

Strategic Shareholder and Member Voting Agreements Under Texas Business Entity Law

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I. INTRODUCTION

A. *The Topic*

Sometimes business entity owners—shareholders, LLC members, and the like—contract to vote strategically. Often owners simply agree to pool their votes. They might do this to form or join a controlling majority or supermajority, or to maximize their influence on the board if the entity allows cumulative voting.¹ The Texas laws governing such non-unanimous, strategic voting agreements are the subject of this paper.² For ease of discussion, I call units of voting power “shares” here (as in shares of voting power) and their owners “shareholders.” The most relevant cases thus far have involved only corporations.³

B. *A Policy Baseline*

Perhaps the most famous example of vote pooling, and the one most studied in law school classrooms, is the case of *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*.⁴ Edith Conway Ringling (315 shares) and Aubrey Ringling Haley (315 shares) agreed to confer with each other prior to each shareholder meeting and cast their votes together.⁵ In

¹ *E.g.*, 13 ELIZABETH S. MILLER & ROBERT A. RAGAZZO, TEXAS PRACTICE SERIES: TEXAS METHODS OF PRACTICE § 45:2 (3d ed. 2016).

² Unanimous owner voting agreements are governed by other statutes which allow owners and entities subject to them much greater leeway. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 21.101 (West Supp. 2015), § 21.714 (West 2012).

³ *See infra* Part II. The analysis would not differ if units of voting power were called membership or partnership interests, however. The code provision at issue applies to LLCs and partnerships as well. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. §§ 1.002(18), (62) (West 2012 & Supp. 2015), § 6.252 (West 2012).

⁴ 53 A.2d 441 (Del. 1947).

⁵ *Id.* at 442–43.

this way, they could elect the board they wanted and thwart the efforts of the only other shareholder, John Ringling North (370 shares), to dominate the business.⁶ The Delaware Supreme Court treated the agreement like a contract because, after all, that is what it was. A shareholder has a right to vote shares and, as the court noted:

Generally speaking, a shareholder may exercise wide liberality or judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed to his fellow shareholders The ownership of voting stock imposes no legal duty to vote at all.⁷

This makes perfect sense. A shareholder buys the shares for profit—for her own personal advantage, not as a public service, nor for the benefit of other shareholders, nor even for the business itself. The court is correct that no legal duty exists to vote shares at all, let alone to vote in a certain way. The next part of the court's argument builds on this premise and is particularly compelling:

A group of shareholders may, without impropriety, vote their respective shares so as to obtain advantages of concerted action. They may lawfully contract with each other to vote in the future in such a way as they, or a majority of their group, from time to time determine.⁸

In other words, shareholders can agree to be legally bound to do what they already have a right to do. If all they agree to do is vote in a way they legally could vote in the first place even without an agreement, then there is in general nothing wrong with their agreement. It harms no one. It is just a contract. As between the parties, the vote pooling agreement should be enforced as a contract.

This rationale gathers strength the more closely it is examined, for several reasons. A vote pooling agreement adds value to shares joining it, generally without decreasing the value of non-joining shares in any prejudicial way. Joining such an agreement increases the voting power of participating shareholders, a clear benefit to them that adds value to their

⁶ *Id.* at 443–44.

⁷ *Id.* at 447.

⁸ *Id.*

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shares. But shareholders not participating in the agreement have no less power than they had before: non-participating shareholders' positions are not changed because of the agreement; non-participating shareholders have exactly the same voting power—no less and no more than—they had before their fellow shareholders joined a pooling agreement. Although non-participating shareholders might complain that, whereas no one before had the control or influence that the vote pooling agreement conferred, the shareholders who participate in the pooling agreement could have caused exactly the same results without the pooling agreement merely by deciding to vote in the same way the agreement specifies.

The sole change to the rights of non-participating shareholders from the pooling agreement is that non-participating shareholders may be deprived of the opportunity to join in a pooling agreement with the participating shareholders while the agreement lasts (because those in the agreement already do not need them),⁹ but the value of this lost opportunity is speculative at best: on the one hand, non-participating shareholders are free to vote with the pool if they choose. On the other hand, the loss of this opportunity is no different than what would occur if the non-participating shareholder lost all the individual votes that occur while the pooling agreement lasts, and that is a risk every shareholder assumes when they buy the shares. A vote pooling agreement thus, by itself, changes nothing of consequence for any other shareholder and harms no one.

Of course, this rationale is limited to vote pooling. Shareholders' agreements to do anything more than shareholders have a right to do without the agreement might be objectionable for some reason. So, a shareholder agreement to manage the corporation themselves (say, by appointing officers)—a core management function generally reserved to the entity's governing authority¹⁰—may well be invalid as a usurpation of a governing authority power.¹¹ Also, taking money or another advantage in

⁹Of course, non-participating shareholders could buy into the agreement. The point of a business is to make money, so there is a price on almost everything. People challenge voting agreements in court when the price of buying into them, or buying the participants out, is for them higher than the cost of a lawsuit multiplied by its probability of success, as against other uses of their time and resources.

¹⁰*See, e.g.*, TEX. BUS. ORGS. CODE ANN. §§ 3.103, 21.417 (West 2012).

¹¹*See, e.g.*, *Grogan v. Grogan*, 315 S.W.2d 34, 39 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); *Funkhouser v. Capps*, 174 S.W. 897, 899 (Tex. Civ. App.—Fort Worth 1915, writ ref'd). Of course, this would be legal if all the shareholders signed. *See* TEX. BUS. ORGS. CODE ANN. § 21.101 (West 2012 & Supp. 2015), § 21.714 (West 2012).

exchange for a vote—vote-selling—may well warrant judicial review, though how strict this review should be is not clear.¹² Shareholder agreements that involve more than just voting have been invalidated for a variety of reasons during a century of litigation about them, and litigation trends regarding them have come and gone.¹³ In the words of *Ringling*, the agreement must not cause or enable “the parties to take any unlawful advantage of the outside shareholder[s], or of any other person.”¹⁴ Moreover, some fiduciary or other status-based duty to a non-participant may dictate or limit some shareholders’ rights to vote as they please,¹⁵ and this limitation, if and when it exists, would affect the legality of action pursuant to a voting agreement.¹⁶ But if it does not—if the voting agreement is merely a promise by shareholders to do what they have every legal right to do, namely, cast a vote as a shareholder, then it should be upheld as a contract.

C. *The Texas Position*

This conclusion that contract law and contractual freedom should be at the root of shareholder voting agreements is important because the law in Texas regarding strategic (non-unanimous) shareholder voting agreements

¹² *E.g.*, 13 MILLER & RAGAZZO, *supra* note 1, § 45.2 n.6; *Schreiber v. Carney*, 447 A.2d 17, 26 (Del. Ch. 1982).

¹³ 1 HODGE O’NEAL AND ROBERT B. THOMPSON, O’NEAL AND THOMPSON’S CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE § 4:4 (rev. 3d ed. 2015).

¹⁴ *Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 53 A.2d 441, 447 (Del. 1947).

¹⁵ For instance, controlling shareholders may be held to have a fiduciary duty of some sort. *See, e.g.*, *Ritchie v. Rupe*, 443 S.W.3d 856, 887 (Tex. 2014) (“[T]here may be circumstances in which the controlling shareholders or directors of a closely held corporation seek to artificially deflate the shares’ value, perhaps to allow the company or its shareholders to purchase a minority shareholder’s shares for less than their true market value, or to hinder a minority shareholder’s sale of shares to third parties As a rule, . . . claims based on such conduct belong to the corporation”); *see also, e.g.*, *Riebe v. National Loan Investors, L.P.*, 828 F. Supp. 453, 456 (N.D. Tex. 1993); 13 ELIZABETH S. MILLER & ROBERT A. RAGAZZO, TEXAS PRACTICE SERIES: BUSINESS ORGANIZATIONS § 36:14 n.5 (3d ed. 2015); *see also* *Portnoy v. Cryo-Cell Int’l, Inc.*, 940 A.2d 43, 71–73 (Del. Ch. 2008) (Chancery’s setting aside a vote because the board made a deal to create a new board seat shortly after an election and give it to an upstart shareholder’s nominee in exchange for the upstart’s supporting the board and buying more shares (and thus more votes) to support the board during that election rather than launching a proxy fight).

¹⁶ *See also, e.g.*, Val Ricks, *No Power to Be Disloyal (Or, How Not to Write a Loyalty Opinion)*, 6 J. BUS., ENTREPRENEURSHIP & L. 247, 261 (2013).

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is conceptually disjointed and easily misunderstood. The early case law was contradictory, both encouraging freedom of contract and attacking it.¹⁷ A statute first passed in 1961 and still (with some modifications) ensconced in the Texas Business Organizations Code (TBOC) fails to clear up the case law. The statute purports to give a permission: it provides that shareholders “may enter into a written voting agreement to provide the manner of voting of ownership interests.”¹⁸ The statute promises “specific enforcement” when it applies,¹⁹ which presumably means that a court should order that the bound party vote as agreed. But the statute purports to require other things of the agreement, too: that it “shall be deposited” with the entity and be “subject to examination” by any owner.²⁰ The statute offers the remedy of specific enforcement “against the holder of an ownership interest that is the subject of the agreement” if “the voting agreement is noted conspicuously on the certificate” or a similar notation is sent by the entity if the share is uncertificated.²¹ In a separate section, the statute appears to grant a remedy of specific enforcement against “any person with actual knowledge of the existence of the agreement,”²² but this section appears to overlap the earlier one inasmuch as a holder of the ownership interest who is also a party to the agreement always has actual knowledge. The entire code section appears in the margin.²³

¹⁷ See *infra* Parts II.A & B.

¹⁸ TEX. BUS. ORGS. CODE ANN. § 6.252(a) (West 2012).

¹⁹ *Id.* § 6.252(c)–(d).

²⁰ *Id.* § 6.252(b).

²¹ *Id.* § 6.252(c)–(e).

²² *Id.* § 6.252(d).

²³ The current statute reads as follows:

Sec. 6.252. VOTING AGREEMENTS.

(a) Except as provided by this code or the governing documents, any number of owners of a domestic entity, or any number of owners of the domestic entity and the domestic entity itself, may enter into a written voting agreement to provide the manner of voting of the ownership interests of the domestic entity. A voting agreement entered into under this subsection is not part of the governing documents of the domestic entity.

(b) A copy of a voting agreement entered into under Subsection (a):

- (1) shall be deposited with the domestic entity at the domestic entity’s principal executive office or registered office; and

The statute is odd. Does the statute confer enforceability, or merely add a remedy? Must the agreement be submitted to the business entity and be examinable by other owners for the statute to apply or to obtain the remedy of specific enforcement? Must a notation referring to the agreement be endorsed on the shares or otherwise noticed to shareholders? These deposit, examination, and endorsement requirements have no basis in policy if only the parties to the agreement are involved. Why should an agreement to do what shareholders have a right to do require disclosure to the entity or the other owners? Essentially, the code appears to require that strategic voting agreements be revealed to current management. The examination requirement in particular makes no sense as a condition of enforceability because the corporation—not the parties to the agreement—controls it. The same is true of the endorsement requirement for uncertificated shares: the new holder will never learn of the agreement if the corporation fails to send the required notice,²⁴ so it appears that the rights of the parties to the

(2) is subject to examination by an owner, whether in person or by the owner's agent or attorney, in the same manner as the owner is entitled to examine the books and records of the domestic entity.

(c) A voting agreement entered into under Subsection (a) is specifically enforceable against the holder of an ownership interest that is the subject of the agreement, and any successor or transferee of the holder, if:

(1) the voting agreement is noted conspicuously on the certificate representing the ownership interests; or

(2) a notation of the voting agreement is contained in a notice sent by or on behalf of the domestic entity in accordance with Section 3.205, if the ownership interest is not represented by a certificate.

(d) Except as provided by Subsection (e), a voting agreement entered into under Subsection (a) is specifically enforceable against any person, other than a transferee for value, after the time the person acquires actual knowledge of the existence of the agreement.

(e) An otherwise enforceable voting agreement entered into under Subsection (a) is not enforceable against a transferee for value without actual knowledge of the existence of the agreement at the time of the transfer, or any subsequent transferee, without regard to value, if the voting agreement is not noted as required by Subsection (c).

(f) Section 6.251 [which governs voting trusts] does not apply to a voting agreement entered into under Subsection (a).

Id. § 6.252.

²⁴ *See id.* § 3.205.

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agreement depend on a corporate action, not on the agreement itself. It seems the statute means to say that property-based remedies such as binding subsequent transferees would not apply without an endorsement of the shares. But should an otherwise binding voting agreement not bind the parties? The statute simply fails to say what happens when an agreement does not conform to the statute. In fact, Texas courts prior to the statute generally enforced vote pooling agreements,²⁵ so shareholders needed no statutory permission to enter into them. Moreover, the statute says only that agreements to which it applies will be specifically enforced; it does not say that, without compliance, a binding contract does not result, nor does it say that other remedies will not apply.²⁶ One wonders what could have been the motivation for this statute.²⁷

Interestingly, and perhaps tellingly, no other state imposes such requirements. Texas is flying solo here. The Model Business Corporations Act merely holds as follows:

(a) Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of section 7.30 [as a voting trust].

(b) A voting agreement created under this section is specifically enforceable.²⁸

The Model Act rests on freedom of contract: “The only formal requirements are that they be in writing and signed by all the participating shareholders; in other respects their validity is to be judged as any other contract.”²⁹ Thirty-two states and the District of Columbia have adopted the Model Act provision.³⁰ Another fifteen states have adopted its substance

²⁵ See *infra* Parts II.A–E. The Texas cases are uniformly in favor except for one decision which is impossibly reasoned and almost surely incorrect.

²⁶ TEX. BUS. ORGS. CODE ANN. § 6.252.

²⁷ I speculate more on that in a later section. See Part III.C.1.d.

²⁸ REVISED MODEL BUS. CORP. ACT § 7.31 (AM. BAR ASS’N 2005).

²⁹ *Id.* cmt.

³⁰ The states are Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming; the District of Columbia follows suit. ALA. CODE § 10A-2-7.31 (2013); ARK. CODE ANN. § 4-27-731 (2001);

and brevity, sometimes without an explicit reference to either (1) the distinction from voting trusts, (2) specific enforcement, or (3) both, though usually these are implied.³¹ The Model Act provision is thus now nearly universal law. Two states lack a statute.³² And then there is Texas, which

COLO. REV. STAT. ANN. § 7-107-302 (West 2006); CONN. GEN. STAT. ANN. § 33-716 (West 2015); FLA. STAT. ANN. § 607.0731 (West 2015); GA. CODE ANN. § 14-2-731 (West 2015); HAW. REV. STAT. ANN. § 414-162 (West 2015); IDAHO CODE ANN. § 30-29-731 (West 2015); 205 ILL. COMP. STAT. ANN. 5/15 (West 2015); IND. CODE § 23-1-31-2 (2011); IOWA CODE ANN. § 490.731 (West 2009); KY. REV. STAT. ANN. § 271B.7-310 (West 2012); LA. STAT. ANN. § 12:1-731 (2015); MASS. GEN. LAWS ANN. ch. 156D, § 7.31 (West 2013); MICH. COMP. LAWS § 450.2461 (Supp. 2015); MINN. STAT. § 302A.455 (2011); MISS. CODE ANN. § 79-4-7.31 (2014); MONT. CODE ANN. 35-1-533 (2015); NEB. REV. ST. § 21-2068 (2012); N.H. REV. STAT. ANN. § 293-A:7.31 (2014); N.M. STAT. ANN. § 53-11-34 (2003); N.D. CENT. CODE § 10-19.1-82 (2012); OR. REV. STAT. § 60.257 (2011); S.C. CODE ANN. § 33-7-310 (2006); S.D. CODIFIED LAWS § 47-1A-731 (2007); UTAH CODE ANN. § 16-10a-731 (West 2013); VT. STAT. ANN. tit. 11A, § 7.31 (2010); VA. CODE ANN. § 13.1-671 (2011); WASH. REV. CODE § 23B.07.310 (2013); W. VA. CODE § 31D-7-731 (2015); WIS. STAT. ANN. § 180.0731 (West 2002); WYO. STAT. ANN. § 17-16-731 (2015).

