" societies around the world in which honor and status were established by a well-defined and authoritative tradition of gift-giving.[5] The impact of *The Gift* on cultural anthropology and on broader streams of social thought is difficult to overstate.[6] This Article suggests that Mauss's work also provides a way to understand recent developments in the U.S. public

1. *Potlatch*, a Chinook term, is defined in various ways in the Marcel Mauss's book *The Gift*. As explained in the editorial note to the 1990 edition, definitions include: "[S]ystem for the exchange of gifts, (as a verb) to feed, to consume, place of being satiated [Boas]. As elaborated by Mauss, it consists of a festival where goods and services of all kinds are exchanged. Gifts are made and reciprocated with interest. There is a dominant idea of rivalry and competition between the tribe or tribes assembled for the festival, coupled occasionally with conspicuous consumption." *Editorial Note* to MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES vii (W.D. Halls trans. 1990) (2002) [hereinafter MAUSS] (internal quotation marks omitted). *Potlatch* should be sharply distinguished from barter, particularly in the case of North American indigenous persons, because of the hierarchical and spiritual significance of the exchange. *See id.* at 43.

2. *Id.* at 16.

3. *Id.* at 7.

4. *Id.* at xi.

5. *See id.*

6. In calling the book "monumental," Jacques Derrida noted that the book "speaks of everything but the gift." Marshall Sahlins called the book "a gift to the ages," but goes on to write that while it is "[a]pparently completely lucid, with no secrets even for the novice, it remains a source of an unending ponderation." *Id.* at i.

equity markets, notably the 2017 initial public offering (IPO) of Snap, Inc. (Snap).[7]

For Mauss, questions of status and honor entailed the social field in which status could be asserted and had its meaning.[8] Although the giver and the recipient of the gift had interests, such interests were defined within the culture.[9] To understand gifts at a *potlach* to be "self-interested," or givers and recipients to be "individuals," in the sense that those words are often used in contemporary legal and economic discourse, would be a serious misreading of Mauss.

In addition, the word "archaic" must be treated with caution. Mauss ultimately located gift exchange in Roman contract law.[10] Roman law lies at the center of the self-understanding of French and other continental legal systems—including the civil law of contract.[11] Mauss was suggesting something important about then-contemporary commercial relations: markets should be understood in terms of the social relations established by the flux of trade, as opposed to individualistically, in terms of the self-interest of isolated actors. As Mary Douglas points out in her foreword to the 1990 edition of the book, a subtext and perhaps the vital intention of *The Gift* is an argument against then-contemporary individualistic utilitarianism.[12] Mauss thus used the word "archaic" to invite his readers to entertain a critique of their social relations that many might have dismissed out of hand if stated explicitly.

There are of course clear differences between modern equity markets and the tribal societies that Mauss studied, but his depiction of the *potlatch* system of gift exchanges has much to say about recent offerings of stock with minimal or no voting rights, notably Snap's startlingly successful $3.4 billion IPO of nonvoting common stock.[13]

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7. For a theoretical discussion of how cultural anthropology, specifically refunctioned ethnography, can be used to think through present situations like equity markets, see DAVID A. WESTBROOK, NAVIGATORS OF THE CONTEMPORARY: WHY ETHNOGRAPHY MATTERS (2008).

8. Not incidentally, Marcel Mauss was Émile Durkheim's nephew. Seth Leacock, *The Ethnological Theory of Marcel Mauss*, 56 AM. ANTHROPOLOGIST 58, 59 (1954).

9. *See* MAUSS, *supra* note 1, at xviii.

10. *Id.* at 60-69.

11. *See* ALAN WATSON, THE MAKING OF THE CIVIL LAW 1-2 (1981). *See also* JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 1 (1995), https://www.fjc.gov/content/primer-civil-law-system-0 [https://perma.cc/9VV7-YBFS]. Apple and Deyling note: "To understand the different civil-law systems as they exist today in European and Latin American countries and elsewhere, one must necessarily begin in antiquity, because the civil law, in all of its variations, has as its bedrock the written law and legal institutions of Rome. Its very name derives from the jus civile, the civil law of Rome." *Id.*

12. MAUSS, *supra* note 3, at xiii-xvi.

13. *See* Seth Fiegerman, *Snapchat Raises $3.4 Billion in IPO*, CNN BUSINESS (Mar. 1, 2017), https://money.cnn.com/2017/03/01/technology/snap-ipo-final-pricing/

And perhaps Snap is not the anomalous case it appears to be on first glance; maybe Snap is a synecdoche for finance capitalism, at least as conducted in Silicon Valley.

Investors buying Snap's nonvoting shares give money to Snap or some other seller, and presumably expect to be given something more valuable in return.[14] But on what is this expectation based? This Article argues that investors' expectation is fundamentally based on what is sometimes called "equity culture."[15] To purchase Snap shares is to participate in a cultural tradition, and should be understood traditionally, that is, according to the logic and rationales of that culture.

On account of its admittedly nontraditional nonvoting shares, the Snap IPO received a great deal of publicity well before it was effected.[16] The IPO flew in the face of the widely held view that a share of common stock provides the right to cast a single vote on various matters, most importantly, the election of the board of directors.[17] Investors in Snap evidently did not care and bought the shares anyway.

Of course, different classes of shares, with different voting rights, are an old—if sometimes controversial—idea.[18] Henry Ford, for

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[https://perma.cc/DG2U-KN6K] (quoting an analyst as saying that "[e]ven the original naysayers and detractors from the deal have pretty much softened their negativity"); Equally startling, Snap conducted its IPO with no headquarters. Nina Agrawal, *Snap has no headquarters*, L.A. TIMES (Feb. 28, 2017), http://www.latimes.com/business/la-fi-live-updates-snap-ipo-snapchat-s-unusual-real-estate-strategy-1488296152-htmlstory.html [https://perma.cc/WCX3-9XV8].

14. People use Snap's best-known product, Snapchat, to give one another pictures or brief videos with short messages (called snaps) that disappear after they are viewed. Snaps are gifts, but these are not the gifts that this Article explores.

15. This term is well known. *See, e.g.*, B. MARK SMITH, THE EQUITY CULTURE: THE STORY OF THE GLOBAL STOCK MARKET (2003) (discussing the development of the international market of stocks, bonds and other instruments).

16. Dominic Rushe, *Snapchat to Make High-Profile Stock Debut After Revealing IPO Plans*, GUARDIAN (Feb. 2, 2017), https://www.theguardian.com/technology/2017/feb/02/snapchat-ipo-goes-public-evan-spiegel-owner-tech [https://perma.cc/UA9N-4URU] ("The sale will be an unusual one. The company will not be selling any voting shares, allowing the company's founders to keep total control of Snap Inc even after raising money in the public markets."); Chris Loterina, *Here Are The Reasons Why You Should Avoid Buying The Snap IPO*, TECH TIMES (Feb. 26, 2017), http://www.techtimes.com/articles/199249/20170226/here-are-the-reasons-why-you-should-avoid-buying-the-snap-ipo.htm [https://perma.cc/W9Y6-Z73B] ("Some [analysts] have balked at the manner in which Snap's shareholders are not entitled to any voting rights. Simply put, there will be a number of trial and errors along the way for this new kind of organization and the shareholders will be powerless to do anything about it.").

17. Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 WASH. U. L. Q. 565, 565 (1991).

18. *See* Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 693-706 (1985) (tracing the background of the one share, one vote controversy); Bainbridge, *supra* note 19, at 568-73 (explaining limitations on shareholder voting rights between 1900 and 1987).

example, used different classes of shares to retain control of his car company.[19] In more recent years, founders of high-technology companies, now seen as central to the economy (or at least the stock market), have used classes of shares, some with more votes than others, to retain control.[20] Snap may simply be a pure expression of an established idea—that all shareholders are equal—but some shareholders are more equal than others.[21]

A number of shareholder groups and index funds protested Snap's idea of issuing nonvoting shares.[22] Index funds in particular expressed concern. An index fund purchases a portfolio of shares that mimics a given index, without doing research or otherwise spending resources deciding what or when to buy and sell.[23] Index funds therefore have low operating costs and have come to dominate the public equity markets.[24] In soliciting investment, index funds promise to investors that they will stick to this strategy.[25] So, if nonvoting Snap shares were a component of an index in question, for example the Standard & Poor's (S&P) 500, funds that use the S&P 500 as an index would be compelled to buy Snap shares that carried no vote.

The California State Teachers Retirement System (CalSTeRS) Fund and about fifty other investors that collectively accounted for approximately $22 trillion in assets under management, objected strongly to Snap and other companies that do not have a one-share-per-vote capital structure.[26] Norway's biggest sovereign wealth fund,

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19. *See* Seligman, *supra* note 20, at 700.

20. *See* discussion *infra* Part II.

21. With apologies to George Orwell. *See* GEORGE ORWELL, ANIMAL FARM 118 (2009) (1945) ("All animals are equal, but some animals are more equal than others.").

22. *See* Ronald Orol, *Dual-Class Voting Structures Spur Growing Revolt*, STREET (Apr. 12, 2017), https://www.thestreet.com/story/14084270/1/dual-class-voting-structures-spur-growing-revolt.html [https://perma.cc/S37M-MNZL] ("The [Council of Institutional Investors] has been leading an institutional investor effort to discourage other companies from following in Snap's footsteps. The group argues that non-voting shareholders are disenfranchised at Snap and at other companies giving insiders control of the votes."); Yin Wilczek, *Investors Get Snappy Over Snap No-Vote Shares*, BLOOMBERG BNA (Mar. 24, 2017), https://www.bna.com/investors-snappy-snap-b57982085665/ ("In the U.K., a group of fund managers are lobbying against including Snap in indexes run by the London Stock Exchange's FTSE Russell unit.").

23. *See* Giovanni Strampelli, *Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing*, 55 SAN DIEGO L. REV. 804, 804 (2018).

24. *See* Timothy Strauts, *5 Charts on U.S. Fund Flows That Show the Shift to Passive Investing*, MORNINGSTAR (Mar. 12, 2018), https://www.morningstar.com/blog/2018/03/12/fund-flows-charts.html [https://perma.cc/UV7F-DTMT].

25. *See* Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 IOWA J. CORP. L. 493, 506 (2018) (explaining that index funds' philosophy of automatically tracking an index enables them to charge lower fees than active funds, and investors are attracted to that model).

26. Andrea Vittorio, *Snap-Like Firms Should Report Investing Risks, Panel Tells SEC*, 83 BLOOMBERG BNA CORP. COUNSEL WEEKLY 158 (Mar. 14, 2018),

worth an estimated $960 billion alone, backed a plan to place a "zero investability weight" on companies with no listed voting shares.[27] On August 1, 2017, five months after the Snap offering, S&P Dow Jones Indices effectuated a new rule barring companies that limit shareholders' rights (or rather that have multiple classes of shares) from being part of its indices.[28] Companies already included in an S&P index, like Facebook and Alphabet (the parent company of Google), are exempted from the new rule, but Snap is ineligible for inclusion.[29]

So why did investors buy into—and indices and index funds object to—the Snap IPO? The answer to this question requires a seemingly naive inquiry that must be treated with care: why do people invest in stocks? What does it mean that people invested in Snap (or Facebook or Alphabet) despite not being able to affect the fate of their investments in any way? Although there are a variety of legal and economic arguments that may be made regarding protections and powers that these new shareholders have, the arguments are unconvincing. From a perspective suggested by Mauss, however, both the investor behavior and the management's treatment of its new "owners" make considerable sense.

Gifts, and by implication exchanges more broadly, both create and must be understood in terms of webs of cultural context. As sketched above, Mauss argued that gifts were constitutive of archaic society; from there, it is a short leap to the proposition that exchanges constitute commercial societies. The Snap IPO demonstrates this

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https://biglawbusiness.com/snap-like-firms-should-report-investing-risks-panel-tells-sec/?promocode=LIPP101AA%3Fpromocode [https://perma.cc/CX2W-DVZZ].

27. Jonas Bergman, *Norway Wealth Fund Wants to Exclude Voteless Shares from Indexes*, BLOOMBERG BNA CORP. L. & ACCOUNTABILITY REP. (June 26, 2017), https://www.bloomberg.com/news/articles/2017-06-26/norway-wealth-fund-wants-to-exclude-voteless-shares-from-indexes [https://perma.cc/B4V3-WJ65].

28. Paresh Dave & Ethan Varian, *S&P 500 Will Exclude Snap Because its Stock Gives New Shareholders No Power*, L.A. TIMES (Aug. 1, 2017), http://www.latimes.com/business/hollywood/la-fi-snap-sp-20170801-story.html [https://perma.cc/U6JT-WVNR] (reporting that the S&P rule would impact a handful of companies but was designed to punish Snap and any firms that follow in its footsteps). "Tracking stocks and companies with multiple share class structures are **not** eligible for the S&P Composite 1500 and its component indices." S&P DOW JONES INDICES, S&P U.S. INDICES: METHODOLOGY 6 (2019), https://us.spindices.com/documents/methodologies/methodology-sp-us-indices.pdf [https://perma.cc/2ZZZ-RQ3R].

29. Chris Dieterich, *Snap Barred from S&P 500 Under New Rules*, MONEYBEAT WALL ST. J. (Aug. 1, 2017), https://blogs.wsj.com/moneybeat/2017/08/01/snap-barred-from-sp-500-under-new-rules/ [https://perma.cc/C9TM-R4ZA] (discussing S&P Dow Jones Indices' announcement that companies with multiple class shares are not eligible to join the index). That same day, Snap's share price hit a then-record low. Katie Roof, *Snap Hits Record Low after Getting Rejected from the S&P 500*, TECHCRUNCH (Aug. 1, 2017), https://techcrunch.com/2017/08/01/snap-hits-record-low-after-getting-rejected-from-the-sp-500/ [https://perma.cc/F9QD-PJFL] (noting that Snap shares fell 4 percent and closed at $13.10 after the S&P announcement).

proposition because the transaction is virtually impossible to understand in terms of rational individualism; and therefore, if Snap's investors are rational at all, they must be socially rational.

Mauss's insights can be used to complement the substantial work of behavioral economics in explaining investor choice and organizational behaviors.[30] The field of corporate finance traditionally has been organized around the figure of the rationally self-interested individual.[31] Behavioral economics argues that people are not all that rational.[32] This Article argues that people in markets are not all that individual.

Part II will look more closely at the Snap offering, in addition to other relatively recent offerings of nonvoting, or at least powerless shares, in (mostly technology-based) companies. Part III will explore the familiar rationales for equity investing, including stock appreciation and dividends, and the logical shortcomings of those rationales. Part IV, by adopting Henry Manne's "two systems" of corporate affairs: law and economics,[33] will show that corporation law fails to ensure that corporations return business profits to shareholders. Part V will conduct a similar analysis of the market for corporate control, concluding that without shareholder voting rights, the market for corporate control also fails to ensure a return for shareholders. Part VI will then employ Mauss's understanding of gift societies to explore the equity culture in which shareholders invest in Snap and other high-technology firms, and in which such firms operate. Part VII will conclude by suggesting some ramifications of understanding shareholding, and consequently management, in terms of this equity culture.

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30. For an excellent summary of behavioral economics and the forces at work in mergers and acquisitions, see generally Donald C. Langevoort, *The Behavioral Economics of Mergers and Acquisitions*, 12 TRANSACTIONS: TENN. J. BUS. L. 65 (2011) (exploring theories of behavior and motivation, including CEO ego, that depart considerably from strict rational choice assumptions in traditional economic models).

31. *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATE LAW AND ECONOMICS 23 (2002) (mentioning the rational actor theory which is based on individuals making rationally self-interested choices).

32. *See* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1593, 1601 (2014) (describing the ways that social scientists focus on ways that human behavior differs from the rational behavior assumed by neoclassical economics).

33. Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967).

II. SNAP AND ITS KIN

On March 2, 2017, Snap offered 200 million Class A shares for $17 each in an oversubscribed[34] IPO of common stock.[35] The Class A shares are nonvoting—although shareholders are entitled to attend the company's annual meeting and to ask questions.[36] In addition to the Class A common stock, Snap also has Class B one-vote-per-share stock, which is reserved for company insiders and early investors, and Class C ten-votes-per-share stock, which is held exclusively by the company's co-founders, Bobby Murphy and Evan Spiegel.[37] Murphy and Spiegel cashed out more than $250 million each in the IPO, but still control nearly ninety percent of the voting power of the company.[38] The Class A nonvoting shares closed on March 2, 2017 up forty-four percent at $24.48[39] and up over fifty-nine percent at $27.09 on March 3, 2017.[40]

Although the Snap IPO is notable for the fact that the publicly traded common shares carried *no* vote at all, this was hardly the first time investors have eagerly purchased IPO common shares with no hope of influencing company policy.[41] Dual-class share structures were

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34. Some estimates put the oversubscription at 10 times. Lauren Hirsch, *Snap Shares Gain 44% on First Day on NYSE*, BNA BLOOMBERG, (Mar. 2, 2017), https://www.bnnbloomberg.ca/snap-shares-open-at-us-24-after-us-17-ipo-pricing-1.685376/snap-s-sought-after-shares-set-for-market-debut-after-3-4-billion-ipo-1.685376 [https://perma.cc/XDP2-MEVE].