³¹The fifteen states are Alaska (no express specific enforcement term; distinction from voting trust implied only); Arizona (no distinction from voting trust); California; Delaware (no express specific enforcement term); Kansas (no express specific enforcement term); Maine (additional term that assumes the agreement binds transferees but gives a right of rescission if the new shareholder took without notice); Maryland (no express specific enforcement term or distinction from voting trust); Nevada (no express specific enforcement term; distinction from voting trust implied only); New Jersey (no express distinction from a voting trust); New York (no express specific enforcement term or distinction from voting trust); North Carolina (no express specific enforcement term, and with some other terms); Oklahoma (no express specific enforcement term or distinction from voting trust; less specific enforcement; distinction from voting trust implied only); Pennsylvania (no express specific enforcement term; distinction from voting trust implied only); Rhode Island (no express specific enforcement term); Tennessee (adopting just what the model code provides plus some other terms relating to management decisions by shareholders and the effect of the agreement on transferees). ALASKA STAT. § 10.06.425 (2014); ARIZ. REV. STAT. ANN. § 10-731 (2013); CAL. CORP. CODE § 706 (West 2014); DEL. CODE ANN. tit. 8 § 218 (West Supp. 2014); KAN. STAT. ANN. § 17-6508 (2007); ME. REV. STAT. ANN. tit. 13-C § 742 (2005); MD. CODE ANN., CORPS. & ASS'NS § 2-510.1 (West 2014); NEV. REV. STAT. § 78.365 (2005); N.J. STAT. ANN. § 14A:5-21 (West 2003); N.Y. BUS. CORP. LAW § 620 (McKinney 1983 & Supp. 2015); N.C. GEN. STAT. § 55-7-31 (2015); OKL. STAT. tit. 18, § 1063 (2012); 15 PA. CONS. STAT. § 1768 (2013); 7 R.I. GEN. LAWS § 7-1.2-709 (Supp. 2013); TENN. CODE ANN. § 48-17-302 (2012). A few states add a time limit on the effectiveness of a shareholder voting agreement: Georgia, Nevada, North Carolina, and Rhode Island. *See* GA. CODE ANN. § 14-2-731(c) (West 2015); NEV. REV. STAT. § 78.365(4)-(5) (2005); N.C. GEN. STAT. § 55-7-31(a) (2015); 7 R.I. GEN. LAWS § 7-1.2-709(d) (Supp. 2013).

³²The two states are Missouri and Ohio. *See* 1 O'NEAL & THOMPSON, *supra* note 13, § 4:12 n.4 (Missouri); 7A OHIO FORMS – LEGAL AND BUSINESS § 19:380 (2015 ed.) (“no specific

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would be consistent with the Model Act except that it adds on extra burdens. The Texas provision was enacted in 1961,³³ eight years before the Model Act provision came into existence.³⁴ The Model Act drafters were well aware of the Texas provision; the Model Act's commentary in 1969 noted the distinctive Texas burdens.³⁵ But the Model Act rejected them, and every other state has followed the Model Act and similarly rejected the Texas position.

Unfortunately, the case law construing the Texas statute does not give a straight story about its meaning.³⁶ Nor does its legislative history.³⁷ Yet if the voting agreement is itself a contract and should be one, then the parties to it should be bound, and applicable contract remedies should be granted in

statutory foundation for shareholder voting agreements"). Both states' common law appears to support shareholder agreements. *See Royster v. Baker*, 365 S.W.2d 496, 500 (Mo. 1963) ("It is not wrongful for the stockholders of a corporation, who control or own a majority of the stock, to agree among themselves to vote their stock a certain way and to change the management of the corporation or its methods of doing business as long as their conduct does not violate the laws of the state, the charter or bylaws of the corporation, or infringe upon contractual or other rights of others."); *State ex rel. Babione v. Martin*, 647 N.E.2d 169, 173-74 (Ohio Ct. App. 1994), *dismiss'd on appeal*, 646 N.E.2d 178 (Ohio 1995) (unpublished table decision).

³³ *See infra* Section II.

³⁴ MODEL BUS. CORP. ACT § 34 ¶2 (AM. BAR ASS'N 1971) (amended 2002).

³⁵ *Id.* ¶3.

³⁶ *See infra* Part II.

³⁷ For instance, the Bill Analysis of the Texas Business Organizations Code provides the following paragraph:

Section 6.252 enables owners to enter into written voting agreements. A counterpart of the agreement must be given to the entity and subject to the right of examination by any owner. The agreement will be enforceable against the parties to the agreement and their successors if the ownership certificates subject to the agreement reference the agreement or if notice is sent to the subsequent holders. Without this information, the agreement is ineffective against a transferee for value who does not have actual knowledge of the agreement at the time of the transfer. However, the agreement is enforceable against any person who is not a transferee for value once that person acquires actual knowledge of the agreement. The provisions of this section are new for limited liability companies.

H. Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 1156, 78th Leg., R.S. (2003). The legislative history suggests the most lackadaisical reading of the statute. The first sentence says the law "enables," as if owners had no prior right to contract. The second sentence says "must." But then the second-to-last sentence makes the agreement enforceable notwithstanding lack of compliance with the second sentence. The bill analysis is simply repeating the language and makes no attempt to sort out the apparent contradictions.

case of breach. Freedom of contract, a basic Texas public policy,³⁸ strongly suggests this result.

In a carefully crafted but very brief essay, Professors Miller and Ragazzo review the case law and statute and then conclude:

As a consequence of the foregoing cases, it can be said that, although some doubt continues to exist regarding the validity of voting agreements that fail to meet the requirements of § 6.252, such agreements will probably be enforced to the extent they do no violence to the policies of the statute.³⁹

My review of the cases persuades me that this conclusion is *and should be* correct. This conclusion is, I hope, understated. The Texas case law that is coherent all suggests that vote pooling agreements are contracts that should be enforced between the parties. Moreover, the case law and the statute as currently written more or less dictate that the remedy of specific enforcement is available to all owner parties of written voting agreements, without condition.

Miller and Ragazzo's take-away is that one should "comply scrupulously with § 6.252 when drafting agreements so that no issue of enforceability exists."⁴⁰ While this conclusion is fine advice for lawyers, the people who make these voting agreements are often not lawyers. Moreover, they may well be people who cannot afford a lawyer. Yet they have entered into what looked to them, and should look to us, like a binding contractual agreement. Such an agreement harms no one else but only seeks to protect the interests of the parties who entered into it. The parties who enter such an

³⁸Texas courts have given up on freedom of contract most reluctantly. *See, e.g.*, *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664–65 (Tex. 2008); *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001). In *Fairfield Ins. Co.*, the court explained:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Fairfield Ins. Co., 246 S.W.3d at 664–665 (alteration in original) (citing *Wood Motor Co., Inc. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951) (quoting *Printing and Num'l Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875))).

³⁹13 MILLER & RAGAZZO, *supra* note 15, § 30:3.

⁴⁰*Id.*

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agreement act reasonably—they are only agreeing to do what they already have a right to do. If the statute declares that this quite reasonable action was legally ineffective, then the statute punishes their reasonableness. Next time around, they will not hire a lawyer (the one they cannot afford)—they will just not work out their problems amicably. Perhaps they will decline to enter into certain transactions or businesses at all, and we will all be the poorer for it. The law should encourage reasonable behavior and the working out of business disputes by contract, the law should encourage business, and the law should uphold the value of the voting right, one stick in the bundle of property that shareholders have purchased. So it matters that Miller and Ragazzo are right.

D. Road Map and Thesis

In this Article, I examine the cases (Part II) and statute (the older versions in Part II, and the latest versions in Part III) in detail. I conclude that one of the Texas precedents is wrong and should be overruled. The one Fifth Circuit case to look at the issue is reasoned incorrectly. A core of Texas cases conflict with these two but reach a defensible, coherent position; they support Miller and Ragazzo's conclusion.

These best-reasoned cases and the most careful and literal reading of the current statute show that the statute leaves enforceability to the law of contracts and merely confers a remedy. No submission to the corporation is required. A notation on the share certificates referring to the agreement may confer an advantage in certain situations but makes no difference between the parties. In short, freedom of contract prevails. I urge that courts reviewing this issue in the future follow the better cases and this careful and literal reading of the statute. The statute requires this result, but it is inartfully drafted and easily misreadable. Amending the statute to encourage this result would also assist. I conclude (Part IV) with a few ways to amend the code to alleviate the problem.

II. THE CASES (AND THE STATUTE): WHAT WORKS AND WHAT DOES NOT

A. *The Earliest Baseline: Withers v. Edwards (1901)*⁴¹ —Works

Withers alleged that he and his co-shareholder Edwards feared the corporation (a bank) was in trouble.⁴² They agreed to go about individually buying up more shares from scattered shareholders and then vote all their shares together to elect better directors and retain their own offices.⁴³ In reliance on the agreement, Withers went about buying up shares.⁴⁴ By the time he finished and returned, Edwards had combined with others to take over control of the bank, shutting Withers out.⁴⁵ Having relied on Edwards's promises, Withers sued for reliance damages.⁴⁶ The court stipulated that shareholder voting agreements were generally enforceable: "It is legal for a majority of the shareholders to combine and control the election of the board of directors and management of the corporation."⁴⁷ This particular agreement went too far, however: "But a contract in regard to elections in private corporations is not legal if it provides that a lucrative corporate position shall be given to one or more of the parties"⁴⁸ "[P]resident and teller" sounded lucrative to the court.⁴⁹ Absent that, the opinion suggests such agreements would be enforceable. The case says nothing about the agreement being in writing.⁵⁰

Courts in Texas have uniformly agreed with *Withers* that a shareholder voting agreement the object of which is to appoint an officer—a paid position—is contrary to public policy and unenforceable.⁵¹ Furthermore, the offending provision is not generally severable from the rest of the

⁴¹ *Withers v. Edwards*, 62 S.W. 795 (Tex. Civ. App.—Dallas 1901, no writ).

⁴² *Id.* at 795–96.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 796.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (citations omitted).

⁴⁹ *Id.*

⁵⁰ *Id.* at 795–96.

⁵¹ *Atlas Petroleum Corp. v. Galveston, H. & S.A. Ry. Co.*, 5 S.W.2d 215, 220 (Tex. Civ. App.—El Paso 1928, writ ref'd); *Funkhouser v. Capps*, 174 S.W. 897, 898–99 (Tex. Civ. App.—Fort Worth 1915, writ ref'd); *Withers v. Edwards*, 62 S.W. 795, 796 (Tex. Civ. App.—Dallas 1901, no writ).

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agreement; it rather takes the whole agreement down with it.⁵² But the baseline default legal position about vote pooling agreements expressed in *Withers* stood unopposed for forty-four years until *Roberts* was decided.

*B. Departing from the Strait and Narrow: Roberts v. Whitson (1945)*⁵³ —Does Not Work

Whitson and Roberts, two shareholders of the J.W. Crowdus Realty Company, agreed for a period of twenty-five years “to vote collectively all shares of the capital stock of the J.W. Crowdus Realty Company now owned or hereafter acquired by us.”⁵⁴ Fourteen years later, Whitson and Roberts amended the agreement to provide that, if the two disagreed on how to vote the shares, arbitrators selected according to an agreed procedure would decide how the shares would be voted.⁵⁵ By this time, Whitson and Roberts were, together, a majority block.⁵⁶ The agreement purported to bind the parties’ heirs and representatives, and the amendment purported to give the parties the right to designate some person “to represent his or her stock” after death until the agreement term expired.⁵⁷ The agreement also purported to bind transferees.⁵⁸

When the parties later disagreed as to how the shares should be voted, Whitson demanded arbitration, and Roberts then claimed the agreement was illegal.⁵⁹ Both the corporation and certain minority shareholders joined the

⁵² *Funkhouser*, 174 S.W. at 899. *But see* *Burnett v. Word, Inc.*, 412 S.W.2d 792, 795 (Tex. Civ. App.—Waco 1967, writ *dism’d* by *agr.*), discussed *infra* Part II.D.

⁵³ 188 S.W.2d 875 (Tex. Civ. App.—Dallas 1945, writ *ref’d* w.o.m.).

⁵⁴ *Id.* at 876. In this recitation, “Roberts” includes both T.P. Roberts and Allene Roberts, who were married at the date of the first agreement. When they were divorced, Allene Roberts came to own some of the shares formerly owned solely by T.P. *Id.* Allene joined in the amendment that occurred in the 15th year of the agreement. *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

suit, and all of these also argued the agreement was illegal.⁶⁰ Though the trial court upheld the agreement, the court of appeals struck it down.⁶¹

The court of appeals seemed unable to grasp basic corporate law distinctions. There are two grounds for its decision.⁶² The first is that the agreement was, in effect, a proxy and therefore revocable (the court cited failed voting trust cases as precedent).⁶³ The second was that the agreement required the shareholder to violate a duty.⁶⁴ Neither argument is correct.

First, the proxy argument. The court began with homage to the rights of shareholders to agree without fraud to do anything they could have done without the agreement: “It is generally held that agreements or combinations by stockholders to vote their stock so as to control corporate action, are permissible if, without fraud, they seek to accomplish only what they might have accomplished without the agreement.”⁶⁵ This sounds like a contract is possible, and is reminiscent of the *Withers* dicta,⁶⁶ but, in the very next sentence, the court claimed that “proxies and voting agreements” are revocable unless “coupled with an interest or based upon consideration deemed valuable in law.”⁶⁷

The conflation of a voting agreement with a proxy was wrong. A proxy is an agent appointed to vote stock on behalf of its owner.⁶⁸ Agency

⁶⁰*Id.* at 877. Quite transparently, Roberts had decided to form a new majority or at least bet that, with Roberts’s having abandoned Whitson, Whitson would not be able to control. The corporation and the minority shares who joined the suit obviously agreed with Roberts on the business’s new direction.

⁶¹*Id.* at 878.

⁶²The court also noted that “the agreement, even if considered permissible, was not based upon any consideration deemed valuable in law.” *Id.* at 877. This is simply wrong or it rests on the court’s other arguments. Obviously, the mutual promises to vote as per the agreement provided consideration.

⁶³*Id.* at 878.

⁶⁴*Id.*

⁶⁵*Id.* at 877–78.

⁶⁶See *supra* text accompanying note 47.

⁶⁷*Roberts*, 188 S.W.2d at 878.

⁶⁸This has always been true, and courts long before *Roberts* recognized it. See, e.g., *Atlas Petroleum Corp. v. Galveston, H. & S.A. Ry. Co.*, 5 S.W.2d 215, 220 (Tex. Civ. App.—El Paso 1928, writ ref’d); *Cattle Raisers’ Loan Co. v. Sutton*, 271 S.W. 233, 239 (Tex. Civ. App.—San Antonio 1925, no writ); *Mann v. Mitchell*, 243 S.W. 734, 740 (Tex. Civ. App.—San Antonio 1922, writ granted), *rev’d on other grounds*, 255 S.W. 980 (Tex. 1923). Courts after *Whitson* also recognized it. See, e.g., *Zollar v. Smith*, 710 S.W.2d 155, 157 (Tex. App.—Eastland 1986, no pet.) (“The proxy agreement is viewed as creating the relationship of principal and agent and is for the

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authority is at will⁶⁹ because it is the power to bind the principal; unless the principal has power to terminate at will the agent's authority, the agent could create infinite liability for the principal. A principal can therefore revoke an agent's authority even though the revocation breaches a contract.⁷⁰ There are two exceptions: when the agency is "coupled with an interest," meaning that the agent herself holds a property right that makes the agency authority valuable to her; and when consideration passes from the agent to the principal in exchange for the agency power.⁷¹ In those cases, the agent has an independent reason to hold the authority; the agent is, in other words, not acting solely for the principal, and the principal knows this. So that kind of agency can be other than at will.

Neither vote pooling agreements generally nor Roberts and Whitson's voting agreement involved any proxies, however; no agent was given power to vote any shares.⁷² The court tried to shoehorn the agreement into an agency category:

[S]everal contingencies are provided where the ownership and power to vote stock are separated. This is true where the parties disagree as to how their stock should be voted[;] . . . the agreement provides for appointment of a board of arbitration constituted of strangers who were to

most part governed by principles of agency law.") (quoting L. Proctor Thomas, Comment, *Irrevocable Proxies*, 43 TEX. L. REV. 733, 735 (1965)).

⁶⁹See, e.g., *Cates v. Cincinnati Life Ins. Co.*, 947 S.W.2d 608, 613 n.19 (Tex. App.—Texarkana 1997, no writ); *Sunshine v. Manos*, 496 S.W.2d 195, 198–99 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.); *Chain v. Pye*, 429 S.W.2d 630, 634 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); *McDonald v. Davis*, 389 S.W.2d 494, 497 (Tex. Civ. App.—Houston 1965, no writ).

⁷⁰This principle is expressed in the cases as a distinction between a power to revoke and a right to revoke:

The principal may of course revoke an agent's authority where not coupled with an interest, but there is a distinction between his power to revoke and his right to revoke. He at any time before full performance can revoke the authority of an agent so the agent will lose his authority to bring the principal into legal relations with a third party. However, if he has no right to revoke it, he will be liable for damages suffered by the agent by reason of the wrongful revocation.

McDonald, 389 S.W.2d at 497. The principle is also cited in *Sunshine*, 496 S.W.2d at 198–99.

⁷¹See *Zollar*, 710 S.W.2d at 156–59.

⁷²See *Roberts*, 188 S.W.2d at 877.

decide the issue or difference, and, according to their decision, *the stock was to be voted*.⁷³

This second sentence, while true in itself, says nothing at all about a proxy. Perhaps the court put the statement in passive voice to obscure the facts. Under the terms of the agreement reported by the court in the opinion itself, after arbitration “the three stockholders were to vote their stock accordingly.”⁷⁴ At no time was any arbitrator authorized to vote the stock. The shareholders were to do it themselves.⁷⁵ There was no proxy and no separation of the ownership and power to vote stock.

The court’s next statement is even further afield. Apologies for the length of this sentence. I did not write it.

The agreement also provides that either party had the right, by will or otherwise, to designate someone with authority to represent the stock after death of the owner, and this without regard to its ownership; and, in absence of such a provision, the person succeeding to the ownership of at least 50 percent of the stock on death of the former owner, was authorized to appoint someone to vote the stock; and,

⁷³ *Id.* at 878 (emphasis added).

⁷⁴ *Id.* at 876. The recitation of the contract terms re-affirms this statement. Under the contract’s terms, only shareholders vote stock:

[B]elieving it to be to our interest at all times and in all meetings of stockholder to vote our stock collectively, do hereby bind ourselves, heirs and representatives . . . to vote collectively. [A]greeing that in all matters to be voted upon by the stockholders . . . the three contracting parties would endeavor to reach an accord in advance . . . as to voting their stock.”

Id.

⁷⁵ J. Cary Barton has written misleadingly that a “statute provides that proxies coupled with an interest include the following: . . . parties to a voting agreement created under Tex. Bus. Org[s]. Code Ann. § 6.252 or shareholder agreement under Tex. Bus. Org[s]. Code Ann. § 21.101.” J. CARY BARTON, TEXAS PRACTICE GUIDE: BUSINESS ENTITIES § 7:57 (2015). For this, he cites Texas Business Organizations Code Section 21.369(a). *Id.* What Section 21.369 actually provides is that “a ‘proxy coupled with an interest’ includes the appointment *as proxy* of: . . . a party to a voting agreement under Section 6.252 or a shareholders’ agreement created under Section 21.101.” TEX. BUS. ORGS. CODE ANN. § 21.269 (West 2012) (emphasis added). First the party to the voting agreement *must be appointed as proxy*. Without this, no proxy exists, and revocability cannot be at issue. Nothing in Section 21.369 remotely suggests that every voting agreement includes a proxy. Of course, a vote pooling agreement can be written to include proxy voting, but it did not in *Roberts* nor in any of the other cases discussed in this Article.

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in case either stockholder disposed of his or her stock, the person acquiring a majority should succeed to the rights and powers of the former owner under the voting agreement; thus clearly disfranchising those acquiring the minority of the stock.⁷⁶

It's a long sentence. The sentence has an either/or/or structure. *Either* the agreement runs afoul of the proxy rule because it allows the parties to designate someone to perform the agreement after the parties' death; *or*, in the absence of such a provision allows a person succeeding to at least half of a party's stock to "appoint someone to vote the stock," the claim goes; *or* if a party transfers stock, the person ending up with the majority of it would "succeed to the rights and powers of the former owner" under the agreement. The claim of this complicated sentence, following immediately on the argument addressed in the last paragraph, appears to be that each of these alternative provisions allows separation of ownership and power to vote, i.e., mandates a proxy.

But the provisions of the agreement did no such thing. The agreement required that the shareholders vote in accordance with the agreement.⁷⁷ With regard to the first *either*, the agreement allowed a party to designate someone to "*represent the stock*," not vote it.⁷⁸ Representing the stock is, as a legal phrase, admittedly, less than a model of clarity,⁷⁹ but it most likely meant taking part in the conference regarding how the stock should be voted and perhaps argue before the arbitrator. The agreement contained no mention of proxies at all, and in all cases provided that the owners were to vote the stock.⁸⁰ In an agreement lacking any reference or requirement whatsoever to the appointment of any proxy, the phrase "represent the stock" can hardly be taken to imply one.

The alternative *or* clauses in the next two parts of the sentence clearly did not require any proxies, either. The court's pegging a proxy requirement on this one phrase is at best a long stretch. Under the agreement, the owner was to vote the stock.

⁷⁶ *Roberts*, 188 S.W.2d at 878.

⁷⁷ *Id.* at 876.

⁷⁸ *Id.* at 876, 878 (emphasis added).

⁷⁹ The phrase in the agreement is, according to the statement of facts in the opinion itself, "to designate some person . . . to represent his or her stock after death and during the remainder of the period covered by the voting agreement." *Id.*

⁸⁰ *Id.*

With regard to the first *or*: in the absence of a designation, the court says that the person succeeding to more than fifty percent of a party's stock "was authorized to appoint someone to vote the stock."⁸¹ But that is not what the stipulated facts report. The facts are that the successor to fifty percent "would be authorized to designate some person as successor in the voting agreement."⁸² Because the voting agreement left voting to the owners, this provision did not separate ownership and voting. That the court could report the facts on one page of its opinion and state something contrary in its legal analysis is remarkable.

With regard to the second *or*, the court reports the facts accurately: the person acquiring a majority would "succeed to the rights and powers of the former owner under the voting agreement."⁸³ But the court assumes without support that the voting agreement gave anyone a power to vote. The voting agreement did not give anyone a right to vote. The parties had the right to vote by virtue of their ownership, not under the agreement. The agreement affirmed the parties' right to vote their own shares and did not attempt to deprive them of it. All the agreement gives a party is the right to agree with other shareholders (something all shareholders have a right to do) or upon disagreement call for arbitration, after which "the . . . stockholders were to vote their stock accordingly."⁸⁴ The right to vote remains in the shareholders in all cases under this agreement. The obligation to vote in a certain way is all the agreement requires.

The falsity of the court's analysis is emphasized by the modest relief the plaintiff sought. Whitson asked the court for an injunction that Roberts "be compelled to comply with the . . . voting agreement and prohibited from voting the stock . . . except in compliance with the terms and provisions of the agreement."⁸⁵ Had the agreement given anyone else the power to vote Roberts's stock, surely Whitson would have asked that it be ordered voted in accordance with that power. But the agreement provided no such thing, so Whitson merely asked that Roberts be prohibited from voting and that the corporation not recognize Roberts's vote if he did not comply. (The

⁸¹ *Id.* at 878.

⁸² *Id.* at 876.

⁸³ *Id.* at 878.

⁸⁴ *Id.* at 876.

⁸⁵ *Id.* at 877.

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Delaware Supreme Court granted the same remedy in a voting agreement case two years later.⁸⁶)

The court in the end claimed, as if the agreement authorized a proxy, that the voting agreement was revocable and had been revoked by Roberts.⁸⁷ Because it was not a proxy, this conclusion did not follow.

The second ground for the court's analysis was that shareholders owe some duty that the agreement required them to violate:

Stockholders have a duty to perform, that is, to use their voting power for the best interests of the corporation, and cannot agree or combine in such a way as to place their voting power in others, thereby disqualifying themselves to perform this duty; but at all times must be free to cast their vote for what they deem the best interests of the corporation.⁸⁸

This seems like a much broader ground. In fact, this statement is so broad that it is frightening. As an aside, some of it is clearly incorrect as applied to this agreement. Note how the court restates the rule: “and cannot agree or combine in such as to place their voting power in others.”⁸⁹ One must remember that the court tried to apply this statement to an agreement that did not in fact place any shareholder's voting power in anyone else. Under the agreement, each shareholder was to vote the shareholder's own shares.

But even if we separate out from the statement the part that does not apply to this case—the separation of ownership and voting power—still the statement seems to condemn these facts. The last part is the kicker, that shareholders “must be free to cast their vote for what they deem the best interests of the corporation.”⁹⁰ That statement appears to condemn any limitation at all on shareholder voting whim, even a limitation self-imposed by the shareholder's own agreement.

But that part of the statement, if meant as a rule of law, is contradicted by the court itself. If this statement were the law, then the court's earlier

⁸⁶Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441, 448 (Del. 1947).

⁸⁷*Roberts*, 188 S.W.2d at 878.

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

statement—that agreements or combinations by stockholders to vote their stock so as to control corporate actions, are permissible if, without fraud, they seek to accomplish only what they might have accomplished without the agreement⁹¹—cannot possibly be the law. One either has the ability to form a binding agreement to vote stock or not. If shareholders “must be free to cast their vote for what they deem the best interests,”⁹² then there is no such thing as an enforceable agreement or combination by shareholders to vote their stock so as to control corporate actions. If a dispute arises between the two shareholders, as in *Whitson* itself, then the court must apply one or the other statement; it cannot apply both to the facts. The court’s statement is wrong by virtue of contradiction.

The court’s statement is surely incorrect, also, as a description of anyone’s understanding today. Shareholders as shareholders do not have a legal duty to use their voting power for the best interests of the corporation. Shareholders have no legal duty to vote at all, and no one even checks to see if they are voting in their view of the corporation’s best interests. I submit that, if shareholders have rights to form binding contracts, as they assuredly do, and if they own the shares, and if the shares include a right to vote and shareholders own that right, then shareholders have a right to make a binding agreement to vote together. That was the general understanding nationally when *Roberts* was decided.⁹³ Either they can do what they will with their own property, or they cannot. In the Delaware case decided two years later, *Ringling*, the court said:

Generally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed his fellow shareholders The ownership of voting stock imposes no legal duty to vote at all. A group of shareholders may, without impropriety, vote their

⁹¹ *Id.* at 877–78.

⁹² *Id.* at 878.

⁹³ See, e.g., Henry W. Ballantine, *Voting Trusts, Their Abuses and Regulation*, 21 TEX. L. REV. 139, 142–43 (1942) (“It is generally held that shareholders may agree to vote their shares as a unit for the election of directors and thus gain control of the management, when they are not seeking some favor or advantage for themselves contrary to the best interests of the corporation. Such agreements to vote for specified persons, or as a majority of the shares in the pool may direct, are valid and binding if they do not contemplate limiting the discretion of the directors or any fraud, oppression or wrong against other shareholders.”).

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respective shares so as to obtain advantages of concerted action. They may lawfully contract with each other to vote in the future in such way as they, or a majority of their group, from time to time determine.⁹⁴

This view of shareholder voting is applied to vote pooling agreements in hornbook law today⁹⁵ and is confirmed in the Model Business Corporation Act,⁹⁶ but this reasoning has always been sound. If shareholders have freedom to vote or not as they wish, then they have freedom to agree to vote or not as they wish; no one could be harmed prejudicially by this.

Had Whitson won, was a remedy available? Damages would surely be speculative. A positive injunction requiring a vote in accordance with the agreement would be possible, though this is what the statute was written to provide. The contract remedy Whitson asked for, and which Delaware granted in *Ringling*,⁹⁷ was almost as modest as enforcement allows: that the breaching party's votes not be counted. An even more modest remedy would be a negative injunction against the owner's voting the shares. Such a remedy affects no one's rights but the breaching shareholder's, and nothing forbids it. So Whitson would have had a remedy.

⁹⁴*Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 53 A.2d 441, 447 (Del. 1947).

⁹⁵*See, e.g.*, JAMES D. COX & THOMAS L. HAZEN, *THE LAW OF CORPORATIONS* § 14.7 (3d ed. 2015) ("Agreements to vote for specified persons as directors or to vote as the holders of a majority of the shares in a pool may direct are valid and binding if they do not contemplate limiting the discretion of the directors or committing any fraud, oppression, or wrong against other shareholders."); R.D. Hursh, Annotation, *Validity and effect of agreement controlling the vote of corporate stock*, 45 A.L.R. 2d 799 § 3 (1956) ("The courts, in what would appear to be a clear majority of jurisdictions, have taken the view that a contract entered into by an owner of corporate stock, under the terms of which the shareholder agrees to vote his stock in a particular manner, is not, by its nature, invalid, but on the contrary, it is only when additional circumstances indicate that the contract was inspired by fraud that public policy requires that it be given no effect.").

⁹⁶*See* MODEL BUS. CORP. ACT § 7.31 (AM. BAR ASS'N 2013). The only requirement of the MBCA besides a contract is that it be memorialized in a signed writing. The entire provision on voting agreements reads as follows:

- (a) Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of section 7.30 [on voting trusts].
- (b) A voting agreement created under this section is specifically enforceable.

Id.

⁹⁷*Ringling Bros.*, 53 A.2d at 448.

Nor is *Roberts* a voting trust case. In a voting trust, the legal ownership of the shares for purposes of voting is turned over to a trustee, who takes possession of the shares.⁹⁸ The *Roberts* parties did no such thing. Even if they had, another case prior to *Roberts* had approved voting trusts in general, albeit in dicta, condemning only voting trusts that attempted to usurp the management authority of the board of directors.⁹⁹ But Whitson and Roberts merely entered a voting agreement.

Discomfort with the *Roberts* case was expressed by contemporaries, including some who suggested that the case was wrong.¹⁰⁰ The *Roberts* case was appealed to the Texas Supreme Court. The writ was nominally refused “for want of merit,”¹⁰¹ but a commentator reported in 1952 that respondents on the writ had moved to dismiss on the ground that Whitson had since sold all of his stock, thus rendering the case moot.¹⁰² That is commentary, however. The law could be clarified substantially, and made better in almost every way, by a decision overruling *Roberts*.

⁹⁸ See, e.g., TEX. BUS. ORGS. CODE § 6.251 (West 2012).