35. Snap Inc., Amended Registration Statement (Form S-1/A) at 8 (Feb. 24, 2017).

36. Snap Inc., Prospectus filed pursuant to Rule 424(b)(4) at 5, 184 (Mar. 1, 2017).

37. Kurt Wagner, *One Way Snapchat's IPO Will Be Unique: The Shares Won't Come with Voting Rights*, RECODE.NET, (Feb. 21, 2017), https://www.recode.net/2017/2/21/14670314/snap-ipo-stock-voting-structure [https://perma.cc/6SCM-4ZKG].

38. Caitlin Huston, *Snapchat Founders, Investors Cash Out Nearly $1 Billion in Snap IPO,* MARKETWATCH (Mar. 3, 2017), https://www.marketwatch.com/story/snapchat-founders-and-investors-sell-millions-of-shares-in-snap-ipo-2017-03-01 [https://perma.cc/5UCB-H5BU].

39. Anita Balakrishnan, *Snap Closes up 44% after Rollicking IPO*, CNBC (Mar. 2, 2017), https://www.cnbc.com/2017/03/02/snapchat-snap-open-trading-price-stock-ipo-first-day.html [https://perma.cc/6V6X-44NK].

40. *Snap Inc. Class A Common Stock (SNAP) Historical Prices & Data*, NASDAQ, https://www.nasdaq.com/symbol/snap/historical (last visited June 3, 2018).

41. *See* Maureen Farrell, *Tech Founders Want IPO Riches Without Those Pesky Shareholders*, WALL ST. J. (Apr. 3, 2017), https://www.wsj.com/articles/control-geeks-tech-founders-want-ipo-investors-not-their-input-1491236464 [https://perma.cc/LBA5-9TVF]; Lisa Lambert & Ross Kerber, *After Snap IPO, U.S. Regulator Questions Unequal Voting Rights*, REUTERS (Mar. 9, 2017), https://www.reuters.com/article/us-usa-sec-rights-idUSKBN16G2LO [https://perma.cc/EA2N-KCPT]; Hannah Roberts, *Snapchat Isn't Offering Voting Rights in its IPO - and Potential Investors Are Furious*, BUS. INSIDER (Feb. 3, 2017), http://www.businessinsider.com/snapchat-ipo-no-voting-rights-investor-letter-2017-2 [https://perma.cc/6LQL-BRGW]; Madison Marriage, *State Street Asks SEC to Block Non-voting Shares*, FIN. TIMES (June 17, 2017), https://www.ft.com/content/9595e5c4-51db-11e7-bfb8-997009366969 [https://perma.cc/5FV6-66YW].

first introduced in the early twentieth century.[42] In 1925, Dodge Brothers, Inc.[43] and Industrial Rayon Corporation issued nonvoting stock. [44] This created considerable controversy at the time, with both politicians and academics criticizing the disenfranchisement of the public investor.[45] In 1940, the New York Stock Exchange (NYSE) took action, banning the listing of nonvoting securities.[46]

Dual-class structures with heavily weighted voting stock for insiders[47] became popular again in the 1980s as a takeover defense.[48] In 1984, the NYSE relaxed its prohibition[49] as it confronted competition from the NASDAQ listing service, which imposed no voting requirements, and the American Stock Exchange, which permitted listing of dual-class stock.[50] Negative investor and regulatory opinions of dual-class capital structures persisted,[51] however, and in 1988, the Securities and Exchange Commission (SEC) adopted Rule 19c-4, which effectively prevented the listing of securities of companies that issued securities or took other actions to nullify, restrict, or reduce the voting rights of existing shareholders.[52] The Business Roundtable promptly challenged Rule 19c-4 and two years later the U.S. Court of Appeals for the D.C. Circuit invalidated the rule

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42. Bainbridge, *supra* note 17, at 568.

43. *Id.* at 569 (explaining that Dodge Brothers, Inc., which was completely controlled by an investment banking firm, listed bonds, preferred stock, and nonvoting common shares on the NYSE in 1925).

44. Seligman, *supra* note 18, at 693-94 (relying on Adolf Berle).

45. *See* WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET (1927). A Harvard economics professor, William Ripley denounced the nonvoting stock as the "crowning infamy" of corporate actions at the time. *Id.* at 86-7 (1927). As Professor Stephen Bainbridge explained, Ripley's argument was an "early version of the conflict of interest argument: promoters used nonvoting common stock as a way of maintaining voting control for themselves. By issuing the voting common stock to insiders and nonvoting common stock to the public, promoters raised considerable sums without losing control of the enterprise." Bainbridge, *supra* note 18, at 569.

46. Seligman, *supra* note 18, at 699. In what is commonly considered to be a politically motivated decision, the NYSE made an exception to its policy in 1956 and allowed Ford Motor Company to list despite the fact that the Ford family controlled 40% of the voting power with only 5% of the equity *Id.* at 700.

47. In a typical dual-class stock company, insiders hold common stock with multiple votes while the public holds one-vote-one-share stock. *Id.* at 687.

48. Bainbridge, *supra* note 18, at 570-71.

49. Seligman, *supra* note 18, at 700.

50. Bainbridge, *supra* note 18, at 576-77.

51. *Id.* at 574-583 (chronicling the SEC's concerns with dual-class structures when they adopted Rule 19c-4).

52. 17 C.F.R. Sec. 240.19c-4 (1990). Rule 19c-4, "Voting Rights Listing Standards; Disenfranchisement Rule," prohibited the exchanges, who were subject to SEC authority, from listing or continuing to list the equity securities of an issuer that took one of the prohibited actions. *See* Exch. Act Rel. No. 25891 (Jul. 7, 1988), 53 F.R. 26376 (Jul. 12, 1988), http://cdn.loc.gov/service/ll/fedreg/fr053/fr053133/fr053133.pdf.

as exceeding the SEC's authority.[53] The NYSE and the NASD (the regulator of the NASDAQ system at the time) adopted listing standards "essentially identical" to Rule 19c-4,[54] but those were subsequently loosened.[55] Currently, U.S. exchanges permit IPOs by companies with existing dual-class structures, but prohibit already listed companies from restructuring into a dual-class system.[56] The exchanges continue to face investor pressure to further limit such structures.[57]

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53. The Bus. Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990) (vacating Rule 19c-4 because it interfered with the allocation of powers among shareholders).

54. Bainbridge, *supra* note 19, at 625.

55. *See* NYSE LISTED COMPANY MANUAL, Voting Rights, § 313.000(A) & (B), http://wallstreet.cch.com/LCMTools/bookmark.asp?id=sx-ruling-nyse-policymanual_313.00&manual=/lcm/sections/lcm-sections/ [https://perma.cc/APE3-T5RG] (explaining that the NYSE's Rule 19c-4-based rules were loosened in 1994 to enable the exchange to adopt a flexible approach). The NASDAQ also has requirements pertaining to voting rights, which were adopted on March 12, 2009. *See* NASDAQ Corporate Governance Requirement 5640, IM-5640, http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F3%5F8%5F29&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F [https://perma.cc/MD9D-UDL7].

56. *See* NYSE LISTED COMPANY MANUAL *supra* note 57, at § 313.00.10 ("[t]he restriction against the issuance of super voting stock is primarily intended to apply to the issuance of a new class of stock, and companies with existing dual-class capital structures would generally be permitted to issue additional shares of the existing super voting stock without conflict with this Policy"). Commentators on listings accuse Congress, the SEC, and the NYSE for being asleep at the switch for allowing Snap's IPO. Ken Bertsch, Executive Director of the Council of Institutional Investors (CII), which represents pension funds, endowments and other large investors, noted that "he is worried that the [Snap] IPO will infect other markets beyond the NYSE and NASDAQ, which he says next to the Netherlands, have the lowest standards in the world." *See* Eleanor Bloxham, *Snap Shouldn't Have Been Allowed to Go Public Without Voting Rights*, FORTUNE (Mar. 3, 2017), http://fortune.com/2017/03/03/snap-ipo-non-voting-stock/ [https://perma.cc/734A-KGHQ]; Eleanor Bloxham, *Jamie Dimon, Alibaba, and Our Crumbling Regulatory Standards*, FORTUNE (Oct. 7, 2013), http://fortune.com/2013/10/07/jamie-dimon-alibaba-and-our-crumbling-regulatory-standards/ [https://perma.cc/3AER-KUZQ].

57. On October 24, 2018, CII petitioned the NASDAQ and the NYSE to require issuers with dual-class share structures to phase out the arrangements within seven years of their IPOs. Tom Zanki, *Investors Urge Exchanges to Phase Out Dual-Class Voting*, LAW360 (Oct. 24, 2018), https://www.law360.com/articles/1095315/investors-urge-exchanges-to-phase-out-dual-class-voting [https://perma.cc/P47X-NVUQ]. CII noted that a number of influential asset managers, including Black Rock, T. Rowe Price, CalSTeRS, and the California Public Employees' Retirement System, supported its petition for sunsets. *Id.* According to CII, a third of companies with dual-class share structures that give insiders extra voting power now have sunset provisions for that structure. *See* Andrea Vittorio, *More Supervoting Stocks Get Expiration Dates as Investors Balk*, BLOOMBERG LAW (Oct. 30, 2018), https://www.bloomberglaw.com/document/XA8HA7JG000000?bna_news_filter=corporate-law&jcsearch=BNA%252000000166b12ed8dca7f7b96f5a590002#jcite [https://perma.cc/GDA2-3D27]. SEC Commissioner Robert Jackson has also called for sunsets on dual-class structures. Commissioner Robert J. Jackson Jr., "Perpetual Dual-Class Stock: The Case Against Corporate Royalty," inaugural speech given at University of California, Berkeley, San Francisco, CA, (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty [https://perma.cc/6PZZ-25C5] (stating that "our

Although the decline of the 1980s takeover fever shifted the spotlight for a few decades,[58] dual-class share structures[59] have again become popular—now as a method for the founders of technology start-up companies to retain control while accessing public company capital markets.[60] Google's 2004 IPO with a dual-class capital structure[61]

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country's founding principles and our corporate law counsel against the creation of corporate royalty" with perpetual dual-class structures).

58. Notably, however, *The New York Times* has always used a dual-class share structure which secures control of the media enterprise by the Sulzberger family. Joe Nocera, *How Punch Protected the Times*, N.Y. TIMES (Oct. 1, 2012), https://www.nytimes.com/2012/10/02/opinion/nocera-how-punch-protected-the-times.html [https://perma.cc/VV54-M49A].

59. A compromise between single-class and dual-class structures is the use of time-phased voting. This structure is beyond the scope of this article but has been comprehensively analyzed by Professors Dallas and Barry. *See generally* Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541 (2016) (arguing that time-phased voting arrangements facilitate controlling insider diversification, and that corporations employing the structure outperform the market).

60. The accountability of management insiders in dual-class companies is further compromised by the fact that many such firms qualify as "controlled companies," defined as listed companies "of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company." NYSE LISTED COMPANY MANUAL, *supra* note 57, at § 303A.00. Controlled companies are exempted from NYSE governance rules requiring companies to have a majority of independent directors on the board, and to ensure that nominating, corporate governance, and compensation committees are composed entirely of independent directors. *Id.* at §§ 303A.01, 303A.04 & 303A.05.

61. Google Inc., Registration Statement (Form S-1) at iii (Apr. 29, 2004) [hereinafter Google Form S-1], https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm [https://perma.cc/4C5J-4HCL]. In the Registration Statement, Google's founder Larry Page argued:

> *We are creating a corporate structure that is designed for stability over long time horizons. By investing in Google, you are placing an unusual long-term bet on the team, especially Sergey and me, and on our innovative approach . . . .*
>
> In the transition to public ownership, we have set up a corporate structure that will make it harder for outside parties to take over or influence Google. This structure will also make it easier for our management team to follow the long term, innovative approach emphasized earlier. This structure, called a dual class voting structure, is described elsewhere in this prospectus.
>
> The main effect of this structure is likely to leave our team, especially Sergey and me, with significant control over the company's decisions and fate, as Google shares change hands. New investors will fully share in Google's long term growth but will have less influence over its strategic decisions than they would at most public companies.…
>
> Google has prospered as a private company. As a public company, we believe a dual class voting structure will enable us to retain many of the positive aspects of being private. We understand some investors do not favor dual class structures. We have considered this point of view carefully, and we have not made our decision lightly. We are convinced that everyone associated with Google—including new investors—will benefit from this structure.

marked the beginning of a trend that seems to have reached its purest expression with the Snap offering. Google (ticker symbol GOOGL) listed Class A one-vote-per-share common stock on the NASDAQ in 2004.[62] The company founders, Larry Page and Sergey Brin, retained nonpublic super-voting[63] Class B ten-votes-per-share common stock.[64]

Although the Financial Crisis soured the IPO market for several years, by 2011, the pace of technology IPOs with dual-class structures began to pick up.[65] On May 19, 2011, LinkedIn (LNKD) went public[66] with one-vote-per-share Class A shares.[67] The existing shareholders, including co-founder Reid Hoffman and three venture capital

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Id. In 2015, Google Inc. was reorganized, with the listed company now known as Alphabet, Inc. *See* Jillian D'Onfro, *Google Is Now Alphabet*, BUS. INSIDER (Oct. 2, 2015), http://www.businessinsider.com/google-officially-becomes-alphabet-today-2015-10 [https://perma.cc/2NY2-7F4G].

62. Google Form S-1, *supra note* 63, at 20.

63. "Super-voting" shares typically confer more than one vote per share, enabling their holders to outvote the holders of listed common stock. The extra votes can give company founders more power to elect directors and take other actions which require a shareholder vote. The extra votes can also protect the founders from the majority of the company's shareholders and their potentially differing opinions/priorities. *See* Rolfe Winkler & Maureen Farrell, *In 'Founder Friendly Era, Star Tech Entrepreneurs Grab Power, Huge Pay*, WALL ST. J. (May 28, 2018), https://www.wsj.com/articles/in-founder-friendly-era-star-tech-entrepreneurs-grab-power-huge-pay-1527539114?mod=searchresults&page=1&pos=2 [https://perma.cc/B649-N5JY].

64. Google Inc., Registration Statement (Amendment No. 9 to Form S-1/A) at 30 (Aug. 18, 2004), https://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm [https://perma.cc/SGE6-LRS7]. Google's founders Larry Page and Sergey Brin explained:

> The main effect of this structure is likely to leave our team, especially Sergey and me, with increasingly significant control over the company's decisions and fate, as Google shares change hands. After the IPO, Sergey, Eric and I will control 37.6% of the voting power of Google, and the executive management team and directors as a group will control 61.4% of the voting power. New investors will fully share in Google's long term economic future but will have little ability to influence its strategic decisions through their voting rights."

Id. at 30.

65. Between the 2004 Google IPO and 2011, the media company Scripps Networks Interactive (SNI) offered Class A common shares on June 20, 2008. The SNI shares were limited to electing one third of the board. At the time, SNI was controlled by the Edward W. Scripps Trust, which ended in 2012 with the death of the last descendent of the founder on whom the duration of the trust was based. A complex family agreement, however, ensures that the next generation will continue to control SNI. *See* Mark Kroeger, *The Edward W. Scripps Trust Ends*, SCRIPPS NETWORKS INTERACTIVE, INC. (Oct. 19, 2012), http://ir.scrippsnetworks.com/phoenix.zhtml?c=222475&p=irol-newsArticle&ID=1747643 [https://perma.cc/EV97-V3MR].

66. *See* Julianne Pepitone, *LinkedIn Stock More Than Doubles in IPO*, CNN MONEY (May 19, 2011), https://money.cnn.com/2011/05/19/technology/linkedin_IPO/index.htm [https://perma.cc/69YC-9NG2] (noting that the shares, priced at $45, closed at $94.25 a share at the end of their first day of trading on the NYSE).

67. LinkedIn Corp., Quarterly Report (Form 10-Q) at 42 (Nov. 3, 2011) (noting the dual class structure as a risk factor).

shareholders, retained super-voting Class B (ten-votes-per-share) shares.[68] As a result, the public shareholders were able to purchase less than one percent of the company voting power.[69] On November 4, 2011, Groupon (GRPN) followed suit, offering one-vote-per-share Class A common stock;[70] the founders retaining all of the Class B 150-votes-per-share, as well as some of the Class A shares.[71] Zynga Inc. (ZNGA) founder Mark Pincus held a class of shares with seventy-votes-per-share when the videogame company went public on December 16, 2011,[72] ensuring him majority voting power, despite the offer of Class A (one-vote-per-share) stock to the public.[73]

In April 2014, Google went back to the public markets and issued a third Class C common stock (listed separately as GOOG) for employee stock incentive plans, acquisitions, and other stock sales.[74] The Class C shares provide a right to dividends but not to vote.[75] The 2015

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68. LinkedIn Corp., Registration Statement (Amendment No. 5 to Form S-1/A) at 26 (May 17, 2011).