⁹⁹ *Hamblen v. Horwitz-Texan Theatres Co.*, 162 S.W.2d 455, 457 (Tex. Civ. App.—Galveston 1942, no writ); see *Grogan v. Grogan*, 315 S.W.2d 34, 38–39 (Tex. Civ. App.—1958, writ ref’d n.r.e.) (recounting the conflict in the case law).

¹⁰⁰ See, e.g., 2 IRA P. HILDEBRAND, *THE LAW OF TEXAS CORPORATIONS* § 556 (1942 & Supp. 1950) (“The reasoning of the court and the limits of the doctrine laid down are not entirely clear.”); Edward O. Belsheim, *The Need for Revising the Texas Corporation Statutes*, 27 TEX. L. REV. 659, 689–90 (1947) (recognizing the conflict created by *Roberts* and suggesting a statutory authorization of voting trusts is in order); Sylvan Lang, *The Proposed Texas Business Corporation Act—Two Important Developments*, 30 TEX. L. REV. 849, 858–59 (1952) (“Viewing all of the Texas decisions and the decisions of the courts of other states, it is my opinion that, in spite of the *Whitson* case, if a voting trust agreement were properly prepared for bona fide purposes—legitimate business reasons—and these purposes were expressed in agreement, our supreme court would sustain its validity. Therefore, I must respectfully disagree with the expressions of the court in this most recent case.”); Leon Lebowitz, Book Review, 38 TEX. L. REV. 659, 667 (1960) (reviewing RALPH J. BAKER & WILLIAM L. CARY, *CASES AND MATERIALS ON CORPORATIONS* (1959)) (“[T]he unfortunate *Roberts v. Whitson* . . .”); see also Note, *Statutory Assistance for Closely Held Corporations*, 71 HARV. L. REV. 1498, 1503 (1958) (continually noting *Roberts* as the unusual precedent other jurisdictions have not followed); Ben Lamar Reynolds, Note, *Corporations—Trusts—Agency—Transfer of Voting Control Converted Intended Voting Agreement into a Voting Trust—Abercrombie v. Davies*, 130 A.2d 338 (Del. 1957), 36 TEX. L. REV. 508, 510–11 (1958).

¹⁰¹ *Roberts v. Whitson*, 188 S.W.2d 875 (Tex. Civ. App.—Dallas 1945, writ ref’d w.o.m.).

¹⁰² Lang, *supra* note 100, at 858.

C. The Statute: Round One —May Work

The current statute addressing voting agreements was the product primarily of two drafting efforts, one presented to the legislature in 1961 and one in 1989. The original Texas Business Corporations Act was passed in 1955,¹⁰³ but the initial act lacked a provision regarding voting agreements.¹⁰⁴ It appears that *Roberts* (1945) did not present enough of a problem to mandate an immediate legislative solution. Language addressing voting agreements was added only sixteen years later. Here is that language:

Any number of shareholders may enter into a voting agreement in writing for the purpose of voting their shares as a unit, in the manner prescribed in the agreement, on any matter submitted to a vote at a meeting of the shareholders for a period not exceeding ten (10) years from the date of the execution of the agreement. A counterpart of the agreement shall be deposited with the corporation at its principal office and shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation. Each certificate representing shares held by the parties to the agreement shall contain a statement that the shares represented by the certificate are subject to the provisions of a voting agreement, a counterpart of which has been deposited with the corporation at its principal office. Upon such deposit of the counterpart of the agreement and endorsement of the prescribed statement upon the certificates representing shares, the agreement shall be specifically enforceable in accordance with the principles of equity.¹⁰⁵

The statute may well have been original with Texas. At the time, the Model Act lacked a provision on voting agreements; it adopted one only in 1969.¹⁰⁶ Though the language of the Texas provision leaves some doubt as

¹⁰³ Act of Mar. 30, 1954, 53d Leg., 1st C.S., ch. 64, 1954 Tex. Gen. Laws 239 (expired Jan. 1, 2010).

¹⁰⁴ See, e.g., *id.* at 256 art. 2.30 (addressing voting trusts).

¹⁰⁵ Act of May 11, 1961, 57th Leg., R.S., ch. 206, § 2, 1961 Tex. Gen. Laws 423, 423–24 (expired Jan. 1, 2010).

¹⁰⁶ MODEL BUS. CORP. ACT § 7.31 hist. n.2 (AM. BAR ASS'N 2011).

to its purposes, the Model Act's purpose was "to resolve any doubts in favor of the enforceability of a voting agreement . . . by a specific statutory provision making it enforceable in accordance with its terms."¹⁰⁷

The language of the 1961 Texas amendment presents three suggestive passages. First, the "permissive" language of the statute was a feature from the beginning: "shareholders may enter." Second, the language about depositing the agreement with the corporation and recording it on the share certificates appears at this early time. Third, the last sentence of the provision appears to mandate specific enforcement in equity if the agreement is deposited and endorsed as stated. But no other remedy is stated for failing to deposit the agreement or endorse the shares; there is no disincentive for doing that. If one fails to do that, the conditional conclusion at the end of the statute—that the agreement shall be specifically enforced—is not required.

What to make of this statute? The language is hardly mandatory. Nowhere does it say that only agreements conforming to the provision are enforceable. And of course these kinds of agreements do not have to occur, so the provision addresses actions no one is forced to take. Moreover, there is a legal history in the common law, if somewhat checkered in Texas (given *Roberts*) of enforcing such agreements, so it is entirely possible that the common law would grant what the statute guarantees, minus only the promised remedy of specific enforcement. On the other hand, the statute cannot be codifying the common law, because the common law lacked any provision for depositing the agreement with the corporation, making it examinable, or endorsing it on the back of certificates. The common law, moreover, lacked a ten-year limitation on the enforceability of such agreements; the common law might enforce a contract as written no matter the term.

Notice also that the statute says nothing about prejudice to other shareholders. Granted, it does declare agreements "specifically enforceable in accordance with the principles of equity." Equity has always taken account of the interests of the public when ordering specific performance.¹⁰⁸

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., *Lone Star Salt Co. v. Tex. Short Line Ry. Co.*, 90 S.W. 863, 868 (Tex. 1906); *Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 488 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Absent a significant public interest, parties to a private contract are left to their remedies at law."); *Canteen Corp. v. Republic of Tex. Props., Inc.*, 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ); *Chevron U.S.A. Inc. v. Stoker*, 666 S.W.2d 379, 382 (Tex. App.—Eastland 1984, writ dismissed w.o.j.).

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Including that in “principles of equity” is a smart way to read the statute. But the interests of other shareholders, and of the corporation and the potential for shareholders to overstep their bounds by usurping board power (a legal, not equitable, concern), seem remarkably removed from this statute’s terms. Clearly this statute does not cover all of the potential grounds for condemning a shareholders’ agreement. How shall we take it?

It is possible to read the statute as merely offering a remedy. It is true, as per dicta in *Withers* and *Roberts*, that voting agreements should be legally possible.¹⁰⁹ However, *Roberts* (and cases *Roberts* cited) cast some doubt on how voting agreements should be handled.¹¹⁰ By offering a remedy, the statute at least holds clearly by implication that, when made and handled pursuant to the terms of the statute, such agreements will be enforceable—they will be specifically enforced. By implication, the statute becomes a kind of safe harbor. But the statute does not require that all shareholder voting agreements be handled this way; it merely allows it and then specifies one result of conformity. This reading accounts for the permissive word “may”—this is one way to do a voting agreement, but other ways are left open. It also accounts for the non-committal way that deposition, examination, and endorsement are named: as duties but more explicitly as sufficient conditions for a remedy of specific enforcement. It accounts for the fact that these sufficient conditions are nowhere named as necessary conditions: the statute does not say that without deposition and endorsement specific enforcement is not allowed, only that it will occur if deposition and endorsement precede it! Finally, this view explains the absence of any requirement of a finding that no other shareholder is prejudiced; putting the agreement in writing and then giving notice to other shareholders by depositing the agreement with the corporation alleviates that concern.

There is quite solid precedent for reading the statute as merely adding a remedy when it applies. The statutes of California, Delaware, Kansas, Oklahoma, and Rhode Island explicitly preserve the validity of agreements under the common law.¹¹¹ In Minnesota, Reporter’s Notes specifically state that the common law of contracts still applies to voting agreements, the

¹⁰⁹ *Roberts v. Whitson*, 188 S.W.2d 875, 877–78 (Tex. Civ. App.—Dallas 1945, writ denied w.o.m.).

¹¹⁰ *See id.* at 878.

¹¹¹ CAL. CORP. CODE § 706(d) (West 2015); DEL. CODE ANN. tit. 8 § 218(d) (2015); KAN STAT. ANN. § 17-6508(d) (2015); OKLA. STAT. tit. 18, § 1063(d) (2015); R.I. GEN. LAWS § 7-1.2-709(c) (2015). Guam also has such a provision. 18 GUAM CODE ANN. § 28718(c) (2015).

statute merely providing an extra remedy.¹¹² Consider this language from California:

This section shall not invalidate any voting or other agreement among shareholders or any irrevocable proxy complying with subdivision (e) of Section 705, which agreement or proxy is not otherwise illegal.¹¹³

The drafter of the California provision later stated that the statute was not meant to be the exclusive means of forming voting agreements.¹¹⁴ The statute was meant only to enable. And consider Rhode Island's provision:

The provisions of this section are construed as permissive and should not be interpreted to invalidate any voting or other agreement among shareholders, or any irrevocable proxy which is otherwise not illegal.¹¹⁵

Yet the operative language of these codes is similar to Texas's provision—permissive in the same sense. A statute that validates agreements formed pursuant to its provisions but does not invalidate others

¹¹²Here is the Minnesota Reporter's language:

The agreement may be enforced in any way set forth in the agreement, but in the absence of such a provision, the only method of enforcement would be action in court for damages or equitable relief under section 302A.469 or general contract principles. Thus, the person drafting or agreeing to the voting agreement should be aware of the possible methods of enforcement, such as specific performance, injunctions against the voting of shares in violation of the agreement or against actions authorized because of violations of the agreement, suit for damages, or arbitration.

Sections 302A.449 and 302A.453 do not restrict such a voting agreement. Section 302A.453 does not apply at all, in recognition of the difference between the voting agreement and a trust, and section 302A.449 may be modified (or ignored) as specific provisions of the voting agreement may direct. This follows from and emphasizes the contractual nature of the voting agreement.

MINN. STAT. § 302A.455, Reporter's Notes, Gen. Cmt. (1981).

¹¹³CAL. CORP. CODE § 706(d) (West 2015).

¹¹⁴Section (d)'s intention that "compliance with section 706(a) is not the exclusive method of creating a legal voting pool" was noted in William K.S. Wang, *Pooling Agreements Under the New California General Corporation Law*, 23 UCLA L. REV. 1171, 1175 (1976). Wang communicated with Harold Marsh, Jr., "principal draftsman" of the provision, who stated that subsection (d) "preserves any voting agreement which would have been upheld under the prior law." *Id.* at 1175 n.11.

¹¹⁵7 R.I. GEN. LAWS § 7-1.2-709(c) (2015).

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“not otherwise illegal” under other law is a plausible reading of the Texas code, too.

If the statute was intended to merely add a remedy, then, one could ask, what would the remedy be without it? Specific enforcement seems to be mandated by the statute only when certain conditions are satisfied. But there are other remedies. One is obviously a negative injunction that the shares not be voted contrary to the agreement. Breaching an order not to vote would be backed up by a potential contempt citation—easily sufficient incentive to conform in many cases.

If the statute simply adds a remedy, then that explains why the next two opinions addressing voting agreements, *Burnett*¹¹⁶ and *Irwin*,¹¹⁷ both decided just six years after the statute was passed, need not have mentioned the statute to rule on the enforceability of a voting agreement. Voting agreements could be enforceable even without complying with the statute. That is exactly how *Burnett* and *Irwin* handled them. To those cases we now turn.

*D. A Return to the Path: Burnett v. Word, Inc. (1967)*¹¹⁸—Works

Twenty-two years after *Roberts v. Whitson* was decided, and post-statute, the Texas courts seem to have forgotten all about the *Roberts* mistake and pointed the law in a completely different direction from *Roberts*—back to the *Withers* dicta. The court in *Burnett v. Word, Inc.* held a vote pooling agreement valid and binding as a contract—as a matter of contract law.¹¹⁹ The agreement at issue involved all but three of the shareholders of Word Records, Inc. and Word Records Distributing Company, but the agreement was consideration in part for allowing those three to be bought out, so, soon after the agreement was signed, the only shareholders left were signatories to it.¹²⁰ The agreement provided, “Each binds himself to vote as stockholders and directors in such a manner as to

¹¹⁶ See generally *Burnett v. Word, Inc.*, 412 S.W.2d 792 (Tex. Civ. App.—Waco 1967, writ dismissed by agr.).

¹¹⁷ See generally *Irwin v. Prestressed Structures, Inc.*, 420 S.W.2d 491 (Tex. Civ. App.—Amarillo 1967, writ refused n.r.e.).

¹¹⁸ *Burnett*, 412 S.W.2d 792.

¹¹⁹ *Id.* at 795.

¹²⁰ *Id.* at 793–94.

carry out bona fide the purposes and intent of this contract as herein expressed.”¹²¹ The purposes were two:

- (1) That Burnett and Howell remain as directors, and
- (2) That Word Records, Inc. not incur any new financial obligation in excess of \$10,000, and Word Distributing not incur any new obligation in excess of \$40,000, without the unanimous approval of the directors.¹²²

The contract was to last ten years.¹²³

Eight years later, however, McCracken, a shareholder party to the agreement and manager of the corporations, wanted to borrow \$200,000 and expand.¹²⁴ The lender, Prudential, required a merger of the two companies as a condition of the loan.¹²⁵ Corporate merger statutes of the time required an 80% vote of shareholders in favor.¹²⁶ Burnett opposed, and with 27% of the preferred shares, Burnett had power to block the merger.¹²⁷ To counter Burnett, the shareholders of Word Records voted to issue 800 shares to Kaiser.¹²⁸ The effect was to dilute Burnett’s interest to less than 20%.¹²⁹ Kaiser then voted for the merger, as did other shareholders bound by the agreement, and with Kaiser’s shares the vote topped 80% and the merger closed.¹³⁰ In the meantime, the two corporations, and later the merged corporation, sued Burnett for a declaratory judgment that the vote pooling agreement was unenforceable and that the merger was valid.¹³¹ Burnett cross-claimed that the agreement was valid and the merger void.¹³²

To the extent the agreement stipulated that the board of directors adhere to certain business positions, the court said it would be void. “An agreement by which directors abdicate or bargain away in advance the judgment the

¹²¹ *Id.* at 794.

¹²² *Id.*

¹²³ *Id.* The facts occurred before the statute was passed, so the term of the contract was not an attempt to conform to the statute.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 793.

¹³² *Id.*

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law contemplates they shall exercise over the corporation is void.”¹³³ But the court held the agreement bound the shareholders as shareholders. Quoting a summary of the law, the court asserted as follows:

[T]he modern view on the question whether a stockholder’s contract, by which the manner in which he may vote his holdings is controlled, is valid, appears to be that *such contracts contain no inherent defect requiring that they be struck down*. Under this view, agreements by which a stockholder binds himself to vote in a specified manner with regard to the election of corporate officers and directors have been upheld, *as have other agreements*, as, for example, agreements binding stockholders to vote their stock in accordance with the will of a majority of the parties to the agreement.¹³⁴

These are just contracts, the court said: “We think the contract valid as to the obligations the parties bound themselves to as *stockholders*.”¹³⁵ The court reversed the trial court’s holding that the contract was unenforceable (so it is possible that the shareholder vote to authorize the sale of shares to Kaiser in order to facilitate expansion financing was a breach).¹³⁶ The court did not mention the statute once. The court appeared to believe it could uphold the contract without the statute’s support.

Note that the *Burnett* facts involved an agreement among all but three shareholders, and the court upheld the agreement without even discussing the rights of the three non-participating shareholders.¹³⁷ The agreement was binding notwithstanding it was not unanimous, the holding implies, because there was no prejudice to the non-participating shareholders, who were quickly bought out.

¹³³ *Id.* at 795.

¹³⁴ *Id.* (emphasis added) (quoting R.D. Hursh, Annotation, *Validity and effect of agreement controlling the vote of corporate stock*, 45 A.L.R. 2d 799 § 2 (1956)). I have no idea why the quoted language appears to sanction shareholder appointment of officers, which would have run afoul of *Withers*. See *supra* notes 48–52 and accompanying text.

¹³⁵ *Burnett*, 412 S.W.2d at 795 (emphasis in original).

¹³⁶ *Id.* at 795–96. The court appeared to sever the void and not-void provisions of the agreement. *Id.*

¹³⁷ See *id.* at 792–96. The agreement was formed to induce Burnett to assent to the three’s sale of their shares to McCracken. *Id.* at 794.

There was no mention in *Burnett* of whether the agreement was deposited with the corporation, available for inspection by the shareholders, or noted on the share certificates.

*E. Building a Hedge by the Path: Irwin v. Prestressed Structures, Inc. (1967)*¹³⁸ —Works

Irwin v. Prestressed Structures, Inc. was also not a straight vote pooling agreement. In the case, a shareholder promised to vote his shares in a certain way in consideration of a non-shareholder's promise to buy those shares.¹³⁹ The court upheld this as a contract, too, however, and this holding on facts well beyond those of vote pooling strongly suggests a plain vanilla vote pooling agreement would be binding.¹⁴⁰

In *Irwin*, shareholder White decided he could no longer work with shareholder Irwin.¹⁴¹ Irwin and White each owned 7,500 shares; Cocanougher, the only other shareholder, owned only 500.¹⁴² The shares were all subject to a transfer restriction requiring them to be submitted first to the corporation at book value before sale.¹⁴³ When White contracted to sell to Flygare, he conditioned the sale on the corporation's declining to buy, but he also promised "to vote his 7,500 shares to cause the corporation to decline to exercise the corporation's option to buy the White stock at book value."¹⁴⁴ At a shareholders' meeting raising the issue, White voted as promised.¹⁴⁵ A Prestressed Structures board meeting also voted to decline to buy.¹⁴⁶ White then sold his shares to Flygare at a price below book value.¹⁴⁷ White explained later that he would not have sold if it would have placed Cocanougher in subjection to Irwin.¹⁴⁸

¹³⁸420 S.W.2d 491 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.).

¹³⁹*Id.* at 493.

¹⁴⁰*Id.* at 495.

¹⁴¹*See id.* at 493.

¹⁴²*See id.*

¹⁴³*See id.*

¹⁴⁴*Id.*

¹⁴⁵*See id.*

¹⁴⁶*See id.*

¹⁴⁷*See id.*

¹⁴⁸*See id.*

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Irwin challenged this chain of events as a breach by White of the transfer restriction.¹⁴⁹ The court responded that the corporation had itself waived its option to buy the stock.¹⁵⁰ Perhaps anticipating that Irwin would then argue that White's voting as a shareholder, or agreeing to vote, for the corporation's waiver breached the transfer restriction, the court discussed the legality of the voting agreement—White's promise to vote his shares against Prestressed Structures's purchase of White's shares.¹⁵¹

On that issue, the court quoted and followed the only language from *Roberts* that displays a correct view of voting agreement law: "It is generally held that agreements or combinations by stockholders to vote their stock so as to control corporate action, are permissible if, without fraud, they seek to accomplish only what they might have accomplished without the agreement."¹⁵² The court applied the rationale straightforwardly:

Since White with 7,500 shares and Cocanaugher with 500 shares controlled the majority voting stock and could have accomplished the objective without the prior agreement, there appears to be no fraud in the agreement nor undue advantage taken of Irwin.¹⁵³

The voting agreement was therefore legal and binding.¹⁵⁴ The court also noted in finding an absence of fraud against Irwin that (1) Irwin in the end held the same voting power and economic share in the enterprise as he did before,¹⁵⁵ and (2) White received less for his shares than the corporation would have paid, thus saving Irwin any indirect expense in the transaction.¹⁵⁶

Like the *Burnett* opinion, the *Irwin* court did not mention the statute. It cited only *Roberts*, quoted extensively from *Burnett* with regard to the contractual freedom of shareholders, and discussed a few cases from other

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 494.

¹⁵¹ *See id.*

¹⁵² *Id.* (quoting *Roberts v. Whitson*, 188 S.W.2d 875, 877–78 (Tex. Civ. App.—Dallas 1945, writ ref'd w.o.m.)).

¹⁵³ *Id.*

¹⁵⁴ The ruling took the form of a denial of injunctive relief on the ground that there was no probable right of recovery. *See id.* at 495.

¹⁵⁵ *See id.* at 493.

¹⁵⁶ *See id.* at 495.

jurisdictions.¹⁵⁷ On the common law alone, or perhaps thinking implicitly that the statute did not curtail contractual freedom, the court appears to have rejected *Roberts v. Whitson*.¹⁵⁸ The *Irwin* case can thus be cited in support of the proposition that shareholders' rights to vote may be made the subject of a binding contract like any other contract.

Note also that, as in *Burnett*, the voting agreement was not unanimous: Irwin was not a party. But the court upheld the agreement nonetheless, Irwin's rights not suffering impairment.

There was no mention in *Irwin* of whether the voting agreement was deposited and available for inspection or whether the agreement was noted on the share certificates.

*F. Another (Broken) Hedge Along the Path: R.H. Sanders Corp. v. Haves (1976) (Haves)*¹⁵⁹

Stanley Haves, Samuel Schwinder, and Ronald H. Sanders entered into a written contract in which Haves and Schwinder promised to loan the R.H. Sanders Corporation \$26,000 and also buy 35% of the corporation's stock for \$24,000.¹⁶⁰ The contract provided, "Each of the three stockholders shall be a Director of the corporation and each vote shall be equal. A majority of the three-man Board of Directors shall control."¹⁶¹ After the agreement was executed, Haves and Schwinder advanced the funds.¹⁶² Later, Sanders gave Haves and Schwinder notice of a shareholders' meeting to address whether to increase the board from three to five, effectively giving control to Sanders, who owned 65% of the stock.¹⁶³ Haves and Schwinder sued for an injunction to stop the meeting, an injunction the trial court granted.¹⁶⁴

The court of appeals affirmed.¹⁶⁵ First, the court found that the contract, if binding, controlled whether the meeting Sanders wanted could occur:

¹⁵⁷ See *id.* at 494–95.

¹⁵⁸ See *id.* at 494.

¹⁵⁹ 541 S.W.2d 262 (Tex. Civ. App.—Dallas 1976, no writ). I use the second party's name as shorthand for the case to avoid confusion with *Sanders v. McMullen*, 868 F.2d 1465 (5th Cir. 1989), discussed *infra* Part II.G.

¹⁶⁰ See *id.* at 263.

¹⁶¹ *Id.* at 264.

¹⁶² See *id.*

¹⁶³ See *id.* at 263.

¹⁶⁴ See *id.*

¹⁶⁵ *Id.*

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Looking at the entire contract, it is evident that this language was intended to protect plaintiffs' investment and loan by giving them a majority control of the Board of Directors. This control is only possible if Sanders is bound to vote his shares for the election of plaintiffs to the Board and is bound not to vote them in a manner that would deprive plaintiffs of a majority. The use of the verb "shall" supports this reading.¹⁶⁶

The court also steered clear of the mistake made by the court in *Roberts*: "Since this is not a voting trust . . . because there is no severance of the voting right from the stock ownership, it can only be construed to be a voting agreement . . ." ¹⁶⁷

Having determined that the contract was a voting agreement, the court then examined the effect on the agreement of the voting agreement statute.¹⁶⁸ (Finally, a court that looks at the statute!) This agreement did not comply with the statute.¹⁶⁹ As the defendants noted, the agreement (1) was not deposited at the corporation's principal office and (2) was not noted on the share certificates.¹⁷⁰ The agreement also lacked a duration term.¹⁷¹ These are defects, the defendants argued, because the statute says that the voting agreement "shall" be deposited and "shall" be noted on the certificates.¹⁷² Duration was limited to ten years.¹⁷³ The statute appeared, according to the defendants, to condition specific enforcement on compliance with the statute.¹⁷⁴ How to respond to these perceived deficiencies?

¹⁶⁶ *Id.* at 264.

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* at 264–65.

¹⁷⁰ *See id.*

¹⁷¹ *See id.* at 264.

¹⁷² *See* Act of May 11, 1961, 57th Leg., R.S., ch. 206, § 2, 1961 Tex. Gen. Laws 423, 423–24 (codified at TEX. BUS. CORP. ACT art. 2.30B (expired Jan. 1, 2010)) ("A counterpart of the agreement shall be deposited . . . and shall be subject to the right of examination Each certificate representing shares held by the parties to the agreement shall contain a statement that the shares represented by the certificate are subject to the provisions of a voting agreement").

¹⁷³ *See id.*

¹⁷⁴ *See Haves*, 541 S.W.2d at 264; Act of May 11, 1961, 57th Leg., R.S., ch. 206, § 2, 1961 Tex. Gen. Laws 423, 424 ("Upon such deposit . . . and endorsement . . . the agreement shall be specifically enforceable in accordance with the principles of equity.").

The court finessed these. The time requirement, it said, would be incorporated by reference into the contract, which, while silent as to time, “shall be deemed to incorporate the statutory period.”¹⁷⁵

With regard to depositing the agreement with the corporation and endorsing the shares, the court reasoned that the spirit of the code was met:

The purpose of these requirements in the statute is to give notice to shareholders or stock purchasers who are not parties to the voting agreement. Since the parties here are all of the shareholders and had knowledge of the agreement, and since no outside buyers were involved, no compelling policy reason exists here for requiring technical compliance with these notice provisions.¹⁷⁶

Having thus set aside the deposit and endorsement requirements, the court enforced the agreement.¹⁷⁷

Haves takes two steps in the right direction. First, it recognized the agreement for what it was: a contract to vote a certain way.¹⁷⁸ The court correctly distinguished a voting trust,¹⁷⁹ and the nowhere does the court (or the parties) suggest that an agreement requiring a shareholder to vote a certain way is a proxy.

Second, the court does not let the agreement’s failure to meet the statute’s provisions stand in the way of enforcement.¹⁸⁰ To be clear, the court actually never said explicitly whether the statute’s provisions were mandatory—required before any enforcement could occur. The court said only that, for the parties themselves, the deposition and endorsement requirements of the statute were met.¹⁸¹ The purpose of these, the court said, is “to give notice to shareholders or stock purchasers who are not parties to

¹⁷⁵ *Haves*, 541 S.W.2d at 265.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at 265–66 (specifically enforcing the agreement, having found no adequate remedy at law).

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* at 264–65. Not doing so would have been problematic after the statute was passed because the statute itself said that “[a] voting agreement entered into pursuant to this Section B is not subject to the provisions of Section A of this Article,” which addressed voting trusts. *See Act of May 15, 1989, 71st Leg., ch. 801, § 15, art. 2.30B, 1989 Tex. Gen. Laws 3610, 3624 (codified at TEX. BUS. CORP. ACT art. 2.30B (expired Jan. 1, 2010)).*

¹⁸⁰ *See Haves*, 541 S.W.2d at 265.

¹⁸¹ *See id.*

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the voting agreement.”¹⁸² The parties always have notice, so as between the parties, failure to satisfy those requirements is beside the point. Another court later called this the application of “equitable principles to notice requirements.”¹⁸³

But the court also took a step that counters these: the court imposed the statute’s ten-year term on the agreement.¹⁸⁴ This holding for the first time in Texas jurisprudence suggested that the statute imposes its requirements on all voting agreements and does not merely add a remedy. If the common law alone, which had no time limit, could support enforcement of a voting agreement, then no requirement would exist to impose one on this agreement. The court’s imposition of the statute’s time limitation on the agreement thus suggests that there is no enforceable voting agreement except through the code. Yet if the statute imposes a ten-year requirement on the parties themselves, how can the court feel free to set aside the statute’s requirements that the shares be deposited, examinable, and endorsed? What purpose is served by the time limitation? If it were met even though the agreement had a longer term, would the court waive this, too? On the other hand, if the statute is the only ground of enforceability, why does the court feel it can set aside its formalities so easily?

Haves does not answer these questions well. Its dicta regarding compliance with the statute is too narrow even to encapsulate earlier case law.¹⁸⁵ *Irwin* expressly held a voting agreement binding in part because Irwin, a shareholder but non-party to the agreement, was not prejudiced by the voting agreement at issue.¹⁸⁶ The court’s ruling against him did not even once mention his knowledge of the agreement.¹⁸⁷ In *Irwin*, the non-participating shareholder obviously knew about the agreement and then complained all the way to the court of appeals that he was prejudiced by it.¹⁸⁸ But his notice of the agreement was neither fruitful nor necessary because the exercise of the votes pursuant to the agreement did not in fact

¹⁸² *Id.*

¹⁸³ *Hoggett v. Brown*, 971 S.W.2d 472, 484 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

¹⁸⁴ *See Haves*, 541 S.W.2d at 265.

¹⁸⁵ *See generally id.*

¹⁸⁶ *See Irwin v. Prestressed Structures, Inc.*, 420 S.W.2d 491, 495 (Tex. Civ. App.—Amarillo 1967, writ ref’d n.r.e).

¹⁸⁷ *See id.* at 493.

¹⁸⁸ *See id.* at 492.

prejudice Irwin's interests.¹⁸⁹ If in fact an agreement causes no prejudice to another shareholder, then, *Irwin* necessarily held, the agreement can be upheld as a matter of contract law without reference to the statute.

Lack of prejudice—rather than the presence of notice—would be a better ground for *Haves*. It is only a slightly broader ground. In fact, in *Haves*, there were only three shareholders, and they were all parties to the agreement.¹⁹⁰ Of course they knew of it. But they were not prejudiced by it at all because the shareholders did only what they had a right to do. Moreover, each was a party to the agreement itself; one can hardly be prejudiced by an agreement one freely signed! I submit that in *Haves* it was far more relevant and important that the parties suffered no prejudice at all from the agreement than that they were aware of it. Had they been harmed by the agreement in a way they could never have contemplated or controlled, I propose that the court would not have enforced it.

Moreover, even if some shareholders are not parties to an agreement, it would be wrong to hold that the agreement is undone because some shareholders did not know about it: *Irwin* quite rightly teaches us that it should be upheld in the absence of prejudice to them. The statute provides notice for a reason—to prevent prejudice, so if no prejudice exists, enforcement of the statutorily non-compliant voting agreement is as just as much in the spirit of the statute—and in the spirit of contractual freedom—as when non-participating shareholders know about the agreement. Re-rationalizing *Haves* on this ground would harmonize Texas law not only with *Irwin*, *Burnett*, and the dicta in *Withers* but also with the national rule:

Agreements to vote for specified persons as directors or to vote as the holders of a majority of the shares in a pool may direct are valid and binding if they do not contemplate limiting the discretion of the directors or committing any fraud, oppression, or wrong against other shareholders.¹⁹¹

It would also clarify the statute's purpose: to protect other shareholders from prejudice—not to do away with contractual freedom shareholders previously enjoyed.

¹⁸⁹ See *id.* at 494–95.

¹⁹⁰ See 541 S.W.2d at 264.

¹⁹¹ *Supra* note 95.