69. Steven Davidoff Solomon, *Plans for LinkedIn's I.P.O. May Make Few Friends*, N.Y. TIMES DEALBOOK (May 10, 2011), https://dealbook.nytimes.com/2011/05/10/plans-for-linkedins-i-p-o-may-make-few-friends/?mtrref=undefined [https://perma.cc/V9Y8-N75X].

70. Groupon, Inc., Registration Statement (Amendment No. 7 to Form S-1/A) at 134 (Nov. 1, 2011).

71. Nell Minow, *The Hidden Danger of IPOs Like Groupon and LinkedIn - and What It Will Cost*, MONEY WATCH CBS NEWS (June 11, 2011), https://www.cbsnews.com/news/the-hidden-danger-of-ipos-like-groupon-and-linkedin-and-what-it-will-cost/ [https://perma.cc/E2K3-5CDA]. Note, however, that Groupon Inc.'s dual-class stock structure converted to a single common class as scheduled on October 31, 2016, five years after the IPO. *See* Amina Elahi, *Groupon Went Public 5 Years Ago. Will a Buyer Come in the Next 5?* CHI. TRIB. (Nov. 4, 2016), https://www.chicagotribune.com/bluesky/originals/ct-groupon-five-years-ipo-bsi-20161104-story.html [https://perma.cc/YY9P-ACM7] (noting that Groupon's sunset date had passed as scheduled).

72. Zynga Inc., Registration Statement (Amendment No. 8 to Form S-1/A) at 28 (Dec. 9, 2011)

73. Maureen Farrell, *Tech Founders Want IPO Riches Without Those Pesky Shareholders*, WALL ST. J. (Apr. 3, 2017), https://www.wsj.com/articles/control-geeks-tech-founders-want-ipo-investors-not-their-input-1491236464 [https://perma.cc/AE89-238F].

74. Ben Pimentel, *Google splits into GOOG and GOOGL*, MARKETWATCH (Apr. 2, 2014), https://blogs.marketwatch.com/thetell/2014/04/02/google-investors-are-about-to-get-goog-and-googl-shares-in-stock-split/.

75. Steven Davidoff Solomon, *New Share Class Gives Google Founders Tighter Control*, N.Y. TIMES DEALBOOK (Apr. 13, 2012), https://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/ [https://perma.cc/B2CC-HZQT]. Unsurprisingly, the Google board of directors—controlled by the founders thanks to their Class B shares—approved the issuance of the Class C shares unanimously. Andrew Ross Sorkin, *Stock Split for Google that Cements Control at the Top*, N.Y. TIMES DEALBOOK (Apr. 16, 2012), https://dealbook.nytimes.com/2012/04/16/stock-split-for-google-that-cements-control-at-the-top/ [https://perma.cc/XS6Y-5M2Y]. As explained by one press report,

> The whole effort is a transparent attempt by [Sergey] Brin and [Larry] Page to maintain their voting control over the company without having stock issued to employees slowly dilute their equity. The two men state as much in their "Founders' Letter" as they describe why these new non-voting class C shares are

placement of Google under the umbrella of a new holding company, Alphabet, Inc. (controlled by Page and Brin), retained the Google share structure.[76]

The Facebook (FB) offering took place on May 18, 2012.[77] Founder Mark Zuckerberg and other early investors held ten-votes-per-share stock,[78] and offered one-vote-per-share Class A common stock to the public.[79] The structure ensured Zuckerberg's voting control over the company. In the face of a shareholder lawsuit, the company abandoned a subsequent plan to issue nonvoting Class C shares of stock.[80]

On September 19, 2014, Chinese internet retailer Alibaba (BABA) accomplished its U.S. IPO,[81] reportedly made in the United States

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> being issued as part of a stock split: "These non-voting shares will be available for corporate uses, like equity-based employee compensation, that might otherwise dilute our governance structure."

Barry Randall, *Why Google Just Issued A New Stock Class*, MARKETWATCH (Apr. 17, 2012), https://www.marketwatch.com/story/why-google-just-issued-a-new-stock-class-2012-04-17 [https://perma.cc/WGU8-Q8HS]. As of April 19, 2019, there were 349,291,000 Class C Shares outstanding. ALPHABET INC. STOCK REPORT, https://www.nasdaq.com/symbol/goog/stock-report (providing the current number of shares outstanding, which may change daily).

76. Trevir Nath, *What Google's Alphabet Means for Investors and Wall Street*, NASDAQ.COM (Aug. 13, 2015), https://www.nasdaq.com/article/what-googles-alphabet-means-for-investors-and-wall-street-cm508721.

77. Julianne Pepitone, *Facebook Trading Sets Record IPO Volume*, CNN MONEY (May 18, 2012), https://money.cnn.com/2012/05/18/technology/facebook-ipo-trading/index.htm (noting "[m]ore than 80 million shares changed hands in the first 30 seconds of trading").

78. Jeremy Quittner, *To Maintain Control of Your Company After Its IPO, Follow Mark Zuckerberg's Lead*, INC.COM (June 11, 2015), https://www.inc.com/jeremy-quittner/facebook-votes-down-one-share-one-vote-proxy-move.html [https://perma.cc/YBX4-YF6L].

79. Facebook, Inc., Registration Statement (Form S-1) at 8 (Feb. 1, 2012).

80. *See* Tom Hals, *Zuckerberg Nixes New Facebook Share Class After Shareholder Lawsuit*, REUTERS (Sept. 22, 2017), https://www.reuters.com/article/us-facebook-stock-trial/zuckerberg-nixes-new-facebook-share-class-after-shareholder-lawsuit-idUSKCN1BX2PA [https://perma.cc/KN6M-6ZPN]. Zuckerberg planned to create a new class of company stock with no voting power as a way for him to retain control over the company while fulfilling a pledge to give away his wealth. Hals notes that Zuckerberg abandoned his plans just before:

> [he] was scheduled to testify on [September 19, 2017] in Wilmington, Delaware, in a shareholder lawsuit seeking to halt the Class C stock plan, which had been approved by shareholders. Sjunde AP-Fonden, a Swedish national pension fund, and The Amalgamated Bank sued [in 2016], saying that Zuckerberg should have to pay for the right to retain control while selling stock.

Id. Facebook later settled an action over the shareholder plaintiffs' attorneys' fees for $67.5 million. *See* Jef Feeley & Sarah Frier, *Facebook to Pay $67.5 Million in Fees in Suit over Shares*, BLOOMBERG (Oct. 24, 2018), https://www.bloomberg.com/news/articles/2018-10-24/facebook-to-pay-67-5-million-in-fees-in-non-voting-shares-suit [https://perma.cc/JX7T-CPJY].

81. *See* Alibaba Grp. Holding Ltd., Registration Statement (Form F-1) (May 6, 2014); Matt Egan, *Boom: Alibaba Surges 38% in Huge IPO Debut*, CNN BUSINESS (Sept. 19, 2014),

after the Hong Kong Stock Exchange refused to list shares in companies with dual-class capital structures.[82] The offering raised a record twenty-five billion dollars,[83] despite the fact that control of the company is "locked forever in the hands of a group of insiders known as the Alibaba Partnership."[84] Although it holds only a small minority of the equity capital, the partnership has the exclusive right to choose a majority of the board of directors, even if the shareholders do not approve the partnership's candidates.[85]

Dual-class shareholding is also often found in technology and internet retail firms.[86] For example, Wayfair, Inc. (W) offered eleven

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https://money.cnn.com/2014/09/19/investing/alibaba-ipo-debut-nyse/index.html [https://perma.cc/EH97-RV9B] (establishing the date of the IPO).

82. Paul Davies & Arash Massoudi, *Alibaba Abandons $60bn Hong Kong Listing*, FIN. TIMES (Sept. 25, 2013), https://www.ft.com/content/525f4bc2-25ae-11e3-aee8-00144feab7de [https://perma.cc/T378-68KW] (noting that founder Jack Ma and other top executives had failed to persuade Hong Kong authorities that they should be allowed to nominate a majority of the board of directors). Hong Kong Exchanges and Clearing Ltd., however, subsequently changed its rules to allow such offerings. *See* Christopher W. Betts et al., *Hong Kong Publishes Groundbreaking New Rules for Dual-Class Shares, Emerging and Innovative Sectors*, SKADDEN (Apr. 25, 2018), https://www.skadden.com/insights/publications/2018/04/quarterly-insights/hong-kong-publishes-groundbreaking-new-rules [https://perma.cc/32K6-RP9G] (explaining that the new rules "permit listings of high-growth and innovative companies with dual-class shares or 'weighted voting rights' (WVR) structures"). The Singapore stock exchange now also allows corporate arrangements such as dual-class shares. *See* Andrea Tan & Benjamin Robertson, *MSCI Reopens Dual-Class Share Debate, Starting New Consultation*, BLOOMBERG BNA CORP. L. & ACCOUNTABILITY REP. (Feb. 2, 2018), *available at* Bloomberg Law, https://www.bloomberglaw.com/product/blaw/document/P3G8J56TTDS1?bc=W1siU2VhcmNoIFJlc3VsdHMiLCIvcHJvZHVjdC9ibGF3L3NlYXJjaC9yZXN1bHRz [https://perma.cc/NAW2-ESB4].

83. Liyan Chen et al., *Alibaba Claims Title For Largest Global IPO Ever With Extra Share Sales*, FORBES (Sept. 22, 2014), https://www.forbes.com/sites/ryanmac/2014/09/22/alibaba-claims-title-for-largest-global-ipo-ever-with-extra-share-sales/ (explaining that the IPO underwriters had exercised their option to purchase additional shares, raising the total raised from $21.8 billion to $25 billion). Leena Rao, *Alibaba's Shares Slide Below IPO Price*, FORTUNE (Aug. 24, 2015), http://fortune.com/2015/08/24/alibaba-slides-below-ipo/ [https://perma.cc/A4KY-HRS6]. Snap surpassed the record as the largest tech offering in 2017. Steven Davidoff Solomon, *In Manchester United's I.P.O., A Preference for American Rules*, N.Y. TIMES DEALBOOK (Jul. 10, 2012), https://dealbook.nytimes.com/2012/07/10/in-manchester-uniteds-i-p-o-a-preference-for-u-s-rules/?mtrref=www.google.com&gwh=EA8BD1EEAC84CB827DAB9C24BA275DB3&gwt=pay [https://perma.cc/23QX-3N9Y].

84. Lucian Bebchuk, *Alibaba's Governance Leaves Investors at a Disadvantage*, N.Y. TIMES DEALBOOK (Sept. 16, 2014), https://dealbook.nytimes.com/2014/09/16/alibabas-governance-leaves-investors-at-a-disadvantage/ [https://perma.cc/A5SM-SPXJ].

85. *Id.*

86. There have been a number of dual-class offerings in the non-tech sector too. For example, Carlyle Group (May 3, 2012), The Carlyle Group L.P., Registration Statement, (Form S-1) (Sept. 6, 2011); New Corp. (Jul. 1, 2013) New Newscorp LLC, Securities Registration Statement (Form 10-12B) (Dec. 20, 2012); American Homes 4 Rent (Aug. 1, 2013), American Homes 4 Rent, Registration Statement (Form S-11) (June 4, 2013); Castlight Health (Mar. 14, 2014), Castlight Health, Inc., Registration Statement (Form S-1) (Feb. 10, 2014); and Shake Shack (Jan. 30, 2015), Shake Shack Inc., Registration Statement, (Form S-1) (Dec. 29, 2014).

million one-vote-per-share Class A shares to the public on October 2, 2015,[87] but founders Niraj Shah and Steven Conine maintained majority ownership and over seventy-one million non-public super-voting (ten-votes-per-share) Class B shares.[88] FitBit (FIT) offered Class A shares to the public on June 16, 2015[89] while retaining ten-votes-per-share Class B shares, and control, for its insiders.[90]

As the debate surrounding dual-class structures continued,[91] Match Group Inc. (MTCH), which owns and operates the dating app Tinder, entered the fray with its November 19, 2015 IPO. [92] IAC/INTERActive Corp., Match Group's parent company, offered one-vote-per-share common stock while retaining all of the shares of the outstanding Class B (ten-votes-per-share) stock, which represented over eighty-six percent of the outstanding capital stock and over ninety-eight percent of the combined voting power.[93] Even more interestingly, Match Group

87. Wayfair, Inc., Amended Registration Statement, (Form S-1/A) at 9 (Sept. 19, 2014).

88. Silvia Ascarelli & Andria Cheng, *5 Things to Know about the Wayfair IPO*, MARKETWATCH (Oct. 2, 2014), https://www.marketwatch.com/story/5-things-to-know-about-the-wayfair-ipo-2014-10-02 [https://perma.cc/EN7C-KYFX].

89. FitBit, Inc., Registration Statement (Amendment No. 4 to Form S-1/A) at 9 (June 16, 2015).

90. Michael J. de la Merced, *Fitbit Files to Go Public*, N.Y. TIMES DEALBOOK (May 7, 2015), https://www.nytimes.com/2015/05/08/business/dealbook/fitbit-files-to-go-public.html [https://perma.cc/EM4Y-X5DF].

91. "There's a long-running debate on dual-class. On one hand, you have visionary founders who want to retain control while gaining access to our public markets. On the other, you have a structure that undermines accountability: management can outvote ordinary investors on virtually anything." Commissioner Robert J. Jackson Jr., Perpetual Dual-Class Stock: The Case Against Corporate Royalty, Inaugural Speech Given at University of California, Berkeley, (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty [https://perma.cc/2QBF-UGML]. Mak Yuen Teen writes:

> Among technology companies in the US, Facebook, Google, Groupon and LinkedIn are examples that have dual class shares. However, many others do not have them, including Amazon, Apple, Microsoft, Netflix and Twitter. Some have argued that dual class shares encourage innovation.…Others have argued that hostile takeovers encourage short-term thinking or threaten founder control and therefore founders and management need to be shielded from them through dual class shares.

Mak Yuen Teen, *Say 'No" to Dual Class Shares*, BUS. TIMES (Nov. 27, 2015), http://governanceforstakeholders.com/2015/11/28/say-no-to-dual-class-shares/ [https://perma.cc/J6BG-WHPY].

92. Matt Egan, *Match's Awkward First Date with Wall Street*, CNN BUSINESS (Nov. 19, 2015), https://money.cnn.com/2015/11/19/investing/match-tinder-ipo/index.html [https://perma.cc/BRX2-NUFH] (noting that the shares ended up 23% on their first day of trading on the Nasdaq).

93. Match Group Inc., Registration Statement (Form S-1) at ii (Nov. 9, 2015) [hereinafter Match Group Inc., Form S-1]. Match Group owns and operates Tinder. "Prior to its spin-off in 2015, Match Group was a wholly-owned subsidiary of IAC (IAC), the media conglomerate run by billionaire mogul Barry Diller. IAC still owns an economic interest of more than 80 percent and a controlling stake of close to 98 percent . . . ." Mike Berner, *Don't*

noted in its Prospectus that following the offering, they would have three classes of authorized common stock: the common stock being offered to the public, the Class B common stock, and the Class C common stock.[94] Apparently not wholly confident in the permissibility of nonvoting Class C common stock, the company explained:

> Holders of Class C common stock are not entitled to any votes per share except as (and then only to the extent) otherwise required by the laws of the State of Delaware, in which case holders of Class C common stock will be entitled to one one-hundredth (1/100) of a vote on such matters for each share of Class C common stock held.[95]

The company disclosed, however, that there would be no outstanding shares of Class C common stock upon completion of the offering,[96] and as of the end of the company's third quarter in 2018, there were still none.[97] On October 14, 2015, Square, Inc. held its IPO,[98] with new investors receiving only a tenth of the voting rights of existing insider shareholders.[99]

And then came the Snap offering. If investors were willing to buy common stock with no realistic hope of affecting corporate governance through voting, then what about common stock with no votes at all? Evidently, a large number of investors were willing to buy such stock.

As noted above, some (often large) investors and index funds were not happy about nonvoting shares. On July 26, 2017, index compiler FTSE Russell announced that beginning in the fall of 2017, it would begin barring stocks that do not give shareholders at least five percent of voting power; for example, from its Russell 3000 index.[100] On August

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Commit to Match Group (At Least Not Yet), SEEKING ALPHA (Oct. 26, 2017), https://seekingalpha.com/article/4116894-commit-match-group-least-yet [https://perma.cc/93AB-VUHX]; Elizabeth Gurdus, *Cramer Unpacks IAC's Confusing Business to Track the Value Monster's Success*, CNBC (updated June 8, 2017), https://www.cnbc.com/2017/06/08/cramer-unpacks-iacs-confusing-business-to-track-its-value-creation.html [https://perma.cc/6N5U-KAU8].

94. Match Group, Inc., Registration Statement (Amendment No. 4 to Form S-1/A) (Nov. 17, 2015).

95. Match Group Inc., Form S-1 at ii.

96. *Id.*

97. *See* Match Group, Inc., Quarterly Report (Form 10-Q) (Nov. 9, 2018).

98. Square, Inc., Registration Statement (Form S-1) (Oct. 14, 2015).

99. Evan Niu, *Square IPO: 4 Things You Need to Know*, THE MOTLEY FOOL (Oct. 17, 2015), https://www.fool.com/investing/general/2015/10/17/square-ipo-4-things-you-need-to-know.aspx [https://perma.cc/D756-PY2G].