*G. A Bridge to Nowhere: Sanders v. McMullen (April 5, 1989)*¹⁹² —
Does Not Work

McMullen,¹⁹³ a case decided in the U.S. Fifth Circuit, took the statute a whole different direction. The Fifth Circuit appeared to have no idea what role the statute plays, or could or should play, in corporate law.

McMullen was a 34% owner of the Houston Sports Association (HSA), a corporation which owned the Astrodome and Houston Astros.¹⁹⁴ Partly by virtue of his large holdings, he became chairman of the board of directors.¹⁹⁵ Sanders owned 2%.¹⁹⁶ Minority shareholders tried to oust McMullen by agreeing to vote against him en masse, but they needed Sanders's 2%.¹⁹⁷ Sanders initially agreed to participate in the coup but changed his mind after McMullen promised him greater access within the Astros' organization.¹⁹⁸ Specifically, McMullen allegedly promised Sanders (1) participation in management decisions, (2) access to operational information, (3) that the baseball staff would be informed of Sanders's elevated status; (4) participation in league meetings and league events, (5) "access to all baseball facilities," (6) inclusion of Sanders's shares in any control block for sale, and (7) that McMullen would vote his own shares to keep Sanders on the board.¹⁹⁹ These promises induced Sanders to withdraw from the scheme to oust McMullen, and Sanders claimed he bought another \$4 million worth of HAS stock in reliance on McMullen's promises.²⁰⁰ When McMullen failed to perform promise (7) and Sanders lost his board seat, Sanders sued.²⁰¹ Sanders wanted his board seat back, but he also wanted to be included in the control block, so he sued for breach of McMullen's complete contract, not just promise (7).²⁰²

¹⁹² 868 F.2d 1465 (5th Cir. 1989). The exact date is named in the heading because the statute was amended in 1989 but not in time to change the result in *Sanders*, which was already before the court.

¹⁹³ I use the second party's name as a short cite to avoid confusion with the *R.H. Sanders Corp. v. Haves* case, discussed *supra* Part II.F.

¹⁹⁴ See *McMullen*, 868 F.2d at 1466.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ *Id.*

²⁰⁰ See *id.*

²⁰¹ See *id.* at 1467.

²⁰² See *id.*

The court wrote a short opinion. The court quoted the statute as it had existed since 1961.²⁰³ After quoting the statute, the court summarily stated what it thought the statute said, then declared: “This statute thus requires, in rather verbose fashion, three things: (1) a writing; (2) a deposit . . . at the corporation’s main office; (3) reference to the agreement on the certificates.”²⁰⁴ That is the extent of the court’s statutory analysis. The court never explained how, or why, without the statute, no promise to vote stock is enforceable. But that was the unspoken assumption the court adopted notwithstanding its absence from the statutory language.

The unspoken assumption became the court’s holding. The court held that McMullen’s promise to vote for Sanders—promise number (7)—could not be enforced because it was not in writing.²⁰⁵ The rest of McMullen’s promises, the court said, would be enforced.²⁰⁶

The application of the statute to promise number (7) may well have been in error. The only clue as to why the court adopted this assumption came later in the analysis, when both Sanders and the court called the statute a “statute of frauds.”²⁰⁷ But the statute is not a statute of frauds. Why not?

The Statute of Frauds is itself the actual, explicit negative statement the court here assumed: “A promise or agreement described in Subsection (b) . . . is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged”²⁰⁸ Other statutes of frauds in the Texas code identically provide the negative conclusion the court here had to invent.²⁰⁹ But the voting agreement statute says no such thing.²¹⁰

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ *See id.* (“In fact, of the seven alleged promises, only the one that required McMullen to vote his shares so as to keep Sanders on the board is without question controlled by [the statute]. The trial court’s summary judgment on alleged promises not relating to the voting of shares is therefore reversed and remanded.”).

²⁰⁷ *Id.* Sanders claimed that McMullen’s part performance excused non-compliance with the statute, an argument that sometimes wins against a statute of frauds, but the court rejected that argument because McMullen had not sufficiently performed under such a part performance rule. *Id.* at 1467–68.

²⁰⁸ TEX. BUS. & COM. CODE ANN. § 26.01(a) (West 2015); *see also, e.g., id.* § 26.02(b) (“A loan agreement in which the amount involved in the loan agreement exceeds \$50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound . . .”).

²⁰⁹ *See, e.g., id.* § 2.201 (“[A] contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that

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Is that clear? The Statute of Frauds (and other statutes of frauds) is an affirmative defense to an action on a contract²¹¹ precisely because it (and they) are stated in this negative way. No plaintiff must show, in order to sue on a promise covered by the Statute of Frauds, that the promise is in writing. Such a promise is enforceable under the common law of contracts. If a person wants the protection of the Statute of Frauds, she must plead the Statute of Frauds, and if it is not pleaded by the defendant, it is waived.²¹² When it is waived, a contract not in writing is enforced even though the Statute of Frauds applies!²¹³ The Statute of Frauds does not grant enforceability.²¹⁴ It can only remove it. The voting agreement statute is quite different even as the court described it. If compliance with the statute were required to create a binding contract in the first place, as the court appeared to assume, then pleading compliance with the statute should be the duty of the plaintiff in her petition.²¹⁵ Because that is true, a general denial should be sufficient to put the matter in issue without any affirmative pleading.²¹⁶ It should be apparent that the voting agreement statute is not a statute of frauds.

a contract for sale has been made between the parties and signed by the party against whom enforcement is sought”); TEX. FAM. CODE ANN. §§ 4.002, 4.006(a)(1) (West 2015) (“A premarital agreement must be in writing and signed by both parties A premarital agreement is not enforceable if the party against whom enforcement is requested proves that: (1) the party did not sign the agreement voluntarily”). Other requirements of a writing exist, but they are not statutes of frauds. For instance, an instrument of conveyance “must be in writing,” TEX. PROP. CODE ANN. § 5.021 (West 2015), but that is because the identity of land must be clear to the state which keeps property records and taxes ownership. Section 5.021 is properly called the “statute of conveyances.” *E.g.*, *Reiland v. Patrick Thomas Props., Inc.*, 213 S.W.3d 431, 437 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

²¹⁰ See TEX. BUS. ORGS. CODE ANN. § 6.252 (West 2015).

²¹¹ See TEX. R. CIV. P. 94; FED. R. CIV. P. 8(c).

²¹² See *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343, 353 (Tex. App.—Corpus Christi 1997), *pet. denied*, 989 S.W.2d 360 (Tex. 1998) (per curiam); *Kinnear v. Tex. Comm’n on Human Rights ex rel. Hale*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam).

²¹³ See, e.g., *Engelman Irrigation Dist.*, 960 S.W.2d at 349 (“We conclude that the water tickets and the Irrigation District’s rule and regulations, taken together, are more than a scintilla of evidence of an agreement” —and concluding that an agreement existed because the district bound itself by its own regulations to deliver water on a “first come, first serve” basis).

²¹⁴ See *Rann v. Hughes* (1778) 2 Eng. Rep. 18, 22 (H.L.). This was decided before the common law was adopted by the state of Texas or by any state.

²¹⁵ See TEX. R. CIV. P. 91a.1; FED. R. CIV. P. 8(a)(2) (mandating that the complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief”).

²¹⁶ See TEX. R. CIV. P. 92; FED. R. CIV. P. 8(b)(3).

No, the voting agreement statute, starting with its plain language, is obviously quite different. Whereas a statute of frauds is a negative statement, and the rights it creates are therefore an affirmative defense, the voting agreement statute is a positive. It is phrased as a permission, and not once does it state a negative conclusion on enforceability: “Any number of shareholders may enter into a voting agreement in writing for the purpose of voting their shares as a unit”²¹⁷ Nor does it purport to take away rights that shareholders already have, under the common law or otherwise. To construe it to include a negative statement that it nowhere states is to add something beyond the statute’s language. Given the strong public policy in Texas in favor of contractual freedom, courts should be hesitant to invent rules that infringe on contracts.

Taking a different tack, Sanders also tried to show that Texas courts do not require literal compliance with the statute, citing *Haves*.²¹⁸ And the Fifth Circuit took this argument seriously, on its own terms.²¹⁹ This is an extreme move for the court after proclaiming the statute a statute of frauds. In the absence of fraud itself, a statute of frauds does quite consciously require literal compliance.²²⁰ That the court even considered the possibility of *Haves*’s precedential status is inconsistent with the court’s supposition that the voting agreement statute is a statute of frauds. Stated another way, the possibility of a *Haves*’s, or a *Burnett*’s or *Irwin*’s, treatment of the statute’s formalities contradicts entirely the *McMullen* court’s assumption that the statute is a statute of frauds. It is not a statute of frauds.

The court rejected *Haves*, anyway.²²¹ The court purported to distinguish the case on the ground that all the shareholders in *Haves* knew of the agreement, whereas in *McMullen* they did not.²²² Why did anyone’s knowledge matter, when the statute does not require that anyone know? Here as well the court assumed its conclusion: “The [*Haves*] rule cannot apply to this case. While Texas courts may not require literal conformity with the statute, they do at least require that the purpose of the statute not be

²¹⁷ Act of May 11, 1961, 57th Leg., R.S., ch. 206, § 2, 1961 Tex. Gen. Laws 423 (codified at TEX. BUS. CORP. ACT art. 2.30B (expired Jan.1, 2010)).

²¹⁸ R.H. Sanders Corp. v. Haves, 541 S.W.2d 262, 265 (Tex. Civ. App.—Dallas 1976, no pet.); see *supra* Part II.F.

²¹⁹ Sanders v. McMullen, 868 F.2d 1465, 1468 (5th Cir. 1989).

²²⁰ E.g., Hooks v. Bridgewater, 229 S.W. 1114, 1117 (Tex. 1921).

²²¹ *McMullen*, 868 F.2d at 1468.

²²² *Id.*

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undermined.”²²³ With this statement, everyone should be on board; of course the statute’s purpose should be met. The relevant question, though, is the purpose of the statute. The court continued: “In this case, other shareholders existed who were totally unaware of the agreement. The notice element of the statute is therefore unsatisfied.”²²⁴ And that is the court’s assumption: the purpose of the statute is notice.

Of course, notice can rationally be called one purpose of a statute that requires deposit with the corporation and that the agreement be subject to examination. But not notice in a vacuum. What is notice for? Taking *Haves* and *Irwin* together, the law teaches that the point of notice is to prevent prejudice to other shareholders. If they have notice, then they can prevent prejudice to themselves without further help from the courts. However, if there was no prejudice to the other shareholders, then their lack of notice was irrelevant, and that was the case here. Recall that the court in *Irwin* said, “Since White with 7,500 shares and Cocanougher with 500 shares controlled the majority voting stock and could have accomplished the objective without the prior agreement, there appears to be no fraud in the agreement nor undue advantage taken of Irwin.”²²⁵ Could there be any fraud or prejudice from McMullen’s agreeing to vote for Sanders for a board position? Did McMullen need an agreement to cast his votes for Sanders? Because he did not, no other shareholder could have been prejudiced as a result of McMullen’s binding himself by contract to do so. He had every right in the world to vote for Sanders. That he did not notify other shareholders of the fact means nothing. In elevating notice for its own sake as the purpose of the statute, the Fifth Circuit attempted to graft onto the law a pointless formality.

Ironies abound in *McMullen*. First, its mistakes were unnecessary. McMullen and Sanders agreed that, in exchange for Sanders not voting against McMullen, McMullen would not only vote for Sanders for director but also—seemingly independent of Sanders’s board position—involve Sanders in management (this was promise (1)).²²⁶ Because McMullen promised to involve Sanders in management merely as a shareholder,

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Irwin v. Prestressed Structures, Inc.*, 420 S.W.2d 491, 494 (Tex. Civ. App.—Amarillo 1967, writ ref’d n.r.e.).

²²⁶ See *supra* text accompanying note 199.

Sanders's involvement in management would usurp board prerogatives.²²⁷ McMullen's promise of shareholder management power alone could have caused the court to strike down the whole agreement.

It is therefore doubly ironic that the court struck down only McMullen's promise to vote to put Sanders on the board but then enforced McMullen's other promises, including McMullen's promise to go around the board to involve a mere shareholder in management. One would think that striking down a promise always held illegal in Texas law would be more important than making up a rule refusing to enforce a promise that harmed no one and was fairly bargained for.

But wait! One final irony should be noted in the *McMullen* opinion: consider that all of McMullen's promises were given in exchange for Sanders's not voting against McMullen—Sanders's voting promise was thus consideration for all of McMullen's promises. The court's allowing Sanders to sue for breach of McMullen's other promises implied that Sanders could orally horsetrade his votes for just about anything but that McMullen could not legally promise his vote for Sanders without a writing. It's a bizarre opinion.

Fortunately, as *McMullen* was being decided, the Texas legislature was amending the statute. Read carefully, the amended statute supersedes the *McMullen* opinion. Read carefully, the statute also suggests that the better run of cases in Texas were right all along.

III. THE AMENDED STATUTE: THE ROAD HOME

A. *The 1989 Amendment—Probably Works*

The statute was substantially amended in 1989.²²⁸ The amendment confirms this Article's reading of *Haves*²²⁹ and the prior version of the statute²³⁰ as merely adding a remedy. A 1987 amendment abandoned the

²²⁷ *E.g.*, *Grogan v. Grogan*, 315 S.W.2d 34, 39 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); *Funkhouser v. Capps*, 174 S.W. 897, 899 (Tex. Civ. App.—Fort Worth 1915, writ ref'd); *see supra* text accompanying note 11.

²²⁸ Act of May 25, 1989, 71st Leg., R.S., ch. 801, § 15, 1989 Tex. Gen. Laws 3610, 3623–24 (codified at TEX. BUS. CORP. ACT art. 2.30 (expired Jan. 1, 2010)).

²²⁹ *See supra* Part II.F.

²³⁰ *See supra* Part II.C.

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10-year limitation in the statute.²³¹ Thus, the only provision ever imposed in Texas case law contrary to the reading of the statute as merely an added remedy²³² was repealed. But the other provisions of the 1989 amendment clarify greatly what the statute is supposed to do. One has to read the provisions closely to see this, but some answers are fairly obvious in the language.

Because these sentences are long, and no one would read them for fun, I have separated them into separate paragraphs in this recitation and labeled each sentence [a]-[e] for ease of discussion. Incidentally, the 1989 amendment remains law today except in a couple of particulars, as shall be noted.²³³

[a] Any number of shareholders of a corporation, or any number of shareholders of a corporation and the corporation itself, may enter into a written voting agreement for the purpose of providing that shares of the corporation shall be voted in the manner prescribed in the agreement.

[b] A counterpart of the agreement shall be deposited with the corporation at its principal place of business or registered office and shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation.

[c] The agreement, if noted conspicuously on the certificate representing the shares that are subject to the agreement or, in the case of uncertificated shares, if notation of the agreement is contained in the notice sent pursuant to Section D of Article 2.19 of this Act with respect to the shares that are subject to the agreement, shall be specifically enforceable against the holder of those shares or any successor or transferee of the holder.

[d] [1] Unless noted conspicuously on the certificate representing the shares that are subject to the agreement or,

²³¹Act of April 30, 1987, 70th Leg., R.S., ch. 93, § 14, 1987 Tex. Gen. Laws 203, 211 (codified at TEX. BUS. CORP. ACT art. 2.30 (expired Jan. 1, 2010)).

²³²See *supra* notes 175–187 and accompanying text.

²³³*Cf.* TEX. BUS. ORGS. CODE ANN. § 6.252 (West 2012).

in the case of uncertificated shares, unless notation of the agreement is contained in the notice sent pursuant to Section D of Article 2.19 of this Act with respect to the shares that are subject to the agreement,

the agreement, even though otherwise enforceable, is ineffective against a transferee for value without actual knowledge of the existence of the agreement at the time of the transfer or against any subsequent transferee (whether or not for value),

[d] [2] but the agreement shall be specifically enforceable against any other person who is not a transferee for value from and after the time that the person acquires actual knowledge of the existence of the agreement.

[e] A voting agreement entered into pursuant to this Section B is not subject to the provisions of Section A of this Article [which dealt with voting trusts].²³⁴

The first three sentences contain little that is new. Sentences [a]-[c] retain the structure of the original: the permissive “may” and the instructive “shall.” Sentence [c] adds that the agreement will be enforceable against successors and transferees if endorsed on the shares. Please note that the endorsement requirement has changed to become a condition with a privilege: an endorsement will ensure that successors and transferees are bound, but it no longer appears to be required.

Sentence [d] backs up this change in the endorsement provision, but sentence [d] also strongly suggests that the statute itself is meant merely to add a remedy. Sentence [d] for the first time names the consequence of non-compliance with what was a requirement in the prior statute. It specifies consequences in two ways, both of which are significant.

First, consider [d] part [1], itself an independent clause in what is a compound sentence. For ease of thinking through the sentence, forget about uncertificated shares for the moment. Please read the sentence again: “Unless noted conspicuously on the certificate . . ., the agreement, even though otherwise enforceable, is ineffective against a transferee for value without actual knowledge of the existence of the agreement at the time of

²³⁴Act of May 25, 1989, 71st Leg., R.S., ch. 801, § 15, 1989 Tex. Gen. Laws 3610, 3623–24 (codified at Tex. Bus. Corp. Act art. 2.30 (expired Jan. 1, 2010)).

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the transfer”²³⁵ Sentence [c] says that an endorsement on the certificate will make the agreement specifically enforceable against a transferee. This sentence [d] part [1] shows that making the opposite statement—that if the certificate is not endorsed, it is not enforceable—was also thought necessary. Why? The obvious answer is that the statute assumes that, without this statement, the agreement in fact can be enforceable against transferees even without an endorsement.

How could it? The assumption is that such agreements are enforceable against transferees even without the statute’s help. Under what rule could they be? Perhaps under the common law of contracts and the property rules that define what it means to be a shareholder! The statute may be, in other words, relying on the common law to specify what is “otherwise enforceable.” If the statute simply adds a remedy, that is exactly what readers should expect.

“Otherwise enforceable” probably also suggests the provisions of sentence [a], which give permission to enter into written voting agreements. It is doubtful that a statute would give permission to “enter into . . . [an] agreement” unless it meant that agreement to be legally enforceable.²³⁶ It is true that sentence [a] does not say so explicitly, and this may well be because the sentence also relies on the common law of contracts, or it might simply be implied. But the writing is the central addition of sentence [a], since the common law already enforced voting agreements before sentence [a] became law. Thus, when sentence [d] part [1] says “otherwise enforceable,” that sentence means to suggest that even having the agreement written down, as sentence [a] permits, does not make the agreement binding on a transferee for value without knowledge if a notation about the agreement is not endorsed conspicuously on the shares.

Perhaps sentence [d] part [1] also meant to include sentence [b] in its reference to law that makes the voting agreement “otherwise enforceable.”²³⁷ The point is hardly clear because the statute never specifies what legal effect depositing the agreement is supposed to have, but sentence [d][1] would clearly apply to save a transferee even if the written agreement was “deposited with the corporation” as sentence [b] appears to mandate.²³⁸

²³⁵ *Id.* at 3624. This provision is substantively the same as the current TEX. BUS. ORGS. CODE ANN. § 6.252(e), reviewed *infra* Part III.B.

²³⁶ *Id.* at 3623.

²³⁷ *Id.* at 3624.

²³⁸ *Id.* at 3623.

What to conclude from this? Two things. First, the sentence means what it says—the negative statement that the transferee is not bound in the conditions specified. But, second, the statute also implies the positive that the agreement binds a transferee for value *with* actual knowledge of the existence of the agreement at the time of the transfer. By specifically excluding from liability the transferee without knowledge, the statute implies that *the transferee for value with knowledge of the agreement would be bound even without a conspicuous statement!*

This implication becomes more significant when read in conjunction with sentence [d] part [2]. Sentence [d] part [2] says that, notwithstanding everything that has gone before in the sentence, “the agreement shall be specifically enforceable against *any other person who is not a transferee for value from and after the time that the person acquires actual knowledge of the existence of the agreement.*”²³⁹

Finally, a clear statement. Read in plain terms, the second part of sentence [d] does not depend on anything in the statute. The phrase “even though otherwise enforceable” does not modify this clause; it modifies only the preceding clause, [d][1]. Part [d][2] does not depend on depositing the agreement with the corporation or its availability for examination.²⁴⁰ It depends only on whether the person bound by the agreement knows about it. This will include, obviously, the parties to the agreement! The parties always have “actual knowledge of the existence of the agreement!”²⁴¹ So, by this statement’s plain terms, the parties will be bound and the agreement specifically enforced against them. The statement will also include transferees, for value or not, if the agreement purports to bind them.

The fourth sentence of the paragraph, in a reference to “anyone not a transferee for value,” seems an obscure place to put the ultimate conclusion. Only there and only at this point in the language (and at this late date in the statute’s drafting history) does the statute reveal the background assumption against which the statute is written: namely, that these agreements were enforceable under the common law of contracts, and the statute does not mean to upset that, and all the statute is offering is an additional remedy—specific enforcement. That is why what seems like an ultimate conclusion appears so obscure: we were already supposed to know it! Freedom of contract is, after all, a fundamental policy of Texas law.

²³⁹ *Id.* at 3624 (emphasis added).

²⁴⁰ *Id.*

²⁴¹ *Id.*

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There is one difficulty left in the 1989 statutory language: sentence [c] also seems to propose a rule for specific enforcement, and this sentence not only names specifically the persons it covers—"the holder of those shares or any successor or transferee of the holder"—but also appears to condition specific relief on a notation about the voting agreement being placed on the certificates themselves or sent *by the corporation* to the holder or successor or transferee.²⁴² This is the endorsement condition mentioned in Part I. It seems an odd provision: it seems to require that notice be given of the agreement to the parties themselves, but they obviously already know of it. Also, it seems to condition enforcement of a voting agreement between private shareholder parties on action by the corporation in case of uncertificated shares. So the corporation might have an effective veto over whether the agreement could be enforced under the statute if the shares were uncertificated.

Moreover, does sentence [c] trump sentence [d]? We just concluded that the statute finally reached a clear position. Do we now have to revise? I do not believe so, for the following reasons.

First, that would be a major change from the prior iteration of the statute and best case law, which had no such condition, especially where the parties themselves are concerned.

Second, there is nothing inconsistent about offering specific enforcement on two different, technically consistent grounds. From the standpoint of policy, clause [d][2] is primary in this regard: if a person *knows* that a voting agreement binds her, then she is bound to it. Sentence [c] follows up: if a person *has notice* by these regulated means that a voting agreement binds her, then she should be bound to it. Clause [d][2] covers *actual knowledge*, and sentence [c] *constructive knowledge*. It is not inconsistent to impose liability on those who know and also on those who

²⁴²*Id.* Act of May 29, 1983, 68th Leg., R.S., ch. 442, § 3, 1983 Tex. Gen. Laws 2511, 2565–66 (codified at TEX. BUS. CORP. ACT art. 2.19D (expired Jan. 1, 2010)) read as follows:

D. In accordance with Chapter 8, Business & Commerce Code, a corporation shall, after the issuance or transfer of uncertificated shares, send to the registered owner of uncertificated shares a written notice containing the information required to be set forth or stated on certificates pursuant to this Act. Except as otherwise expressly provided by law, the rights and obligations of the holders of uncertificated shares and the rights and obligations of the holders of certificates representing shares of the same class and series shall be identical. No share shall be issued until the consideration therefor, fixed as provided by law, has been fully paid.

fairly have constructive notice. But, of course, the tail should not wag the dog. Knowledge trumps over constructive knowledge, so if a person has knowledge, the lack of constructive notice is irrelevant.

The language of the two sentences is consistent with this explanation. Sentence [c] does not say that, without the endorsement, specific enforcement is not possible. It only says it will be granted if the endorsement has been given. That clause [d][2] also offers a path to specific enforcement does not detract from this. This may be why clause [d]'s "any other person" is a broader category than sentence [c]'s "the holder of those shares."²⁴³ I admit that the statute is drafted in a confusing way because the "against" clauses in the two subsections have different objects, but I submit this is a drafting inconsistency, and no more.

Third, though the "against" clause objects differ, clause [d][2]'s "any other person" is, as noted, broader than sentence [c]'s "the holder of those shares or any successor or transferee."²⁴⁴ The broader category should have primacy. Moreover, though the words describing the object differ, I cannot imagine a difference in practice. Who will be bound by a voting agreement other than the owner of the shares, a successor, or a transferee? They are the only ones with a right to vote. I believe they are the same categories for all practical purposes.

Fourth, and finally, policy requires it. Parties to voting agreements ought to be bound by them, and they always know about them—their signature is on them. So the fact that they have no constructive notice of them should not matter. Construing a constructive notice provision to override a knowledge provision is morally wrong and unfair to the other parties to the agreement. It encourages cheating or at least opportunism. Inasmuch as it overrides the bargain the parties have made, it is economically inefficient.

For these reasons, I do not believe that the separation of sentences [c] and [d] into separate provisions makes any difference. We should take the statute at its plain meaning, and the statute plainly says that "the agreement shall be specifically enforceable against any other person who is not a transferee for value from and after the time that the person acquires actual

²⁴³ Act of May 25, 1989, 71st Leg., R.S., ch. 801, § 15, 1989 Tex. Gen. Laws 3610, 3624 (codified at Tex. Bus. Corp. Act art. 2.30 (expired Jan. 1, 2010)).

²⁴⁴ *Id.*

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knowledge of the existence of the agreement.”²⁴⁵ For the parties, that moment will be when the agreement forms.

B. Today’s Iteration, TBOC § 6.252—Works Even Better

The TBOC changed the voting agreement provision only slightly. The understanding restored by the 1989 amendments persists, with one important caveat. The code now reads as follows:

(a) Except as provided by this code or the governing documents, any number of owners of a domestic entity, or any number of owners of the domestic entity and the domestic entity itself, may enter into a written voting agreement to provide the manner of voting of the ownership interests of the domestic entity. A voting agreement entered into under this subsection is not part of the governing documents of the domestic entity.

(b) A copy of a voting agreement entered into under Subsection (a):

(1) shall be deposited with the domestic entity at the domestic entity’s principal executive office or registered office; and

(2) is subject to examination by an owner, whether in person or by the owner’s agent or attorney, in the same manner as the owner is entitled to examine the books and records of the domestic entity.

(c) A voting agreement entered into under Subsection (a) is specifically enforceable against the holder of an ownership interest that is the subject of the agreement, and any successor or transferee of the holder, if:

(1) the voting agreement is noted conspicuously on the certificate representing the ownership interests; or

²⁴⁵ *Id.*

(2) a notation of the voting agreement is contained in a notice sent by or on behalf of the domestic entity in accordance with Section 3.205, if the ownership interest is not represented by a certificate.

(d) Except as provided by Subsection (e), a voting agreement entered into under Subsection (a) is specifically enforceable against any person, other than a transferee for value, after the time the person acquires actual knowledge of the existence of the agreement.

(e) An otherwise enforceable voting agreement entered into under Subsection (a) is not enforceable against a transferee for value without actual knowledge of the existence of the agreement at the time of the transfer, or any subsequent transferee, without regard to value, if the voting agreement is not noted as required by Subsection (c).

(f) Section 6.251 does not apply to a voting agreement entered into under Subsection (a).²⁴⁶

The substance of the statute has not changed much. The language was broadened to apply to all business entities. Subsection (a) adds that the voting agreement is not a governing document. This is of course true: it is at most a contract the entity enters.

The key language of the statute, however, remains the same. What appeared in sentences [c] and [d] in the prior version now appears in subsections (c), (d), and (e). While subsections (c) and (e) track the effect of endorsement, as sentences [c] and [d] did in the prior statute, subsection (d) in the current provision clearly separates the ultimate legal statement from the other provisions about endorsements, more clearly declares its generality, and specifies its result more absolutely:

Except as provided in Subsection (e), a voting agreement entered into under Subsection (a) is specifically enforceable against any person, other than a transferee for value, after

²⁴⁶TEX. BUS. ORGS. CODE ANN. § 6.252 (West 2012). The section was amended in 2003, as part of the TBOC, and again in 2007. Act of May 23, 2007, 80th Leg., R.S. ch. 688, § 39, 2007 Tex. Gen. Laws 1267, 1277–78.

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the time the person acquires actual knowledge of the existence of the agreement.²⁴⁷

This section is now the heart of the voting agreement law. There is nothing here about endorsements. This is merely a statement of liability. Transferees for value are separated out as an exception by commas because the subsection is not about them; it is about the more general “any person” who is covered by a voting agreement. As with the prior provision, subsection (d) says nothing about the agreement being deposited and examined; the subsection’s statement by its plain language is true without regard to whether the corporation has the agreement and what the corporation does with it. It says, plainly, “a voting agreement entered into under Subsection (a) is specifically enforceable against any person . . . after the time the person acquires actual knowledge of the existence of the agreement.”²⁴⁸

As with the 1989 statute, the current iteration retains the potentially misunderstood language of subsection (c). That language has exactly the same problems it did under the prior statute. It promises specific enforcement against the same “holder of an ownership interest that is the subject of the agreement” *if* the endorsement on the shares exists or was sent by the corporation.²⁴⁹ But this language should not be taken to be the exclusive path to liability for the reasons noted above, which still apply. The language stayed substantially the same as prior law, so no change was intended.²⁵⁰ Second, (d) and (c) impose liability when there is *knowledge* and *constructive knowledge*, respectively, as before, and there is nothing inconsistent about liability for either or for both. Of the two, knowledge is most central, and constructive knowledge (should have known) is a second-best ground for liability. Subsection (c) does not forbid liability without endorsement; it only prescribes liability when it exists, and subsection (d)’s language (“any person”) is broader. For policy reasons, (d) should be applied literally. It remains the core of the section. Keeping it at the core is most consistent with freedom of contract.

The only major change in the relatively new TBOC provision is that now each subsection explicitly applies only to “a voting agreement entered

²⁴⁷ *Id.* § 6.252(d).

²⁴⁸ *Id.*

²⁴⁹ *Id.* § 6.252(c).

²⁵⁰ The committee that drafted the TBOC also commented that its provisions “are materially the same as those found in the TBCA.” *Id.* § 6.252 revisor’s note.

into under Subsection (a).”²⁵¹ Subsection (a) requires that the agreement be in writing. So, if a shareholder wants the benefits of specific enforcement under subsection (d), the agreement must be in writing. This was not obvious under the 1989 version, but a writing is now obviously required to gain the statute’s benefits. But that is the only new requirement of subsection (d) and of the statute as a whole.

Aside from this, the statute retains the permissive language in subsection (a): “may enter.” There is no reason in the statutory language to believe that the statute preempts the common law of contract. While the statute creates a clear path to specific enforcement, the statute does not say that another agreement might not generate other contractual liabilities. The statute is quite broad. It purports to grant permission for written agreements between “owners . . . or any numbers owners . . . and the . . . entity itself.”²⁵² But even this broad statute does not apply to voting agreements with non-owners, including with the entity itself. These agreements are left to the common law. That owners and non-owners sometimes form contracts on the manner in which ownership interests will be voted²⁵³ is one more reason to hold that the common law governing voting agreements still governs when the statute does not. One could hardly suppose that a statute not covering such agreements would, by implication, leave them ungoverned.