100. *See FTSE Russell Voting Rights Consultation - Next Steps*, FTSE RUSSELL (Jul. 2017), https://www.ftse.com/products/downloads/FTSE_Russell_Voting_Rights_Consultation_Next_Steps.pdf [https://perma.cc/DT8W-668S] [hereinafter *FTSE Russell Voting Rights*](summarizing the results of the voting rights consultation and proposing to implement changes beginning in September 2017). *See also* Abe M. Friedman et al., *S&P and FTSE Russell on Exclusion of Companies with Multi-Class Shares*, HARV. L. SCH. F. ON

1, 2017, S&P Dow Jones Indices amended its rules to prohibit inclusion of securities of companies whose shares offer limited or no voting rights.[101] The S&P Dow Jones Indices rule change effectively barred Snap from inclusion in the S&P 500, but left both Google/Alphabet Inc. and Facebook in the index under a grandfather clause.[102] On October 30, 2018, the controversy continued as indexer MSCI Inc. announced that it had abandoned plans to reflect voting power in its benchmarks, clearing the way for Snap and other companies with dual-class share structures to be included in the MSCI indexes.[103]

Despite the controversies over the Snap offering and the S&P Dow Jones rule change, the pace of dual-class listings has not slowed. On September 28, 2017, Roku, Inc. (ROKU) went public with a dual-class (public Class A at one-vote-per-share and non-public Class B at ten-votes-per-share) structure.[104] Ninety-eight percent of the voting power of the company remained in the hands of insiders, including its founder Anthony Wood.[105] Data center operator Switch (SWCH) went

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CORP. GOVERNANCE & FIN. REG. (Aug. 5, 2017), https://corpgov.law.harvard.edu/2017/08/05/sp-and-ftse-russell-on-exclusion-of-companies-with-multi-class-shares/ [https://perma.cc/VQ4T-2WKM]; Andrea Vittorio, *FTSE Russell to Revisit Voting Power One Year After Snap IPO*, BLOOMBERG BNA (Mar. 13, 2018) [hereinafter "*FTSE*"] (focusing on FTSE Russell's decision to reconsider the question later). The FTSE Russell is a unit of the London Stock Exchange Group plc. FTSE RUSSELL, *About Us*, https://www.ftserussell.com/about-us [https://perma.cc/A2BR-RLJ8] (explaining that the FTSE Russell is a wholly-owned subsidiary of the London Stock Exchange Group and is a unit of the group's information services division).

101. Press Release, S & P Dow Jones Indices, S&P Dow Jones Indices Announces Decision on Multi-Class Shares and Voting Rules (Jul. 31, 2017), https://www.spice-indices.com/idpfiles/spice-assets/resources/public/documents/561162_spdjimulti-classsharesandvotingrulesannouncement7.31.17.pdf?force_download=true [https://perma.cc/G2MS-RZNG]; *see also* Caitlin Huston, *S&P Dow Jones Indices Crack Down on Multi-class Share Structures*, MARKETWATCH (Aug. 1, 2017), https://www.marketwatch.com/story/sp-dow-jones-indices-crack-down-on-multi-class-share-structures-2017-08-01 [https://perma.cc/Q6AN-38ES] ("[T]he S&P Composite 1500, which includes the S&P 500, S&P MidCap 400, and S&P SmallCap 600, will no longer add companies with multiple share class structures . . . .").

102. Trevor Hunnicutt, *S&P 500 to Exclude Snap after Voting Rights Debate*, REUTERS (Jul. 31, 2017), https://www.reuters.com/article/us-snap-s-p-idUSKBN1AH2RV [https://perma.cc/L7AJ-G9N6].

103. *See* Rachel Evans, *Snap May Join MSCI Gauges after Indexer U-Turns on Voting Rights*, BLOOMBERG LAW (Oct. 31, 2018), https://news.bloomberglaw.com/corporate-law/snap-may-join-msci-gauges-after-indexer-u-turns-on-voting-rights (quoting the MSCI Index Policy Committee chairman as stating that many investors think the problem should be dealt with by either regulators or stock exchanges).

104. Roku, Inc. Registration Statement (Form S-1) at 8 (Sept. 1, 2017). *See* Sherisse Pham & Kaya Yurieff, *Roku Shares Jump More than 50% in Trading Debu*t, CNN BUSINESS (Sept. 28, 2017), https://money.cnn.com/2017/09/28/technology/roku-ipo-price/index.html [https://perma.cc/928F-7FG3] (noting strong investor demand for the company's shares when the company went public on September 28, 2017).

105. Troy Wolverton, *Roku's CEO and Other Insiders Will Control 98 Percent of the Company's Voting Power Even after its IPO*, BUS. INSIDER (Sept. 18, 2017),

public on October 6, 2017,[106] allowing public shareholders only about five percent of the company's voting rights, while almost seventy percent of the voting power remained with founder Rob Roy.[107]

The Blue Apron Holdings, Inc. [108] and Dropbox, Inc. [109] IPOs used a three-class share structure, with one-vote-per-share Class A shares on June 29, 2017[110] and March 23, 2018,[111] respectively. In the case of Dropbox, founders Drew Houston and Arash Ferdowski, as well as a venture capital firm retained a significant chunk of the Class A shares, but, more powerfully, a majority of the Class B super-voting (ten-votes-per-share) stock.[112] In both cases, there is a third class of Class C nonvoting stock.[113] In addition, Houston, a founder and the CEO of

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http://www.businessinsider.com/post-ipo-ceo-anthony-wood-will-have-32-of-rokus-voting-power-2017-9 [https://perma.cc/34PY-5Z7Q].

106. Switch, Inc., Registration Statement (Form S-1) (Sept. 8, 2017). *See* Press Release, Switch, Inc., Switch, Inc. Announces Closing of Initial Public Offering (Oct. 12, 2017), https://www.prnewswire.com/news-releases/switch-inc-announces-closing-of-initial-public-offering-300536213.html [https://perma.cc/S5DN-RVBN] (noting that shares began trading on the NYSE on October 6, 2017).

107. Reuters, *This Tech IPO Is the Latest to Limit Rights of Small Investors*, FORTUNE (Oct. 5, 2017), http://fortune.com/2017/10/05/switch-ipo-small-investors/ [https://perma.cc/X92F-4CAJ].

108. *See* Blue Apron Holdings, Inc., Registration Statement (Form S-1/A) at 10 (June 28, 2017) [hereinafter Blue Apron, Form S-1/A] (reflecting the pricing just before the S&P Down Jones rule went into effect).

109. Dropbox, Inc., Registration Statement (Amendment No. 2 to Form S-1/A) at 7 (Mar. 21, 2018) [hereinafter Dropbox, Inc., Form S-1/A].

110. *See* Seth Fiegerman, *Blue Apron Serves Up Lukewarm IPO*, CNN BUSINESS (June 29, 2017), https://money.cnn.com/2017/06/29/technology/business/blue-apron-ipo/index.html [https://perma.cc/PD8G-H84Z] (noting the stock's "flat performance" because it ended the day at its IPO price of $10).

111. *See* Seth Fiegerman, *Dropbox pops in Wall Street debut*, CNN BUSINESS (Mar. 23, 2018), https://money.cnn.com/2018/03/23/news/companies/dropbox-goes-public/index.html [https://perma.cc/KDB8-SC6H] (noting the company's strong start in trading on the Nasdaq).

112. *See* Leslie Picker, *Dropbox Sets Valuation as High as $8 Billion; Announces Private Placement by Salesforce Ahead of IPO*, CNBC (Mar. 12, 2018), https://www.cnbc.com/2018/03/12/dropbox-sets-valuation-as-high-as-8-billion.html [https://perma.cc/6ZPV-TP6E] (describing the terms for the planned IPO).

113. Blue Apron indicated that no Class C capital stock would be outstanding after the offering. Blue Apron, Form S-1/A, *supra note* 110. It is unclear who owns the Class C capital stock; however, the amended registration does indicate that in February 2017, Blue Apron issued 42,687 shares of Class C capital stock as consideration for their purchase of the assets of BN Ranch, LLC. *Id.* at II-3. Dropbox indicated that no Class C common stock would be outstanding after the offering and the concurrent private placement. Dropbox, Inc., Form S-1/A, *supra note* 111, at 7. Additionally, Dropbox indicated that 41,368,326 shares of their Class C common stock are to be reserved for future issuance under their 2018 Class C Stock Incentive Plan (their 2018 Class C Plan), which will become effective prior to the completion of the offering, and that 4,136,832 shares of their Class C common stock are to be reserved for future issuance under their 2018 Class C Employee Stock Purchase Plan (their Class C ESPP), which will become effective prior to the completion of the offering, but no offering periods under the Class C ESPP will commence unless and until otherwise determined by their Board of Directors. *Id.* at 10.

Dropbox, received a large stock package before the March 2018 offering.[114] Houston's stock vests on the attainment of certain stock price milestones, and the share price must reach ninety dollars for him to receive it all.[115] Apparently, the better the company does, at least as measured by share price, the less its owners care about their right to control its management.

Other offerings have used different instruments to ensure ongoing control by the founders. In February 2018, for example, the shareholders of Spotify Technology SA, a music-streaming service, issued special "beneficiary certificates" to its founders, Daniel Ek and Martin Lorentzon.[116] The certificates carry voting power but no economic interest,[117] and increased the founders' voting control to a combined 80.5% (double their economic ownership).[118] Two months later, on April 3, 2018, Spotify (SPOT) went public, offering soundly outvoted common stock.[119]

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114. The stock package took the form of a restricted grant of 15.5 million shares, which the company valued at $109.6 million figuring each share was worth about $7.07. The stock will vest over four to 10 years, depending on the company's stock hitting certain price targets. Weinberger and Price find that:

> In addition to the restricted stock grant, Houston also owns 127 million shares of Drop box's [sic] Class B stock, which offers greater voting power than the Class A shares it plans to sell to the public. The company valued those shares at $7.01 a piece at the end of 2017, per the filing. That's worth about $891 million on its own, at that price.

Matt Weinberger & Rob Price, *Dropbox CEO Drew Houston Made $110 million in 2017 - and Is on Track to Be Silicon Valley's Newest Billionaire after the IPO*, BUS. INSIDER (Feb. 23, 2018), http://www.businessinsider.com/dropbox-ceo-drew-houston-salary-revealed-2018-2 [https://perma.cc/35FK-HHZ8].

115. *See* Winkler & Farrell, *supra* note 53.

116. *Id.*

117. Lucas Shaw, *Spotify's Founders Aren't Giving Up Control Any Time Soon*, BLOOMBERG (Feb. 20, 2018), https://www.bloomberg.com/news/articles/2018-02-21/spotify-s-founders-aren-t-giving-up-control-any-time-soon [https://perma.cc/396U-NLW4].

118. *See* Winkler & Farrell, *supra* note 53 (reporting that the certificates were issued because co-founder and CEO Daniel Ek wanted to maintain control of the company).

119. Spotify Technology S.A., Registration Statement (Amendment No. 2 to Form F-1/A) at 46-47 (Mar. 20, 2018), .*See* Sara Salinas, *Spotify Closes Up 13 Percent after Falling from Highs on First Day of Trading*, CNBC (Apr. 3, 2018) https://www.cnbc.com/2018/04/03/spotify-spot-ipo-stock-starts-trading-on-the-nyse.html [https://perma.cc/KJ7L-NU4B] (noting that the IPO was a direct listing, with no banks underwriting the offering, and began on April 3, 2018).

The list goes on,[120] and there are reportedly others in the pipeline.[121] A recent study found that sixty-seven percent of U.S. venture-backed technology companies that staged IPOs in 2017 had super-voting shares for insiders.[122] In 2010, that percentage was only thirteen percent for technology companies.[123] As Matt Levine explained in his *Bloomberg Money Stuff* financial column:

> The basic trade-off used to be that if I had an idea and you had money, you would let me use your money, but in exchange you would have the right to monitor and control what I did with it, and to fire me if you thought I was doing a bad job. The new trade-off is, you

120. Zscaler Inc.'s March 16, 2018 IPO, though technically a single class of stock, still retained 60% ownership with the insiders. Zscaler, Inc., Amended Registration Statement (Amendment No. 2 to Form S-1/A) at 44 (Mar. 13, 2018); *see* Ciara Linnane, *Zscaler Stock Jumps 70% in Trading Debut in Positive Sign for Tech IPOs*, MARKETWATCH (Mar. 16, 2018), https://www.marketwatch.com/story/zscaler-stock-jumps-70-in-its-trading-debut-2018-03-16-11911234 [https://perma.cc/EA6X-WFQH] (identifying Zscaler as the first Silicon Valley tech unicorn to go public in 2018). Pivotal's April 20, 2018 dual-class share offering was conducted in the shadow of Dell's 70% ownership stake. Pivotal Software, Inc., Registration Statement (Amendment No. 3 to Form S-1/A) at 37 (Apr. 18, 2018); *see* Jonathan Vanian, *Pivotal CEO Rob Mee Talks Michael Dell and Cloud on IPO Day*, FORTUNE (Apr. 20, 2018), http://fortune.com/2018/04/20/pivotal-ipo-rob-mee/ [https://perma.cc/UBH7-VJ7E] (calling the first day of trading "a modest success). For other recent S-1 filings with proposed dual-class structures, see generally: Domo, Inc., Registration Statement (Form S-1) at 12 (June 1, 2018) (each share of Class A common stock is entitled to forty votes per share and each share of Class B common stock is entitled to one vote per share); EverQuote, Inc., Registration Statement (Form S-1) at 10 (June 1, 2018) (Class A common stock is entitled to one vote per share and each share of Class B common stock is entitled to ten votes per share); Altair Engineering, Inc., Registration Statement (Form S-1) at 13-14 (June 4, 2018) (Class A common stock is entitled to one vote per share, Class B common stock is entitled to ten votes per share); U.S. Xpress Enterprises, Inc. Registration Statement (Amendment No. 2 to Form S-1/A) at 12-13 (June 4, 2018) (Shares of Class A common stock are entitled to one vote per share. Shares of Class B common stock are entitled to five votes per share).

121. Stripe, Inc.'s founders were recently given special super-voting (ten votes per share) stock by its venture capital investors as an incentive to go public. *See* Winkler & Farrell, *supra* note 53. WeWork Cos. Co-founder and CEO Adam Neumann holds 78% of the company's class B shares, which come with super-voting rights and has been rumored to be considering an IPO, although a 2017 $4.4 billion SoftBank investment delayed the need for tapping the public markets. *Id.* In August 2018, SoftBank invested an additional $1 billion in the company. *See* Arash Massoudi et al., *SoftBank in Talks to Invest $10bn in WeWork*, FIN. TIMES (Oct. 10, 2018), https://www.ft.com/content/1753e892-cc77-11e8-b276-b9069bde0956 [https://perma.cc/J5FV-3WHW] (speculating that SoftBank is considering an even larger infusion of cash in the company).

122. If one focuses on the largest technology companies (those valued at over $1 billion), the proportion of companies that engaged in IPOs since May 2016 that featuring super-voting rights rises to 72%. Winkler & Farrell, *supra* note 53.

123. *Id.* In 2010, only 12% of all IPOs (technology and non-technology-related) contained dual-class share structures. *See* Tom Zanki, *Investors Urge Exchanges To Phase Out Dual-Class Voting*, LAW360 (Oct. 24, 2018), https://www.law360.com/articles/1095315/investors-urge-exchanges-to-phase-out-dual-class-voting [https://perma.cc/W76Y-E7CH] (citing a Dealogic study).

> let me use your money, and you are grateful that I deign to use your money instead of someone else's.[124]

So, why do shareholders buy these shares?

III. WHY SHOULD SHAREHOLDERS EXPECT TO MAKE MONEY?

The obvious reason to invest in stocks or anything else is to make money. The legal question is: *how* do the owners of shares—a form of property—make money from their property?[125] There are two deceptively simple answers to the question: stock appreciation and dividends. The Snap IPO puts both answers under considerable pressure.

A. Stock Appreciation and Faith in an Ever-Rising Market

"Stock appreciation" simply begs the question: if you invest in a stock, why do you believe that somebody else will come to want the stock more? Although stock markets have generally risen over time, that is not true for all companies and that may not be true in a time frame that is convenient for a particular investor. Let us assume, however, you invest in stock with a rising price. The concept of stock appreciation entails the existence of a subsequent purchaser willing to pay more for your stock than you did. But why does the subsequent purchaser want the stock? Does she believe that yet another subsequent purchaser exists, who is willing to pay still more for the stock? This rationale sounds like the greater fool theory, more respectably known as the "theory of rational bubbles."[126] Belief in an unending supply of greater fools does not appear to be the best foundation for an investing strategy. In fact, at some point it seems to suggest that stock markets are merely Ponzi schemes[127] in which today's investor is dependent on tomorrow's new investor in order to

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124. Matt Levine, *Xerox CEO Showed Some Strategic Thinking*, BLOOMBERG OPINION (May 29, 2018), https://www.bloomberg.com/opinion/articles/2018-05-29/xerox-ceo-showed-some-strategic-thinking.

125. This question applies to shareholders as shareholders. Controlling shareholders have lots of ways of making money from a company, notably by giving themselves jobs with salaries.

126. *See* Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL. J. CORP. L. 455, 491 (2006) (noting that "[t]he essence of the theory is that it is rational to overpay for a stock if you believe that you can later sell the stock to someone else and recoup your overpayment.").

127. A Ponzi scheme, named for the famous fraudster Charles Ponzi, involves establishing an investment fund in which existing investors are paid using funds contributed by new investors. Like most pyramid schemes, it requires continuous growth in order to keep going. *See* U.S. SEC. & EXCH. COMM'N, PONZI SCHEMES-FREQUENTLY ASKED QUESTIONS, https://www.sec.gov/fast-answers/answersponzihtm.html [https://perma.cc/QF3C-Z37E] (describing Ponzi schemes).

achieve any return on her investment. That seems too much, and presumably, in a post-Madoff market,[128] investors are on their guard against such logic.

The orthodox answer is that equity investment is "sound" if it is based on concrete business reasons and not on speculative mania. In this vein, for example, CapitalOne helpfully suggests "investing in companies you believe will make money."[129] Good businesses may be expected to be profitable and grow in various ways, and therefore become more valuable over time. Putting aside subsequent dilution, a percentage of such a company (a fractional "share") grows correspondingly by operation of accounting. So, if a shareholder owns shares representing one percent of XYZ corporation, and XYZ corporation doubles in size, her one percent stake represents twice as much business. From this perspective, Snap's investors logically must believe that Snap will do well, and thus their Snap shares will be worth more when the investors choose to sell. Of course, Snap may or may not do well, but an analysis of the strength of Snap's business model is beside the point here.[130]

The point is that the act of buying a share for investment entails an implicit assumption that the company will do well and that the stock will be "worth" more later. Further, it assumes that at that time, someone or something will seek to purchase the stock from the investor. But why is the stock's representation of a fraction of a business worth anything? And if the stock is not worth anything, then doubling the size of the business with more stock does not improve the situation (2 x 0 = 0). In other words, what is the economic benefit of owning stock? The classic but somewhat unsatisfying answer is "dividends."[131]

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128. Bernard L. Madoff famously perpetuated a $50 billion Ponzi scheme that went undetected by regulators for a long time. In August 2009 the SEC Inspector General submitted a highly critical 457-page report about the SEC's failure to detect Madoff's fraud. OFFICE OF INVESTIGATIONS, U.S. SEC. & EXCH. COMM'N, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (2009), https://www.sec.gov/news/studies/2009/oig-509.pdf [https://perma.cc/Z3Z6-44AR].

129. *See* CAPITALONE INVESTING, *What Is a Stock and Why Buy Stocks?*, https://www.capitaloneinvesting.com/a/main/Education/KnowledgeCenter/What-is-a-Stock-and-Why-Buy-Stocks [https://perma.cc/DPX7-VBMU] (explaining that shareholder rights are probably not the reason to buy stocks).

130. It may be enough to point out that the smartphone app business sector is a crowded one, and, as of December 11, 2018, Snap shares are trading at $5.86. *Snap, Inc. (SNAP)*, YAHOO! FINANCE, https://finance.yahoo.com/quote/SNAP/ [https://perma.cc/9C8N-HKB4].

131. *See, e.g.*, ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENTS: ESSENTIAL CONCEPTS AND APPLICATIONS § 8.6, at 200 (2d ed. 1998) (identifying dividends as the basic way for investors to receive a financial return on their investment).

B. Dividends

1. Director Discretion and the Agency Problem

It may be said that investors buy stock with the expectation of dividends, an occasional or even regular share of the profits of the company that provide a return on their investment.[132] The decision of whether or not to issue a dividend, however, is almost exclusively in the discretion of the board of directors.[133] Shareholders have no right to a dividend. It is well established in corporate law that "the question of whether or not a dividend is to be declared or a distribution of some kind should be made is exclusively a matter of business judgment for the board of directors."[134]

Since Berle and Means published *The Modern Corporation and Private Property*[135] in 1932, the core problem of the corporation has been seen to stem from the core strength of the corporation: the separation of ownership from control.[136] On the upside, businesses pool capital and place it at the disposal of talented managers so that they can do great things. On the other hand, the shareholder owners cannot compel management (including the board) to do much of anything.[137] Moreover, management has incentives to spend money on itself, notably through high executive compensation, rather than make money for the shareholders.[138] This has come to be called the agency problem, under the notion that executives are the agents of

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132. *Id.*

133. *See, e.g.*, Morris Mendelson, *Payout Policy and Resource Allocation*, 116 U. PA. L. REV. 377, 377 (1968) ("Modern American corporate law clearly establishes the right of corporate boards of directors to determine their own dividend policy.").

134. *See* Kamin v. American Express Co., 383 N.Y.S. 2d 807, 810 (N.Y. App. Div. 1976) (upholding the board decision regarding form and timing of dividend distribution to shareholders).

135. ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1991).

136. *Id.* at xi.

137. *See generally* Amy Deen Westbrook, *Does Banking Law Have Something to Teach Corporations Law About Directors' Duties*? 55 WASHBURN L.J. 397 (2016) (explaining that the business judgment rule and the hurdles of derivative shareholder litigation make it very difficult for shareholders to compel any board action).

138. *See* Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 501 (2002) (noting that fiduciary duties should limit the ability of directors to act in their own self-interest at the stockholders' expense). *But see* Amy Deen Westbrook, *Does the Buck Stop here? Board Responsibility for FCPA Compliance*, 48 U. TOLEDO L. REV. 493, 497 (2016) (explaining that such fiduciary duties may not be effective).

shareholders.[139] Long story short, we would expect dividends to be relatively low or nonexistent, and they are.[140]

2. Dividends Are Not Debt

So, even investors who follow CapitalOne's sensible advice about investing in shares of companies that make money may have no right to that money and no right to a return on their investment.[141] Historically, the stocks that made up the backbone of our markets paid steady dividends to their shareholders.[142] Between 1978 and 1999, however, the number of companies issuing dividends annually fell from roughly sixty-seven percent to twenty-one percent for NYSE, NASDAQ, and American Stock Exchange companies.[143] Whether or not companies pay dividends is often a result of the relative tax rates on dividends and capital gains.[144] In addition, "dividends" are a somewhat unsatisfying answer to the question of why to invest in equities. For most of the last few generations, the income stream derived from dividends (exclusive of appreciation) has been smaller than the income derived from other investments, most notably less risky government or even corporate debt.[145] Currently, a majority of the S&P 500 stocks pay dividends to investors, but they are often

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139. *See generally* Michael C. Jenson & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (reframing corporate governance in terms of the difficulties faced by shareholders in monitoring, organizing, and disciplining managers ("agency costs")).

140. *See infra* Part III.B.2.

141. *See* Kamin v. American Express Co., 383 N.Y.S. 2d 807, 810 (N.Y. App. Div. 1976) (ruling that the question of whether a corporation declares a dividend or makes a distribution of some kind to the shareholders is exclusively a matter of business judgment for the board of directors).

142. Dividends in the S&P 500 index played a large role in terms of their contribution to total returns during the 1940's, 1960's, and 1970's. Dividends played a smaller role during the 1950's, 1980's, and 1990's. *The Power of Dividends: Past, Present, and Future*, HARTFORDFUNDS.COM (2017), https://www.hartfordfunds.com/dam/en/docs/pub/whitepapers/WP106.pdf [https://perma.cc/PY4Q-L5RP].

143. *See* Gustavo Grullon, Bradley Paye, Shane Underwood & James Weston, *Has the Propensity to Pay Out Declined?* 46 J. FIN. & QUANTITATIVE ANALYSIS (2011); Eugene F. Fama & Kenneth R. French, *Disappearing Dividends: Changing Firm Characteristics or Lower Propensity to Pay?* 60 J. FIN. ECON. 3 (2001).

144. *See* Ironman, *Dividend Paying Companies in the S&P 500*, BUS. INSIDER (July 15, 2014), http://www.businessinsider.com/dividend-paying-companies-in-the-sp-500-2014-7 [https://perma.cc/DVE3-YSV9] (finding that, in 2014, 425 of the companies in the S&P 500 were paying dividends).

145. *See* PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 185 (1998) (recalling reactions in 1959 when dividend yields fell below bond yields); Alex Rosenberg, *The Ratio of Dividend Yields To Bond Yields In Historical Perspective*, BIG TRENDS (Jul. 15, 2016), https://www.bigtrends.com/education/the-ratio-of-dividend-yields-to-bond-yields-in-historical-perspective [https://perma.cc/H8NC-HM7N].

low.[146] In addition, high technology companies pay few, if any, dividends.[147] Alphabet/Google, Amazon, and Facebook have never paid a dividend.[148]

In sum, a share of common stock is not a bond, or even a debt-like instrument (like a share of preferred stock). Common stock carries no guarantee of dividend payment and, even if paid, dividends are often relatively low. Therefore, it is a little odd to say that investors buy stock because the board is likely to issue some dividend. Consequently, shares of common stock appear to be a bad investment in terms of both their return and the certainty of that return.

In his annual letters to the Berkshire Hathaway shareholders Warren Buffett has frequently discussed management decisions regarding whether to retain or distribute unrestricted earnings, arguing that dividends should be paid unless management has a reasonable prospect that the retained capital will produce incremental earnings equal to, or above, those generally available to investors through other investments.[149] Berkshire Hathaway is known for not paying dividends.[150] Indeed, there are benefits to not paying dividends, including the fact that they are generally not deductible as a business expense for the corporation.[151]

Nevertheless, the stock market keeps going. So the question remains: why do investors buy shares?

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146. For an overview of historical returns of the Dow Jones Industrial Average, see Kamal Khondkar, *Stock Market Yearly Historical Returns from 1921 to Present: Dow Jones Index*, TRADINGNINVESTMENT.COM (Jan. 20, 2018), https://tradingninvestment.com/stock-market-historical-returns/ [https://perma.cc/7U7S-ZEY5].

147. *See* Fred Imbert, *Investors Are Losing Out on Billions Because Tech Stocks Don't Pay Dividends*, CNBC.COM (Oct. 6, 2017), https://www.cnbc.com/2017/10/06/investors-are-losing-out-on-billions-because-tech-dont-pay-dividends.html [https://perma.cc/DM4W-65DX] (arguing that if Alphabet, Amazon and Facebook, along with Berkshire Hathaway, paid shareholder dividends at the 2.37% average yield of other S&P 500 companies that do so, it would produce $32.2 billion for investors).

148. *Id.*

149. *See* Letter from Warren E. Buffett to the Shareholders of Berkshire Hathaway, Inc., at 19-21 (Mar. 1, 2013), http://www.berkshirehathaway.com/letters/2012ltr.pdf [https://perma.cc/H4DG-S7CU].

150. *See* Dan Caplinger, *Will Berkshire Hathaway Finally Pay a Dividend in 2019?*, THE MOTLEY FOOL (Jan. 20, 2019), https://www.fool.com/investing/2019/01/20/will-berkshire-hathaway-finally-pay-a-dividend-in.aspx [https://perma.cc/STB9-ALWG] (providing an example of the perennial speculation that Berkshire Hathaway will finally pay a dividend this year).

151. Cam Merritt, *Corporate Taxation When Issuing Dividends*, CHRON (2018), http://smallbusiness.chron.com/corporate-taxation-issuing-dividends-66085.html [https://perma.cc/V8KS-5RKD].

IV. CORPORATE LAW DOES NOT PROTECT THESE SHAREHOLDERS

A. Corporate Purpose and Shareholder Wealth Maximization

In theory, law could provide a solution to the agency problem. One might think that corporate managers have a duty to return value to the investors. Indeed, one might read the classic and frequently cited 1919 case of *Dodge v. Ford* in this fashion.[152] The Michigan court stated that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[153] This proposition has been widely interpreted to mean that the purpose of a corporation is shareholder wealth maximization, measured in financial terms.[154]

More recently, in 2010, the Delaware Chancery Court in *eBay Domestic Holdings, Inc. v. Newmark* reasoned from that familiar proposition that the purpose of a for-profit corporation is to promote shareholder value.[155] At least at first glance, the Delaware holding appeared to "mandate profit maximization."[156] The case involved a challenge by the auction site eBay, which was a minority shareholder in the classified ad site Craigslist, to the decisions of two other Craigslist shareholders, who were also the company's founders and directors.[157] In the *eBay* opinion, Chancellor Chandler indicated that at least in the close corporation context of Craigslist, a corporate policy is improper if it does not seek to maximize economic value for stockholders.[158]

As Joan Heminway recently noted, however, no state statutory frameworks, including Delaware law and the Model Business Corporations Act, "mention—no less require—management action in a manner that maximizes shareholder wealth or value or compels

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152. *See* Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TRANSACTIONS: TENN. J. BUS. L. 415, 423-24 (2017) (finding that the *Dodge v. Ford* case had been cited in seventy-one cases by August 2017, and that *Dodge* and *eBay Domestic Holdings, Inc. v. Newmark* "are two of the cases most often cited as evidence of a common law duty to maximize shareholder value").

153. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). *See also* David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L. J. 1013, 1013-15 (2013) (suggesting that there are two versions of shareholder primacy, radical and traditional, and that the radical shareholder primacy concept which has emerged in the last 50 years is based on the premise that corporate management is the agent of the shareholders and is thus required to maximize current value to shareholders).

154. *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951 (analyzing judicial discussion of shareholder profit maximization in cases between 1900 and 2016 and finding that courts have generally accepted the concept).

155. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010).

156. Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 409 (2013).

157. *eBay Domestic Holdings*, 16 A.3d at 6-7.

158. *Id.* at 34.

shareholder primacy."[159] Professor Heminway pointed out that "none of this decisional law—not even the seminal, foundational *Dodge* opinion—substantiates an enforceable, judicially imposed legal obligation to maximize shareholder financial wealth in ordinary-course decision-making."[160]

Lyman Johnson expressed similar concerns in the wake of the *eBay* decision, noting Chancellor's Chandler's struggle in the opinion to find "some legal foundation for his view."[161] Professor Johnson explained that Chancellor Chandler relied on the simple fact that Craigslist was a "'for-profit' corporation,"[162] although the opinion "did not go on to explain how being a 'for-profit' corporation meant a company had to 'maximize' profits, as opposed to making (or seeking or enhancing) profits."[163] Moreover, even if the management is bound to operate a "for-profit" company for a profit, as opposed to for charity, just *how* does that benefit shareholders?

In *eBay*, the Court prevented Craigslist from adopting a poison pill, and from encumbering eBay's shares in Craigslist, because neither action could be justified in terms of maximizing shareholder value.[164] The court's decision, however, did not affect the management of Craigslist's business.[165] In particular, Craigslist was not obliged to monetize its business in accordance with eBay's desire for wealth maximization, nor did the court force Craigslist to give eBay more value.[166] In fact, the court likened Craigslist to "David" and eBay to

159. *See* Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents,* 74 WASH. & LEE L. REV. 939, 948 (2017) (demonstrating that neither state corporate law nor judicial decisions mandate shareholder wealth maximization as the purpose of the corporation). In fact, as Professor Heminway points out, in a number of states that do not mimic either Delaware law or apply the Model Business Corporations Act, there are now so-called 'other constituency' statutes which explicitly allow consideration of more than shareholder wealth.

Id. at 948-49.

160. *Id.* at 951.

161. Johnson, *supra* note 156, at 444.

162. *Id.*

163. *Id.* Professor Johnson explains that Craigslist had been providing significant financial returns to its investors, although possibly not the maximum profit. *Id.* at 443.

164. eBay Domestic Holdings, Inc., v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010). Chancellor Chandler stated that the Craigslist founders/directors "did not make a serious attempt to prove that the Craigslist culture, which rejects an attempt to further monetize its services, translates into increased profitability for stockholders." *Id.*

165. *Id.* at 48 (Del. Ch. 2010) (only rescinding the rights plan and the right of first refusal/dilutive issuance).

166. *Id.*

"Goliath."[167] Years later, eBay sold its stake in Craigslist back to Craigslist.[168]

As Warren Buffet noted, management can do any number of things with the company's profit: reinvest it, raise salaries, maintain its cash reserves, etc.[169] So the real question for shareholders is not whether the company is for profit, but whether the law provides shareholders with any judicially enforceable rights to the profits generated by the company. If so, what rights? It seems incredible that investors were willing to spend $3.4 billion in the Snap offering based on their assurance that the company was "for-profit," would be managed accordingly, and that such profits would ultimately go to shareholders.[170]

B. Procedural Difficulties

1. Berle and Means: The Ideal

Again, in theory, Snap's investors could be relying on the very traditional idea that Snap's directors and officers [171] have a fiduciary duty to act in the best interests of the corporation and its shareholders.[172] Indeed, in confronting the agency problem, Berle and Means argued for enhanced fiduciary duties.[173] They maintained that courts should protect shareholders, which one might think entailed the proposition that the law requires that the money earned by the business was actually transferred to the owners.

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167. *Id.* at 25.

168. Leena Rao, *eBay Sells a Coveted Prize Back to Craigslist, Ending Long Legal Battle,* FORTUNE (Jun. 19, 2015), http://fortune.com/2015/06/19/ebay-craigslist-stake-buy/ [https://perma.cc/QVP5-386U].

169. For an explanation of Buffett's approach to dividend and share repurchases as outlined in his annual letters, see LAWRENCE A. CUNNINGHAM, THE ESSAYS OF WARREN BUFFETT, 178-88 (3d ed. 2013).

170. *See* Fiegerman, *supra* note 15.

171. Professor Johnson notes the distinction between the duties of, and protections for, corporate directors and corporate officers. Generally, the business judgment rule applies clearly to directors, and the way in which it is applied to corporate officers is less clear. *See, e.g.*, Lyman P. Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005).

172. *See generally* Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B. C. L. REV. 595 (1997) (exploring the background of the fiduciary duty of loyalty in the context of a publicly traded corporation). The question of whether the duty is owed to the shareholders or to the company itself has been the subject of substantial scholarship. *See e.g.*, Heminway, *supra* note 159, at 952-53.

173. ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 248 (rev. ed. 1991). *See also* William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001) (concluding that Berle and Means's understanding of fiduciary standards as a primary concern in corporate governance has played a critical role in shaping corporate-fiduciary law).

State corporation laws, however, have developed differently. As discussed below, over time, legal requirements on corporations and their managers have been lowered, and it has become much harder for shareholders to sue.[174] In practice, if not often explicitly, the fiduciary duty of managers to shareholders has been greatly reduced.[175]

2. Shareholder Remedies: Delaware[176] and the Business Judgment Rule

Even if the corporation's managers violate their fiduciary duties in fact, shareholders may have a hard time enforcing their rights in court. State corporation laws, led by Delaware,[177] have expanded the reach and depth of the business judgment rule.[178] The business judgment rule, a "cornerstone concept" in the judicial review of corporate conduct,[179] is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of

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174. In the 1970s, in fact, Bayless Manning called corporation laws "towering skyscrapers of rusted girders, internally welded together and containing nothing but wind." Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962) (arguing that corporation law as a field of intellectual effort was dead). For a more extended discussion of the reduction in corporation law requirements, see Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 698-712 (2018). For a fuller discussion of the difficulties shareholders confront when suing a corporation, see Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1228-1232 (2012) (explaining that shareholder derivative suits face substantial procedural hurdles.

175. BERLE & MEANS, *supra* note 175 at 248. Judicial application of fiduciary duties to constrain the board of directors has been diplomatically characterized as "gentle." Bernard S. Sharfman, *The Tension between Hedge Fund Activism and Corporate Law*, 12 J. L. ECON. & POL'Y 251, 253 (2016). For a more extended discussion of the failure of fiduciary duty doctrine to constrain managers, see Westbrook & Westbrook, *supra* note 176, at 703 (2018) (arguing that economic and legal developments in the last decades have combined to concentrate control over the equity markets); Westbrook, *supra* note 139, at 404-05 (discussing a higher standard of fiduciary duty being imposed in some recent banking law cases).

176. Delaware is the established leader in the development and interpretation of corporation law. For a thoughtful discussion of Delaware's dominance, see William J. Carney, *Larry Ribstein's Federalism Scholarship and the Unfinished Agenda*, 2014 U. ILL. L. REV. 1603 (2014) (discussing the late Professor Ribstein's scholarship relating to corporate choice of law).

177. For an analysis of the significance of Delaware in the development of U.S. corporation law, see Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1 (2013) (finding that the significance of Delaware in the shaping of corporate governance was substantial but not decisive).

178. For a fuller discussion of the business judgment rule, see Stephen M. Bainbridge, *The Business Judgment Rule as an Abstention Doctrine*, 57 VAND. L. REV. 83 (2004) (offering a theory to explain the function and utility of the rule).

179. Johnson, *supra* note 171, at 453.

the company."[180] Unless plaintiff shareholders can rebut the presumption, courts have refused to second-guess a board's business decision if that decision can be "attributed to any rational business purpose."[181] Though shareholders on occasion have suffered, courts have reasoned that more aggressive judicial policing of business judgment would chill risk-taking, entrepreneurship, innovation, and other behavior that might benefit shareholders.[182] As Professor Johnson aptly quoted, "[the business judgment rule], which began as a minor exception, is now so dominant a winning argument that the only fun left is trying to prove that [it] . . . does not cover absolutely *all* forms of corporate theft."[183]

Judicial deference is based at least in part on the statutory rules of corporation law. Delaware law explicitly provides that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors."[184] Arguably, in enforcing the business judgment rule, courts have merely been ensuring that, in the absence of self-dealing or other disabling conflicts of interest, corporate managers are left free to manage. A great deal of scholarship and commentary, however, suggests that such freedom restricts shareholders' ability to influence their investment.[185]

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180. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds*, Brehm v. Eisner, 746 A.2d 244 (Del. 2000). Arguably, the strength of the business judgment rule, to the extent that it reduces the accountability of corporate managers, may operate as a counterbalance to the shareholder wealth maximization requirement. *See* Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TRANSACTIONS: TENN. J. BUS. L. 415, 424 (2017).

181. Brehm v. Eisner, 746 A.2d 244, 264 n. 65-66 (Del. 2000).

182. *See* In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 750 (Del. Ch. 2005) (nothing that "to employ a [rule other than the business judgment rule]—one that permitted an 'objective' evaluation of the [board] decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests.").

183. Johnson, *supra* note 171, at 439 (quoting David Bazelon, *Clients Against Lawyers*, HARPER'S MAG., Sept. 1967, at 104, 112). Of course, there have been calls for courts to consider more carefully whether deference to the business judgment rule is warranted. *See, e.g.*, Bernard S. Sharfman, *The Tension between Hedge Fund Activism and Corporate Law,* 12 J. L. ECON. & POL'Y 251 (2016).

184. DEL. CODE ANN. tit 8, § 141(a) (2011).

185. *See* Charles M. Elson & Craig K. Ferrere, *Unequal Voting and the Business Judgment Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 7, 2018), https://corpgov.law.harvard.edu/2018/04/07/unequal-voting-and-the-business-judgment-rule/ [https://perma.cc/5F4H-KAH4]; Elson and Ferrere note:

> Across the expanse of time and knowledge, judges are unable to substitute their business judgment for that of experienced corporate management. Thus, while heightened review might be doctrinally prudent, it is practically unfeasible. The result will be a growing number of dual-class companies that are unaccountable to shareholders, the markets, *and* the courts.

More technically, the procedural evolution of the shareholder derivative suit has made it virtually impossible for shareholders to enforce rights against management in the absence of outright wrongdoing.[186] Under Delaware law, the requirement—that shareholders suing in a derivative law suit make a pre-suit demand on the board of directors, or demonstrate that such demand would have been futile—[187] is a nearly insurmountable barrier, and results in the early dismissal of the majority of derivative suits.[188]

In theory, and sometimes in practice, a derivative remedy can be pursued successfully by alleging "self-dealing" with respect to a particular transaction.[189] Self-dealing constitutes a violation of a director's fiduciary duty of loyalty, and avoids the messy argument over whether the director's behavior can be exculpated based on a clause in the corporation's certificate of incorporation.[190] In addition, a

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Id. See also Aurelia Gurrea-Martinez, *Re-examining the Business Judgment Rule from a Comparative Perspective: Is it Really in the Shareholders' Interest?*, THE CLS BLUE SKY BLOG (Feb. 26, 2016), http://clsbluesky.law.columbia.edu/2016/02/26/re-examining-the-business-judgment-rule-from-a-comparative-perspective-is-it-really-in-the-shareholders-interest/ [https://perma.cc/65YE-2DXV] ("From the shareholders' perspective, this authority of the board of directors [derived from the business judgment rule] means that they will virtually have no powers to intervene in the business affairs of the corporation, even with regard to some 'hybrid' decisions such as a hostile takeover, where heightened agency problems may arise between managers and shareholders."); Paramount Commc'ns. Inc. v. Time Inc., 1989 WL 79880 at *30 (Del. Ch. 1989) ("The value of a shareholder's investment, over time, rises or falls chiefly because of the skill, judgment and perhaps luck-for it is present in all human affairs-of the management and directors of the enterprise.").

186. Securities law tells a subtler story that can be bracketed for now. For a fuller discussion of this issue, see generally Westbrook & Westbrook, *supra* note 175.

187. Del. Ch. Ct. R. 23.1(a) ("The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort."); MODEL BUS. CORP. ACT § 7.42 (2016) ("No shareholder may commence a derivative proceeding until: (1) a written demand has been made upon the corporation to take suitable action…"); Aronson v. Lewis, 473 A.2d 805, 816-18 (Del. 1984) (requiring that, to demonstrate demand futility, plaintiff shareholders must allege at the pleading stage particularized facts that show a reasonable doubt that the directors are disinterested and independent and plaintiff shareholders must show a reasonable doubt that the challenged transaction was a product of a valid exercise of business judgment).

188. Lenois v. Lawal, No. 11963-VCMR, 2017 Del. Ch. LEXIS 784, at *4 (Del. Ch. Nov. 7, 2017) (plaintiff's derivative claims dismissed for failure to make a demand on the board); In re J.P. Morgan Chase & Co. Shareholder Litig., 906 A.2d 808, 812 (Del. Ch. 2005) (plaintiffs failed to adequately argue demand futility; therefore, the plaintiff's derivative claim was dismissed and demand was not excused). For additional discussion of the difficulty in pursuing a shareholder derivative suit, see Westbrook & Westbrook, *supra* note 175; Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L. J. 1217 (2012); Westbrook, *supra* note 175, at 404-05.

189. *See generally* Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability with the Corporate Power*, 35 DEL. J. CORP. L. 199, 2121-235 (2010).

190. *Id.*

director's conflict of interest transaction generally entitles a challenging shareholder to a standard of review with more possibility of success than the shareholder would have if the court applied the business judgment rule.[191] There are plenty of ways in which the directors or officers of a company can operate, however, that are unpalatable for shareholders but do not constitute "self-dealing."[192] And, even in the case of self-dealing, the cumbersome, expensive, time-consuming, and uncertain litigation may effectively preclude a shareholder's suit to enforce her rights.

C. Appraisal Rights and Minority Shareholder Protections

So far, there seems to be no reason for a shareholder to believe that Snap, or any other corporation for that matter, is legally required to deliver money back to its investors. Return on investment seems to be a mere hope.

In the context of a merger, however, if a number of requirements are met, shareholders who feel that they have received unfair compensation for their shares generally have the remedy of appraisal rights.[193] Appraisal rights empower dissenting shareholders to petition the court to appraise their shares, and then to have the corporation

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191. Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 173 (Del. Ch. 2005) (if one of the safe harbor provisions of title 8, §144 of the Delaware Code is satisfied, the business judgment rule applies; if none of the safe harbor provisions of title 8, §144 of the Delaware Code are satisfied, entire fairness review applies); *See also* DEL. CODE ANN. tit. 8, §144 (2013) (an interested transaction will not automatically be void or voidable solely because of the director's interest if there has been informed, disinterested, board approval, or informed shareholder approval, or the transaction is fair to the corporation); MODEL BUS. CORP. ACT ch. 8, subch. F, introductory cmt. (2016) (addressing legal challenges based on director conflict of interest only and applying only when there is a "transaction" by or with the corporation); *Id.* § 8.70(a)(1), official cmt. 238 (noting that the provision "provides a safe harbor for a director or officer weighing possible involvement with a prospective business opportunity that might constitute a 'corporate opportunity'").

192. *See* Sinclair Oil Corp. v. Levien, 280 A. 2d 717, 722 (Del. 1971) (holding that dividends paid out by the parent company in excess of subsidiaries' earnings and the parent company's allocation of business opportunities to entities other than the subsidiary did not constitute self-dealing). For a general survey of this area of the law in Delaware, see Lewis H. Lazarus & Brett M. McCartney, *Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Past Decade*, 36 DEL. J. CORP. L. 967 (2011).

193. DEL. CODE ANN. tit. 8, § 262(a)-(b) (2013). Steven Haas & Charles Brewer, *Nonvoting Common Stock: A Legal Overview*, HUNTON & WILLIAMS LLP (Nov. 2017), https://www.hunton.com/images/content/3/4/v2/34138/nonvoting-common-stock.pdf [https://perma.cc/VVA7-MSHD]. Under the Delaware General Corporation Law § 262(a), "[a]ny stockholder of a corporation of this State who [complies with the requirements of Section 262] shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock" (emphasis added). DEL. CODE ANN. tit. 8, § 262(a) (2013). *See also id.* § 363(b) (granting appraisal rights to stockholders who have not "voted in favor of" an amendment of its certificate of incorporation or merger to become a public benefit corporation).

buy those shares at the appraised value plus prejudgment interest.[194] The number of cases in which shareholders seek an appraisal remedy has increased dramatically, from two to three percent of eligible deals in the early 2000s,[195] to approximately twenty-five percent between 2010 and 2014,[196] making appraisal a more credible threat and increasing its impact on corporate management.[197] For example, in considering the merger of Delphi Financial Group, Inc. with Tokio Marine Holdings Inc. in 2011, the Delaware Court of Chancery ruled that the controlling shareholder breached his fiduciary duty by extracting a control premium for his shares, even though the certificate of incorporation specifically stated that both classes of stock should be treated equally in the event of a merger.[198]

There has been some question of whether nonvoting shareholders have an appraisal rights remedy, but the better view seems to be that they do; "nonvoting stockholders are entitled to appraisal rights in a merger to the same extent as voting stockholders."[199] Assuming that nonvoting shares have appraisal rights, such rights provide scant assurance for shareholders seeking a return on investment. It seems far-fetched to think that an investor invests in reliance on the hope that the company is the target of an eligible merger,[200] and then either (i) the premium offered by the acquiring company is completely

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194. Wei Jiang et al., *Appraisal: Shareholder Remedy or Litigation Arbitrage?*, 59 J. L. & ECON. 697, 697 (2016).

195. *Id.* at 699.

196. This may be partially the result of so-called "appraisal arbitrage," a relatively recent development in which hedge funds purchase shares of known merger targets solely to pursue (or threaten to pursue) an appraisal remedy. *See* Abigail Pickering Bomba et al., *New Activist Weapon - the Rise of Delaware Appraisal Arbitrage: A Survey of Cases and Some Practical Implications,* FRIED FRANK (June 18, 2014), http://www.friedfrank.com/siteFiles/Publications/FINAL%20-%206182014%20TOC%20Memo%20-%20New%20Activist%20Weapon--%20The%20Rise%20of%20Delaware%20Appraisal%20Arbitrage.pdf [https://perma.cc/QY3E-8WYR].

197. Jiang, *supra* note 194, at 699. Note, however, that even in this environment of increased assertion of appraisal rights, it is estimated that such actions still account for only one of every twenty merger-related lawsuits. Charles Kormso & Minor Myers, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279, 282 (2017).

198. In re Delphi Fin. Grp. S'holder Litig., 2012 Del. Ch. LEXIS 45 (Del. Ch. Mar. 6, 2012).

199. Haas & Brewer, *supra* note 195 (footnote omitted). *See* DEL. CODE ANN. tit. 8, § 262(a)-(b) (2013).

200. Note that only some mergers would be eligible mergers. John Marsalek, *2016 Amendments to the Delaware General Corporation Law*, DORSEY & WHITNEY LLP (Jul. 7, 2017), https://www.dorsey.com/newsresources/publications/client-alerts/2016/07/2016-delaware-general-corporation-law-amendments [https://perma.cc/V6X6-PAEM] (noting the difference between short-form mergers, which do not require stockholder approval, and long-form mergers, which require a proxy statement and a stockholder meeting).

satisfactory, or (ii) the premium offered is so inadequate she can pursue a remedy in the Delaware courts (which may take one to three years of litigation).[201] Presumably, the risk of appraisal rights litigation has a disciplining effect on a controlling founder who agrees to an eligible merger.[202] In addition, some scholars have noted that an appraisal action still compares favorably to litigation based on management breach of fiduciary duties.[203] But again, following CapitalOne's advice, surely most public equity market investments are made under the assumption that a business will be successful, and investors will profit from that success?

V. THE MARKET DOES NOT PROTECT THESE SHAREHOLDERS

A. The Market for Corporate Control

If the courts provide little or no assurance that a shareholder will benefit from her investment, perhaps the market does? In a quintet of articles published in the 1960s,[204] Henry Manne described two systems of corporate governance: "law" and "economics."[205] "Law," as discussed above, does not really protect shareholders, leaving the question of why one would invest at all. Manne found the same to be true in the 1960s: "in the present posture of the law, the derivative suit, whatever its potential, is not furnishing a great deal of direct protection for shareholder interests."[206]

Manne maintained *via* a great phrase that shareholders were protected not by law, but by "the market for corporate control."[207] If

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201. Jiang, *supra* note 194, at 697.

202. Courts do assign a market value to shares with no enforceable claim on the profits of the business, and in spite of the market for corporate control operating through the merger itself, but why should they?

203. Jiang, *supra* note 194, at 698.

204. Henry Manne, *The 'Higher Criticism' of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962) [hereinafter Manne, *The Higher Criticism*]; Henry Manne, *Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle*, 64 COLUM. L. REV. 1427 (1964) [hereinafter Manne, *Theoretical Aspects*]; Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965) [hereinafter Manne, *Mergers*]; Henry Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967) [hereinafter Manne, *Our Two Corporation Systems*]; Henry Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L. J. 231. For a comprehensive treatment of Professor Manne's impact on legal scholarship, see William J. Carney, *The Legacy of "The Market for Corporate Control" and the Origins of the Theory of the Firm*, 50 CASE W. RES. L. REV. 215 (1999) (discussing all five of Professor Manne's articles published during this period, and providing anecdotal, doctrinal, and empirical evidence of their impact).

205. For an explanation of Professor Manne's dual theory of corporations, see generally Manne, *Our Two Corporation Systems*, *supra* note 204.

206. Manne, *The Higher Criticism*, *supra* note 204, at 410.

207. This phrase is most commonly associated with Professor Manne's 1965 article *Mergers and the Market for Corporate Contro*l, although the concept was introduced in his

management is as bad as Berle and Means worried, then shareholders can band together and elect directors who represent their own interests.[208] More specifically, shareholders would elect, presumably through a proxy fight, directors who would declare a dividend.[209]

If—as is often the case—transaction costs prevent shareholders from banding together, then an economic opportunity exists.[210] A stronger firm could merge with the badly managed firm.[211] More dramatically, an outside party could buy shareholder votes, perhaps enough of a stake to affect elections.[212] If the opportunity was enticing enough, the party could buy enough shares to elect new directors, reorganize the corporation, and make money.[213] The result would be a takeover.[214] The increased profits, plus the opportunity to sell the shares at a higher price, would motivate investors to look for badly managed firms.

Sometimes proxy fights, mergers, and takeovers do in fact happen. More commonly, managers, who presumably want to keep their good jobs, are disciplined by the threat of takeovers into looking out for shareholders.[215] Knowing this, shareholders rationally want to own stock.[216] Or so argued Manne and his intellectual progeny.[217]

B. The Market for Corporate Control Requires Shareholder Voting

The extent to which the market for corporate control successfully addressed the agency problem animated over a generation of corporation law scholarship.[218] For present purposes, however, it is critical to note that the market for corporate control does not exist—even in principle—in the case of Snap.[219] In fact, it does not exist, at

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1962 article, *The 'Higher Criticism' of the Modern Corporation.* Manne, *Mergers*, *supra* note 204, at 110.; *see also* Manne, *The Higher Criticism*, *supra* note 204.

208. Manne, *Mergers*, *supra* note 206, at 114; Manne, *The Higher Criticism*, *supra* note 206, at 405.

209. Manne, *The Higher Criticism*, *supra* note 158, at 405.

210. Manne, *Mergers*, *supra* note 206, at 113.

211. *Id.* at 112.

212. Manne, *Theoretical Aspects*, *supra* note 206, at 1432-33.

213. Manne, *Mergers*, *supra* note 206, at 113.

214. *Id.*

215. Manne, *The Higher Criticism*, *supra* note 206, 412-13.

216. Manne, *Mergers*, *supra* note 206, at 113. "Only the take-over scheme provides some assurance of competitive efficiency among corporate managers and thereby affords strong protection to the interests of vast numbers of small, non-controlling shareholders." *Id.*

217. George Priest, *Henry Manne and the Market Measure of Intellectual Influence*, 50 CASE W. RES. L. REV. 325, 329 (1999) (discussing Manne's influence).

218. *See id.* (laying out the influence of Manne's theory of a market for corporate control).

219. *See supra* Part II (explaining that the Snap shares offered to the public have no voting rights).

least in practice, in other important high technology companies.[220] Google, for example, is not vulnerable to a takeover bid—that is the entire point of its hierarchical shareholding arrangements.[221]

The "economics" in Manne's argument is very dependent on "law." The "market for corporate control" is a market for a property right, the right to vote for the board of directors who can hire and fire managers and hence control what the company does.[222] That is, with enough votes, one has the ability to control both the operations and the treasury of the firm.[223]

But shares in Snap do not have voting rights.[224] A corporate raider could buy all of the Snap common shares but would still have no way to replace the board or access the firm's value. The market for corporate control is a market for votes. There is no public market for corporate control in Snap, Google, or Facebook, or any of the other companies discussed in Part II above.[225] The Snap Registration Statement is explicit:

> This concentrated control could delay, defer, or prevent a change of control, merger, consolidation, or sale of all or substantially all of our assets that our other stockholders support. Conversely, this concentrated control could allow our co-founders to consummate such a transaction that our other stockholders do not support. In addition, our co-founders may make long-term strategic investment decisions and take risks that may not be successful and may seriously harm our business.[226]

Interestingly, voteless shares are not only the logical terminus of the market for corporate control but also appear at the conception of the idea. For various reasons beyond the scope of this article, business theorist Peter Drucker and influential law professors Abram Chayes and Bayless Manning, proposed abolishing the ritual of shareholder

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220. *See supra* Part II (explaining that many high technology companies have a dual-class share structure that prevents holders of the publicly traded common stock from exercising any meaningful voting control).

221. "[W]e have set up a corporate structure that will make it harder for outside parties to take over or influence Google." Google Inc., Registration Statement (Form S-1), at iii (Apr. 29, 2004).

222. *See* Manne, *Theoretical Aspects*, *supra* note 206, at 1430 ("An individual voting share of stock is a package composed of two parts - an underlying investment interest and a vote.").

223. *Id.*

224. *See supra* Part II.

225. *See supra* Part II.

226. Snap Inc., Registration Statement (Amendment No. 3 to Form S-1/A) at 20 (Feb. 24, 2017).

democracy and issuing voteless shares.[227] In 1962, in the earliest of his series of articles, Manne responded that voteless shares would mean that outsiders could not buy votes and reap the gains of improved management, and shareholders would thus be at the mercy of managers.[228]

To summarize: neither law nor economics gives investors in Snap any assurance that they will share Snap's business gains, should the company be successful. In fact, Snap investors and the public investors in the many recent dual-class offerings may not be able to influence corporate matters in any direct way.[229]

At this point, the objections to the Snap IPO and other dual-class offerings are clear. But many investors nonetheless invested.[230] As Institutional Shareholder Services observed in response to the Facebook IPO, investors confront "a Hobson's choice: accept governance structures which diminish shareholder rights and board accountability or miss out on what appears to be one of the hottest business models of the internet age." [231]

VI. SNAPCHAT'S GIFT

A. Introduction

The investors in the Snap IPO transferred several billion dollars to the company without any reliable mechanism to compel a return on their investment. It is tempting to call such a transfer "a gift." But

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227. *See* Manne, *The Higher Criticism*, *supra* note 204, at 409. Abe Chayes was a mentor to both of the authors, albeit in international law.

228. *Id.* at 410-13 (1962). *See* Carney, *supra* note 204, at 233-34.

229. This was brought home to Groupon investors in 2012 following its accounting restatements. Founders Andrew Mason, Eric Lefkowsky and Brad Keywell controlled 100% of the Class B common stock and over a third of the Class A common stock, thus preventing any shareholder-sponsored management change. Therese Poletti, *IPO Investors: Beware the Dual-Class Stock*, MARKETWATCH (Apr. 5, 2012), https://www.marketwatch.com/story/ipo-investors-beware-the-dual-class-stock-2012-04-05 [https://perma.cc/TPV5-26XU]. *But see* Joan Macleod Heminway, *Selling Crowdfunded Equity: A New Frontier*, 70 OKLA. L. REV. 189 (2017).

230. In fact, the result has been some large investors objecting to the index funds' restrictions. For example, Blackrock Inc. informed its clients that some investment returns could suffer as the result of the exclusions imposed by S&P Dow Jones and FTSE Russell indexes. Blackrock reportedly said that "policy makers, not index compliers, should set equity investing and corporate governance standards." Nick Baker et al., *MSCI Extends Review of Whether to Ban Multiple-Class Stocks*, BLOOMBERG BNA CORP. L. & ACCOUNTABILITY REP., HTTPS://WWW.BLOOMBERG.COM/NEWS/ARTICLES/2017-11-02/MSCI-EXTENDS-REVIEW-OF-WHETHER-TO-BAN-MULTIPLE-CLASS-STOCKS (last updated Nov. 6, 2017).

231. INSTITUTIONAL SHAREHOLDER SERVICES, THE TRAGEDY OF THE DUAL CLASS COMMONS 1 (2012), http://online.wsj.com/public/resources/documents/facebook0214.pdf [https://perma.cc/6K6U-PUUF].

what is a gift? It is certainly not a unilateral transfer, at least not here.[232] Even in the contemporary United States, a gift creates some expectation of reciprocation, albeit often under the heading of manners rather than legal obligation.[233] For their part, the Snap investors presumably expect the management of Snap to do well by them in return, in other words, to run the company in the shareholders' interest and enable them to share in eventual profits. So perhaps we require a more sophisticated understanding of the term "gift," or more generally, the social obligations created by exchanges. For that, we return to Mauss.

B. The Seriousness of Giving

In the social systems Mauss discussed, gifts were viewed very seriously. Gifts were given to establish relative importance and position, and they were reciprocated for the same reason.[234] Far from free gestures of affection, gifts were highly constrained and obligatory.[235] Exchanging "total services" and "counter-services" was "strictly compulsory, on pain of private or public warfare."[236]

For example, Mauss described the system of contractual gifts in Samoa, which followed marriage, birth, circumcision, sickness, a daughter's arrival at puberty, funeral rights, or trade.[237] In the Samoan *potlatch* system, Mauss found that honor, prestige, and

232. For a discussion of Mauss, and the role of the gift, in the context of international bribery and corruption, see generally Timothy L. Fort & James J. Noone, *Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia*, 33 CORNELL INT'L L. J. 515 (2000) (arguing among other things that nothing is a "gift" and that there is always self-interest involved based on the social context).

233. The legal academy has also explored the idea of gifts, particularly the possibility that people gain utility from acting altruistically. Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 411-12 (1977). Contract law has long struggled with the enforceability of gratuitous promises without (apparent) consideration. Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 1 (1979).

234. MAUSS, *supra* note 1, at 52. *See also* discussion *supra* note 170 (noting that this idea has been explored by the legal academy in the context of gratuitous promises). In his 1997 article, Eric Posner discussed an expanded world of gift-giving motivation that included not just altruism but the more self-serving ideas of increasing the donor's status and creating or enhancing trust relations between the donor and the recipient. Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 572-82 (1997). *See also* Robert A. Prentice, *"Law &" Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 888 (2007). Professor Prentice discusses the observations of Wright, who observed that reciprocal altruism "is fundamental to life in all cultures." *Id.* at 889 (quoting ROBERT WRIGHT, THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY 202 (1994)).

235. MAUSS, *supra* note 1, at 4. Mauss also explained the role of destruction, of sacrifice in order to receive a reciprocal, spiritual, benefit. *See, e.g.*, *id.* at 20. Discussion of destruction as a form of gift, however, is beyond the scope of this article.

236. *Id.* at 7.

237. *Id.* at 11.

spiritual power were expressed by wealth; the failure to reciprocate gifts resulted in the loss of spiritual power, "the talisman and source of wealth that is authority itself."[238] In the same vein, the North American Tlingit and Haida may have carried the *potlatch* the furthest, outdoing the Melanesian gift systems in "the violence, exaggeration, and antagonisms that it arouse[d]."[239] "The goal is above all a moral one, the object being to foster friendly feelings between two persons in question. . . ." [240]

The need to foster friendship raises the possibility of enmity; giving is a grave business. "Nobody is free to refuse the present that is offered. Everyone, men and women, tries to . . . outdo one another in generosity."[241] In discussing the role of the gift in classical Hindu law, Mauss explained: "[t]he gift is therefore at one and the same time what should be done, what should be received, and yet which is dangerous to take."[242] He further explains, "[t]his is because the thing that is given itself forges a bilateral, irrevocable bond."[243]

Less dramatically, even though Snap shareholders lack a legal right to compel behavior by Snap managers, shareholders undertake the risk of investment and thereby connect to managers.[244] Exchange forms bonds and weaves the social fabric. Investment makes people

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238. *Id.* at 8.

239. *Id.* at 45.

240. *Id.* at 24-5 (quoting A.R. RADCLIFFE BROWN, THE ANDAMAN ISLANDERS: A STUDY IN SOCIAL ANTHROPOLOGY 73, 83 (1922)).

241. *Id.* at 25 (quoting A.R. RADCLIFFE BROWN, THE ANDAMAN ISLANDERS: A STUDY IN SOCIAL ANTHROPOLOGY 73, 81 (1922)).

242. *Id.* at 76.

243. *Id. See* PAUL SEABRIGHT, THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMICS 148 (2004) (explaining that for Mauss, "the nature of obligation incurred on receipt of a gift was not determined wholly or even primarily by the nature of the goods received but owed a great deal to relative status, and to other social and emotional links between donor and recipient").

244. Scholars have long emphasized the relational aspects of reciprocity. For example:

> From a relational perspective, however, individual intentions are not all that matters: a relation is characterized by the two (or more) persons linked and by the kind of link they have. This perspective . . . is better suited to discuss the implications of individuals' social identity (and also of groups' identity), because it makes it easy to recognize that establishing a certain kind of link (say, reciprocal, but also altruistic) with a certain kind of person (or group) also affects my own identity, at least in its social component, and, . . . the choice of one's social identity may be the most relevant economic decision, which then drives all other economic choices.

Pier Luigi Sacco et al., *The Economics of Human Relationships*, *in* HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY 697 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

part of the company (which in English is another word for guest).[245] The shareholders are committed, and in some moral sense, owed good faith management, and so it may be rational, morally if not legally, for them to expect something in return for their investment.[246]

Perhaps, *contra* the suspicion of management that has existed in corporation law since at least Berle and Means,[247] Snap's management will do the right thing. There is no self-evident reason to believe that it will not.[248] As Mauss explained, "[t]he unreciprocated gift still makes the person who has accepted it inferior, particularly when it has been accepted with no thought of returning it."[249] Snap's management therefore may want to reciprocate the trust shown by their shareholders. Simply put: don't we think that most founders of Silicon Valley start-ups want to be respected as such, to enter the pantheon with Hewlett, Packard, Jobs, Gates, and the other heroes? As Alan Palmiter has argued, corporate management decisions are the product of moral values, not economics or law.[250] In Professor Palmiter's view, many of the supposed rational reasons for human actions, especially in social or political groups, are more truly understood as justifications or "after-the-fact rationalizations."[251] To the extent that the founders are in a particular "tribal group,"[252] they may act in the best interests of their companies and their shareholders, regardless of whether such behavior is "required" by legal doctrines like shareholder wealth maximization, or by pressures from the market for corporate control.

Conversely, there are lines that cannot be crossed. Consider the case of Uber Technologies Inc., the ride-hailing unicorn.[253] The founder and former CEO Travis Kalanick held super-voting shares and what appeared to be *de facto* control of the board, but was eventually forced

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245. The English word "company" derives through French from the Latin word "companio," which means "one who eats bread with you." *Company*, WEBSTER THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabr. 1976).

246. Of course, there have been plenty of scandals involving Silicon Valley start-ups. *See* Erin Griffin, *The Ugly Unethical Underside of Silicon Valley*, FORTUNE (Dec. 28, 2016), http://fortune.com/silicon-valley-startups-fraud-venture-capital/ [https://perma.cc/M5QS-FW9C] (chronicling problems with Hampton Creek, Zenefits, Lending Club, Skully, ScoreBig, Rothenberg Ventures, Faraday Future, Hyperloop One, Uber, and Theranos).

247. *See supra* Part IV.B.1.

248. Recall Larry Page's assurances in the Google Registration Statement. Google Form S-1, *supra* note 6, at iii.

249. MAUSS, *supra* note 1, at 83.

250. *See* Alan R. Palmiter, *Corporate Governance as Moral Psychology*, 74 WASH. & LEE L. REV. 1119, 1122 (2017) (exploring the motivations of corporate governance in the context of the scholarship of Lyman Johnson and David Millon).

251. *Id.* at 1120.

252. *Id.* at 1128.

253. *About Us*, UBER, https://www.uber.com/about/ [https://perma.cc/66LJ-XUXE] (explaining what Uber is).

to step down by five of the company's major investors.[254] In 2017, the company abolished super-voting rights and returned to a one-vote-per-share structure, reportedly in preparation for its 2019 IPO.[255]

It is not clear, however, if or how the obligation to run the company for the benefit of its shareholders would be externally enforced onto Snap's management.[256] SEC Rule 19c-4 was short-lived; all of the major exchanges have relaxed or are relaxing their restrictions on listing dual-class shares.[257] Even the indexes, which acted in response to the Snap offering, are under increasing pressure to remove their prohibitions.[258] SEC Chairman Jay Clayton stated that he does not believe that indexes should choose which stocks to include based on voting power: "[g]overnance by indexation doesn't sit really well with me."[259]

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254. Mike Isaac, *Uber Founder Travis Kalanick Resigns as C.E.O.*, N.Y TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html [https://perma.cc/26HF-P27L] (detailing the fallout from Kalanick's "brash" approach as well as allegations of sexual harassment in the Uber workplace).

255. *See* Winkler & Farrell, *supra* note 53. The October 2017 changes, which among other things increased the board from 11 to 17 members who will all vote on an equal scale, reportedly reduced Kalanick's control over the company, paved the way for a large investment by Japanese SoftBank, and helped Uber prepare for a its IPO. David Goldman, *Uber Strips Power from Ousted Kalanick*, CNN TECH (Oct. 3, 2017), http://money.cnn.com/2017/10/03/technology/business/uber-board-kalanick/index.html [https://perma.cc/6LKX-VK9C]; Emily Bary, *Uber IPO: 5 things you need to know about the biggest IPO in years*, MARKETWATCH (May 13, 2019), https://www.marketwatch.com/story/uber-ipo-5-things-you-need-to-know-about-potentially-the-biggest-ipo-in-years-2019-04-12 [https://perma.cc/BTU8-QPDM].

256. Cultural norms may be followed because they are norms, but people may also stray, in which case society may enforce the norm. Indeed, a norm backed by a sanction is a traditional understanding of what law essentially is, associated with HLA Hart, and some corporate norms are enforced by courts. For pertinent example, currently Snap is defending against a suit by its shareholders who are alleging that Snap's disclosure to investors in the IPO was inadequate as a matter of securities law. *In re* Snap Inc. Sec. Litig., 2018 U.S. Dist. LEXIS 99704, at *5-6 (C.D. Cal. June 07, 2018) (alleging that Snap did not reveal the extent of competition from Instagram, a whistleblower law suit alleging inaccuracies in the company's reporting of daily active users, and its use of "growth hacking"); *see also* Edvard Pettersson, *Snap Shareholders Can Pursue Claims that IPO Hid Crucial Information,* BLOOMBERG (June 8, 2018), https://www.bloomberg.com/news/articles/2018-06-08/snap-shareholders-can-pursue-claims-ipo-hid-crucial-information [https://perma.cc/V2TU-XQ7N]. The U.S. Department of Justice and the SEC have also launched investigations into the company's statements ahead of the offering. Rachel Graf, *Snap Facing Gov't Probes after Pre-IPO Instagram Claims*, LAW360 (Nov. 14, 2018), https://www.law360.com/articles/1101899/snap-facing-gov-t-probes-after-pre-ipo-instagram-claims [https://perma.cc/9K9J-BZRG].

257. *See supra* Part II.

258. *See supra* Part II.

259. *FTSE Russell Voting Rights*, *supra* note 100 (reporting on Chairman Clayton's remarks at the March 2017 Council of Institutional Investors conference).

C. *Gift: Tradition :: Individual: Social*

Cultural anthropology tends to move from the particular to the general; from data collected during fieldwork toward articulations of a given culture, toward yet broader understandings of the human condition.[260] So, Mauss begins with particular accounts of gift giving in various parts of the world to suggest deep truths about gift giving writ large, and even about how exchanges form social worlds. Trade constitutes commercial cultures.[261] Methodologically, the effort is to observe individuals in order to articulate and understand the collective.[262] In this case, understanding the Snap offering may illuminate, but may also only be understood in the context of, contemporary equity markets.

The *potlatch* created three obligations: to give, to receive, and to reciprocate.[263] For a gift to create such obligations, there must be a social context in which the gift has such meanings.[264] People had to understand what a *potlach* was, how it worked, and what the rules were, in order to give and show their importance and to expect reciprocation.[265] By the same token, a gift in a *potlatch* system had to be visible.[266] The gift was given in the context of a public drama because it was directly connected to honor and authority.[267]

The parties did not merely receive meaning from their context; in giving and receiving they perpetuated the tradition, in other words—they made the context.[268] The gift was constitutive: it wove the social fabric among individuals, maybe even strangers.[269] Participation in the

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260. *See* BRONISLAW MALINOWSKI, THE ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA, 1-26 (1961 ed.) (explaining the subject, method, and scope of ethnography).

261. *See* David A. Westbrook, *If Not a Commercial Republic? Political Economy in the United States after Citizens United*, 50 U. LOUISVILLE L. REV. 35 (2011) (explaining that various modes of social decision in U.S. society).

262. *See* DAVID A. WESTBROOK, NAVIGATORS OF THE CONTEMPORARY: WHY ETHNOGRAPHY MATTERS (2008) 37-76 (analyzing ethnography for present situations). Contemporary refunctioning of ethnography tends both to extend and to contrast itself from the Malinowskian project. *See* MALINOWSKI, *supra* note 262; *see also* Michael M.J. Fischer, *Foreword: Renewable Ethnography*, *in* FIELDWORK IS NOT WHAT IT USED TO BE: LEARNING ANTHROPOLOGY'S METHOD IN A TIME OF TRANSITION vii (James D. Faubion & George E. Marcus eds., 2009).

263. MAUSS *supra* note 1, at 50-53.

264. *Id.* at 52.

265. *Id.*

266. *Id.* at 47.

267. *Id.* at xviii. Arguably a gift exchange is not only more visible but also more readily judged by society than a market exchange.

268. *Id.* at xi (explaining, in Mary Douglas's Foreword, the cycles and tradition).

269. *See id.* at 59. ("If one gives things and returns them, it is because one is giving and returning 'respects'—we still say 'courtesies.' Yet it is also because by giving one is giving

potlatch system therefore required both giving and receiving: "[t]o refuse to give, to fail to invite, just as to refuse to accept, is tantamount to declaring war; it is to reject the bond of alliance and commonality."[270] In sum, successfully giving, receiving, and creating an obligation to reciprocate enabled people to come together.

The sense of being apart and together, or together and estranged, is central to contemporary experience.[271] In other circumstances, the need to construct the social and to build community can be more dramatic. For isolated peoples separated by miles of open ocean, occasionally navigated in small boats, the stakes were high. "[T]here is no middle way: one trusts completely, or one mistrusts completely; one lays down one's arms and gives up magic, or one gives everything, from fleeting acts of hospitality to one's daughter and one's goods."[272] In such societies, the peoples had no choice. "Two groups of men who meet can only either draw apart, and, if they show mistrust towards one another or issue a challenge, fight—or they can negotiate."[273] The gift was the response by those societies to what Mauss called their "unstable state between festival and war."[274]

Similarly, in *Beowulf*[275] and the *Iliad*,[276] gifts strengthened the bonds among warriors—or did not. In a heroic world, a meager gift was important, not because the recipient was short-changed, but because the recipient was insulted.[277] To generalize, giving and receiving proper gifts presumes, creates, and stabilizes relationships, and so society itself. In our modern markets, there is a "moral obligation" imposed on managers who receive investment, but only insofar as we presume a social world —the equity culture of Silicon Valley—in which such moral statements are legible.

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oneself, and if one gives oneself, it is because one 'owes' oneself—one's person and one's goods—to others.").

270. *Id.* at 17 (footnotes omitted).

271. *See, e.g.*, JOHN PAUL SARTRE, HUIS CLOS 47 (1947) (concluding, *"l'enfer, c'est les Autres"*). Coincidentally, managing such states of (dis)connection with the exchange of images is what Snapchat does.

272. MAUSS, *supra* note 3, at 104.

273. *Id.* at 104-05.

274. *Id.* at 105.

275. BEOWULF, BRIT. LIBR., https://www.bl.uk/collection-items/beowulf [https://perma.cc/7ZX9-MNKG]; BEOWULF (Lesslie Hall trans., Project Gutenberg 2005), https://www.gutenberg.org/files/16328/16328-h/16328-h.htm [https://perma.cc/2LS3-NV3M].

276. HOMER, THE ILIAD OF HOMER (Alexander Pope trans., Project Gutenberg 2006), http://www.gutenberg.org/files/6130/6130-h/6130-h.html#toc5 [https://perma.cc/UD9L-HJXZ].

277. *Id.* at 163-64 (Agamemnon (the king of Mycenae) acknowledges that it was foolish of him to insult Achilles and he offers Achilles lavish gifts, including the return of Briseis, if Achilles agrees to rejoin the army).

D. Collectivities

Gifts given by chiefs of peoples constitute the social obligation of collectivities, not the atomistic individuals with which economic thought[278] typically begins. The Tlingit and the Haida described their system as tribal kinship groups showing respect to one another.[279] Clans exchanged total services, offering and receiving gifts to and from each another.[280] However, the gifts or services were often given and received in an environment of rivalry or even hostility.[281] And, because the clan operated through its chief, the gift exchange was at its heart "a struggle between nobles to establish a hierarchy amongst themselves from which their clan will benefit at a later date."[282] In his seminal ethnography of the Trobriand people,[283] Bronislaw Malinowski found that although their system of services rendered and reciprocated (known as the *kula*) was extensive, "in the end, only the chiefs, and even solely those drawn from the coastal tribes—and then only a few—do in fact take part in it."[284]

The situation of shareholders vis-à-vis managers in a contemporary public corporation is, of course, different from the situation among Trobriand chiefs. But what is not different is the participation and therefore legitimation of social roles as opposed to personal, individual, relations. If the founders and managers of Snap owe something to its investors, they do so not because of any personal relationship with a particular shareholder, but because that is how a shareholder should be treated by the chiefs of a corporation. In both the Trobriand Islands and Silicon Valley, the actions of chiefs are essentially representative.

E. Leadership

Finally, leadership entails the temporality of the collectivity; one leads the group forward.[285] Just as we expect corporate managers to

278. At least economic thought in the tradition running from Adam Smith through, *inter alia*, Henry Manne, to contemporary corporate finance. *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1982 ed.) (explaining the potential mutual gains from exchanges between nations).

279. MAUSS, *supra* note 1, at 7.

280. *Id.* at 8.

281. *Id.*

282. *Id.*

283. Malinowski, *supra* note 262. Malinowski is commonly considered a founding father of cultural anthropology.

284. MAUSS, *supra* note 1, at 34.

285. *See, e.g.*, Deborah Blagg & Susan Young, *What Makes a Good Leader*, HARVARD BUSINESS SCHOOL: WORKING KNOWLEDGE (Apr. 2, 2001), https://hbswk.hbs.edu/item/what-makes-a-good-leader [https://perma.cc/Z3YF-HSY8] (quoting Harvard Business School Professor Nitin Nohria explaining, "[e]nduring setbacks while maintaining the ability to show others the way to go forward is a true test of leadership.")

talk about the growth of their companies and the benefits to come to investors, in gift societies, the obligation to reciprocate entailed interest.[286] If a subject received a blanket from his chief for some service he rendered, he would give two blankets upon a marriage in the chief's family. Mauss estimated the rate of return to range from 30-100% per year.[287] In the societies that Mauss studied, he found that the obligation to reciprocate in the expected range was "imperative."[288] Failure to reciprocate the *potlatch* appropriately could result in loss of rank and even slavery.[289]

Less dramatically, a shareholder who is discontent with leadership or with the way the company is growing, has the right to sell her shares. In the context of crowdfunded equity, Professor Heminway pointed out that, even without a vote, the right to sell is the "power to discipline or signal poor firm management."[290] In the context of Snap and other public companies in which the founders retain effective control and substantial economic interest, the widespread sale of shares would presumably drive down the price of shares, and therefore lower the net worth of the founders. Thus one might say that, even in the absence of a vote, the founders may be disciplined.

It is important to recall, however, that in such circumstances, the founders would not be disciplined by a market for corporate control.[291] The founders would retain control of the company.[292] But the symbols of participation in the company—shares—would be less desirable.[293] The founders, the leaders of the company, would have fewer people who wanted to be "followers."[294] As demand for shares fell, presumably so would the price. If so, the company's leaders would have less social capital,[295] or more simply, less wealth. Snap and its kin thus have

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286. MAUSS, *supra* note 1, at 53.

287. *Id.* Snap might have a hard time meeting such earnings expectations.

288. *Id.* at 54.

289. *Id.* (comparing the institutional punishment to the *nexum* in Roman law).

290. Heminway, *supra* note 231, at 189 (citing Manne and explaining the application to crowdfunded equity, another locus of legal debate in the context of contemporary technology ventures).

291. *See supra* Part II.

292. *See supra* Part II.

293. *See* Heminway, *supra* note 231, at 189.

294. "Followers" here uses the parlance of social media structures to explain the point.

295. *See* Lyda J. Hanifan, *The Rural School Community Center*, 67 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 130, 130 (1916) (defining "social capital" in the context of the rural school community). Hanifan explained:

> In the use of the phrase *social capital* I make no reference to the usual acceptation of the term *capital*, except in a figurative sense. I do not refer to real estate, or to personal property or to cold cash, but rather to that in life which tends to make these tangible substances count for most in the daily lives of a

made literal the idea of "social capital."[296] The social standing of high technology companies and their founding chiefs is monetized by the market for powerless shares, tokens of association.

While a return to a traditional *potlatch* system does not seem imminent, the importance of status in an exchange is becoming more obvious in the digital age. Some scholars suggest that the return of the gift in the current digital society is the result of a new, post-market system that might be called a "crowd society:" a networked, open, and mass-collaborative arrangement of Wikipedia, YouTube and fan-fiction communities.[297] In a culture ripe with peer and user-generated production, "community recognition supersedes economic incentives."[298] Perhaps, in the equity markets, economic recognition and social recognition have always been imbricated.

VII. CONCLUSION

Financial markets are often conceived of as spaces in which more or less rationally self-interested individuals form legally enforceable contractual agreements, or rely on market mechanisms, to structure relationships that generate profitable outcomes with a reasonable degree of certainty. That just does not seem to be what is happening with Snap. Or, more precisely, it *is* what is happening with Snap, but the market in question—for equity in high technology companies—is a more deeply acculturated space than the traditional conception allows. In addition, the "individuals" who inhabit that space must be understood in terms of their context, not as individuals strictly speaking.

If the foregoing is true enough, then doctrinal problems arise. Henry Sumner Maine defined modernity (in law especially) as the movement from status to contract.[299] Similarly, Mauss was careful to call societies with gift economies "archaic," even if his intentions

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> people, namely, goodwill, fellowship, mutual sympathy and social intercourse among a group of individuals and families who make up a social unit . . . .

Id.

296. For a discussion on the forms of capital, see Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241-58 (J. Richardson ed., 1986).

297. *See generally* Giancarlo F. Frosio, *User Patronage: The Return of the Gift in the "Crowd Society,"* MICH. ST. L. REV. 1983 (2015) (exploring the tension between the gift economy and the market economy in the history of creativity).

298. *Id.*

299. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 170 (John Murray ed., 16th ed. 1897).

seemed a bit more subversive.[300] We "moderns," on the other hand, tend to see ourselves as rational and equal, with our relations formed by acts of choice.[301] Nowhere is this more pronounced than in economic life, in markets.[302] We reflexively contrast this self-understanding with "traditional" societies, which are about association, hierarchical status, and tribes. Nevertheless, in some ways, what is arguably our premier market is all about status and socially defined obligations.[303]

Historically, we may argue that although the conventional narrative epitomized by Maine holds that a clan society was replaced by a modern society of property and free exchange,[304] offerings such as the Snap IPO suggest that our current digital, crowd-based environment may be more hierarchical. With a "market" that not only accepts but welcomes reciprocal, status-establishing exchanges, we may be moving beyond liberal political economy.

Philosophically, our reading of Mauss suggests that perhaps our understanding of the modern was always overdone; that the individualistic liberal imagination at the heart of utilitarian economic thought (and most finance) was misbegotten from the beginning. The social always matters, especially to obligation, property, law, and so forth. To believe that at some point, perhaps in early twentieth century Paris, or for that matter early twenty-first century Silicon Valley, individuals walked the earth, naked and alone, freely contracting, is simply to refuse to acknowledge the reality of the social.

The Snap IPO suggests that rethinking is in order. Perhaps we never understood ourselves. Or perhaps we did, once, and are becoming something else.

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300. MAUSS, *supra* note 3, at x (including the suggestion, in Mary Douglas' Foreword, that the book was part of an "organized onslaught on contemporary political theory," namely utilitarianism).

301. THE DECLARATION OF INDEPENDENCE, para 1 Stat. 1 (U.S. 1776) (asserting "WE hold these truths to be self-evident, that all [persons] are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

302. *See* MAINE, *supra* note 301, at 170; *see also* SMITH, *supra* note 280 (expressing the centrality of economics in human life).

303. One could go further and say radical inequality and *noblesse oblige* as well. *See* David A. Westbrook, *The Culture of Financial Institutions; the Institution of Political Economy*, *in* REGULATING CULTURE: INTEGRITY, RISK AND ACCOUNTABILITY IN CAPITAL MARKETS 3-20 (2013) (arguing that "medieval" forms of social organization reappear in "modern" financial markets); David A. Westbrook, *Neofeudalism, Paraethnography and the Custodial Regulation of Financial Institutions*, 2 JASSA: THE FISIA J. OF APPLIED FIN., 57-61 (2013) (arguing that understanding status to entail social obligation provides opportunities for better prudential regulation of financial institutions).

304. CHRIS GREGORY, GIFTS AND COMMODITIES 37 (1982) (contrasting Mauss's clan communities of gift exchange with the modern class society of private property and commodity).