Incidentally, this most recent iteration of the code supports this Article’s analysis of what was called by *McMullen* a notice requirement. The analysis *supra* of *McMullen* reasoned that the statute was not about notice for its own sake.²⁵⁴ It was about prejudice. Now the language of the current

²⁵¹ *Id.* § 6.252(c).

²⁵² *Id.* § 6.252(a).

²⁵³ So, for instance, a sale after a record date of all of a person’s stock to a person who did not own any prior to the sale might involve an agreement that the seller retain the right to vote. Delaware has suggested such a vote might not be legal because of the misalignment between “the interests of voters and the interests of the residual corporate risk bearers.” *Commonwealth Assocs. v. Providence Health Care, Inc.*, 641 A.2d 155, 157–58 (Del. Ch. 1993) (“These considerations lead me to doubt whether, in a post record-date sale of corporate stock, a negotiated provision in which a beneficial owner/seller specifically retained the “dangling” right to vote as of the record date, would be a legal, valid and enforceable provision, unless the seller maintained an interest sufficient to support the granting of an irrevocable proxy with respect to the shares.”); *see also* *Hewlett v. Hewlett-Packard Co.*, No. CIV.A. 19513–NC, 2002 WL 818091, at *12, *15 (Del. Ch. Apr. 30, 2002) (ruling on allegations that HP management had improperly coerced a shareholder into voting for the HP-Compaq merger, and exonerating HP’s management).

²⁵⁴ *See supra* notes 152–156, 187–191 and accompanying text.

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version proves the point. The parties are always bound no matter who else knew about the voting agreement. The current subsection about transferees does not detract from this:

An otherwise enforceable voting agreement entered into under Subsection (a) is not enforceable against a transferee for value without actual knowledge of the existence of the agreement at the time of the transfer, or any subsequent transferee, without regard to value, if the voting agreement is not noted as required by Subsection (c).²⁵⁵

The only exception to (d) is for transferees who did not know, but not every transferee. Only transferees for value take free of the agreement if it is not endorsed on the shares. For them, prejudice can be presumed: they thought they were buying voting power along with the other ownership rights. Their transferees piggyback on that prejudice, and so should also take free. The notice requirement is for these investors. But all other transferees are bound once they know, regardless of notations and endorsements. They are free from this prejudice. Thus, the current statute limits the notice and knowledge ideas to those who really need it. This and the otherwise absolute statement in subsection (d) entirely undercut the *McMullen* case's reasoning about a notice requirement.²⁵⁶ The statute has no purely formal notice requirement.

C. *Residual Policy Concerns*

1. Harmony with Other Law

a. *Texas Case Law.*

This Article's view of the state of the law harmonizes all prior Texas law on voting agreements except the erroneous *Roberts*.²⁵⁷ The *McMullen* case's reasoning should be rejected, but a court today might well reach the same result on the ground that the agreement there involved a transfer of management right away from the board to a shareholder.²⁵⁸ The

²⁵⁵TEX. BUS. ORGS. CODE ANN. § 6.252(e).

²⁵⁶See *supra* notes 218–24 and accompanying text.

²⁵⁷See generally *Roberts v. Whitson*, 188 S.W.2d 875 (Tex. Civ. App.—Dallas 1945, writ ref'd w.o.m.); see *supra* Part II.B.

²⁵⁸See *supra* notes 226–27 and accompanying text.

management problem aside, a *McMullen* court now might resolve the case by denying specific enforcement because McMullen's promise was oral and therefore the statute does not apply. In that case, assuming the Sanders-McMullen agreement did not offend another statute (forgetting the management problem for the moment), a separate remedy might apply. Perhaps McMullen could be subject to a negative injunction against voting his shares at all unless he votes for Sanders. That probably would have given McMullen (the controlling shareholder) all the incentive he needed to keep his contract! The other promises McMullen made (such as including Sanders in the control group for purposes of a sale) could have been specifically enforced. Besides these, the statute as it now stands is consistent with prior law. *Withers*, *Burnett*, *Irwin*, and *Haves* can more or less retain persuasive precedential value.²⁵⁹

b. Other States' Statutes.

Understood as outlined in this Part III, Texas law is in harmony with the law of other states across the nation. Notwithstanding the Texas statute purports to add burdens to voting agreements—deposit and examination, and the appearance of a duty to endorse in subsection (c), subsection (d) of the statute resolves absolutely that a written voting agreement is the only necessity under the statute for specific enforcement.²⁶⁰ This is the position of the Model Act adopted in nearly every other state.²⁶¹ The case law of other states conforms generally to those statutes. This understanding of the Texas voting agreement statute thus renders Texas law consistent with hornbook law on the subject.²⁶² The widespread agreement on the hornbook rule testifies to its usefulness, its reasonableness, and its congruity with the rest of corporation law and with general expectations of investors and business people. If Texas wishes to attract investors to Texas businesses, its laws cannot undercut those reasonable expectations much, and should not without very good reason.

It is true that Texans often take pride in going it alone, but this Article's view of the statute confirms that Texans retain freedom of contract with respect to shareholder agreements (and their property right to vote) and that they are able to bind themselves to exercise their rights in potentially

²⁵⁹ See *supra* Parts II.A., D.–F.

²⁶⁰ See *supra* Part III.B.

²⁶¹ See *supra* notes 28–32 and accompanying text.

²⁶² See *supra* note 95 and accompanying text.

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beneficial ways without satisfying costly and unnecessary regulation. The existence of a residual common law supporting voting agreements also supports that freedom. Asserting rights under the common law apart from the safe harbor of the statute may be more costly, but it is a reasonable position and in the end reaches the same result.

c. Voting Agreement Policy.

The remarkably coherent view taken nationally and by this Article's view of the Texas statute maximizes the planning capability of business people. When they act reasonably by obtaining legal help, they can be sure to create a shareholder voting agreement that is enforceable under the statute. When they act reasonably even without obtaining legal help, then their shareholder voting agreement will still be enforceable as long as they have agreed to vote as they could have done without the agreement and so long as no other shareholder is unfairly prejudiced. A shareholder with knowledge of the agreement is probably not prejudiced by it, the statute suggests. And, as *Irwin* showed, a shareholder who has less influence because parties to such an agreement vote according to its terms is also not prejudiced.²⁶³ Such a shareholder has suffered no injury other than one he could have suffered even had the agreement not existed.

That the voting agreement is at its root governed by contract law is an assumption most courts make. In *Ritchie v. Rupe*,²⁶⁴ the Texas Supreme Court described how shareholders in close corporations protect themselves by contract:

Sometimes, they enter into shareholder agreements to define things like their respective management and voting powers, the apportionment of losses and profits, the payment of dividends, and their rights to buy or sell their shares from or to each other, the corporation, or an outside party. Occasionally, things don't work out as planned: shareholders die, businesses struggle, relationships change, and disputes arise. When, as in this case, there is no shareholders' agreement, minority shareholders who lack

²⁶³ See *supra* notes 149–156 and accompanying text.

²⁶⁴ 443 S.W.3d 856 (Tex. 2014).

both contractual rights and voting power may have no control over how those disputes are resolved.²⁶⁵

Affirming the importance of contractual power to resolve these disputes in advance, the *Ritchie* decision encourages shareholders to engage in just the sort of agreement this Article addresses.²⁶⁶

d. Voting Trusts Distinguished.

The Texas voting agreement statute shows a similarity with Texas's voting trust statute. Given that Texas was one of the first states to write a voting agreement statute, and no model act existed at the time, it is possible that its voting trust statute was the model for its voting agreement statute. Texas's voting trust statute contains a provision requiring a copy of a voting trust to be deposited with the entity and be subject to shareholder examination.²⁶⁷ The language of the deposit and examination sections of the two laws is remarkably similar.²⁶⁸ There is one major difference: the voting trust must be examinable by holders of the beneficial interest in the trust.²⁶⁹ These might be the original trustors or their successors in interest, but the trustees legally own the shares, so these are not "owners" of shares and need a separate examination provision.

Notwithstanding the similarity of the two statutes' language, their policies are completely different. The corporation and other shareholders have a need to know about a voting trust for reasons that do not apply to a voting agreement. "Owners" vote, including shareholders of corporations and members of limited liability companies.²⁷⁰ Business entities must keep a record of their owners,²⁷¹ and the entity must rely on these records in

²⁶⁵ *Id.* at 878–79, quoted again in the later case of *Sneed v. Webre*, 465 S.W.3d 169, 177–78 (Tex. 2015).

²⁶⁶ *Ritchie*, 443 S.W.3d at 879 (reasoning that "corporations and the relationships among those who participate in them . . . are largely matters governed by statute and contract," then denying a statutory remedy); *id.* at 881 ("Of course, shareholders may also prevent and resolve common disputes by entering into a shareholders' agreement to govern their respective rights and obligations . . . [A]lthough [these litigants] did not enter into a shareholders' agreement, they certainly could have done so . . ."); *id.* at 882 (noting breach of contract as a claim often brought between shareholders in close corporations).

²⁶⁷ TEX. BUS. ORGS. CODE ANN. § 6.251 (West 2012).

²⁶⁸ Compare *id.* § 6.251(c), with *id.* § 6.252(c).

²⁶⁹ *Id.* § 6.251(c)(2).

²⁷⁰ *Id.* § 1.002(63) (West Supp. 2015).

²⁷¹ *Id.* § 3.151(a)(3) (West 2012), § 21.173 (West 2012).

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determining who may vote and also who may receive distributions, notices, and so on.²⁷² Every business entity involving owners would grind to a halt if the business could not rely on its records to know the identity of its owners. A voting trust alters the legal ownership of the interests subject to the trust.²⁷³ So, for voting purposes, a voting trust trustee becomes the owner or member.²⁷⁴ (For other purposes, the voting trust beneficiary retains the rights of an owner.²⁷⁵) The entity must know that this has occurred in order for it to know who its owners are and who can vote, so some kind of deposit is required. Also, for practical reasons, the corporation cannot recognize a vote by a person claiming to be a voting trustee without evidence of the document. So the “deposit” part of the voting trust statute is self-executing, and no need exists for any remedy for failure to deposit.

The mere voting agreement presents an entirely different situation. There is no similar need to deposit or examine. A voting agreement does not alter ownership of shares. In a voting agreement, a shareholder agrees to vote in a certain way. The shareholder casts the votes. The owner remains the same. There is no need for anything in the records of the corporation to change. So subsection (d) of TBOC section 6.252 reaches exactly the right conclusion when it declines to condition enforceability of a voting agreement on filing the agreement with the corporation. It is possible for a voting agreement to create a proxy as an enforcement mechanism, but the creation of proxies is governed by statutes that address proxies. Obviously, the corporation would need to know if a proxy was to vote, but the proxy rules provide notice to the corporation in that case.²⁷⁶ There simply is not a

²⁷² See *id.* § 1.002(53) (West Supp. 2015), §§ 101.001(1), 21.201(a) (West 2012).

²⁷³ *Id.* § 6.251(b) (West 2012) (“An ownership or membership interest that is the subject of a voting trust agreement . . . shall be transferred to the trustee named in the agreement for purposes of the agreement.”).

²⁷⁴ *Id.* § 6.251(a).

²⁷⁵ See *id.* §§ 21.218 (inspection rights), 21.551(2) (right to sue derivatively).

²⁷⁶ See *id.* § 21.367.

(a) A shareholder may vote in person or by proxy executed in writing by the shareholder. (b) A telegram, telex, cablegram, or other form of electronic transmission, including telephonic transmission, by the shareholder, or a photographic, photostatic, facsimile, or similar reproduction of a writing executed by the shareholder, is considered an execution in writing for purposes of this section. Any electronic transmission must contain or be accompanied by information from which it can be determined that the transmission was authorized by the shareholder.

Id.

substantial reason why a voting agreement must be deposited with the corporation and be on display, which is why every other state has rejected such a burden. Of course other shareholders may want to know that such an agreement exists; perhaps that (rather than blind following of the trust statute) is the genesis of the suggestion that it be provided. But I cannot think of a reason why the other shareholders should have a right to know. If their rights are not affected, it really is none of their business. So it is appropriate that the voting agreement statute omits a remedy for failure to inform the entity of the agreement so that it can be placed on display.

I can imagine why corporate actors would want to keep subsection (b) in the code. They would like plotters to inform current corporate management of their plans. It's a way for controllers to put an early lid on anyone who would try to take control, or at least to argue afterward that the upstarts have done something untoward (like agree to do what they have every right to do). I cannot think why preserving this argument for those in control is a good idea. It seems to put a thumb on the scales in favor of current management. Why should the law do that?

Mere symmetry with voting trusts is no reason at all to have similar requirements. In fact, some such thought may be why Texas has the provision. Delaware decided in *Abercrombie v. Davies*²⁷⁷ in 1957 that a kind of vote pooling agreement which provided that pooled shares would be placed in escrow, proxies would vote the pooled shares, and a certain percentage of the proxies could agree to remove the pooled shares from escrow and place them in a voting trust—that this arrangement was in effect a voting trust and should be governed by the voting trust statute.²⁷⁸ In the process, Delaware declared that voting trusts were illegal without statutory authorization, implying that compliance with every part of the statute was required for deals deemed a voting trust.²⁷⁹ The Delaware decision invoked critical commentary.²⁸⁰ It may well be that Texans in 1961, reacting to *Abercrombie*, decided that imposing on voting agreements the same formalities as were required of voting trusts would solve the problem—by

²⁷⁷ *Abercrombie v. Davies*, 130 A.2d 338 (Del. 1957).

²⁷⁸ *Id.* at 341–45.

²⁷⁹ *Id.* at 344.

²⁸⁰ *E.g.*, Recent Development, *Close Corporations: Voting Trust Legislation and Resolution of Deadlocks*, 67 COLUM. L. REV. 590 (1967); Gary D. Berger, *The Voting Trust: California Erects a Barrier to a Rational Law of Corporate Control*, 18 STAN. L. REV. 1210, 1211 n.8 (1966); Comment, *Voting Agreement or Voting Trust? A Quandary for Corporate Shareholders*, 10 STAN. L. REV. 565, 567–68 (1958).

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obviating the need to make a distinction between the two.²⁸¹ In 1961, the Texas statute did in fact require the same formalities of voting trusts (an older provision passed in 1955) that the then new voting agreement statute purported to require.²⁸² But voting trusts are not the same kind of legal instrument at all, as discussed above. Voting trusts should be disclosed to the entity and other shareholders. They confer on a trustee a right to vote shares, and the entity must know who will vote. Mere voting agreements do no such thing, and there is no similar need.

2. Prejudice to Other Shareholders

Notice finally that this statute, like its predecessor but unlike the common law, makes no mention of prejudice to other shareholders (except for the carve-out for transferees of value, as discussed²⁸³): a finding of no fraud or prejudice is not required. Why? Probably the omission of this concern is proper, because the source of prejudice (other than to a transferee for value who could not have known) is the breach of an independent legal duty not part of the voting agreement. So, for instance, a separate statute specifies that a corporation will be managed by the board of directors.²⁸⁴ A voting agreement that purported to directly manage would violate this provision (unless, of course, the agreement was unanimous among shareholders, in which case a separate statute grants authority²⁸⁵). Vote-buying is wrong because it involves company management in a fiduciary breach,²⁸⁶ or involves some fraud or attempt to disenfranchise other

²⁸¹Miller and Ragazzo describe at least part of the 1961 amendment as a reaction to *Abercrombie*. See 13 MILLER & RAGAZZO, *supra* note 1, § 45:2 n.12 (“This provision [§ 6.252(f)] is designed to reverse the result in a leading Delaware case, *Abercrombie* . . .”). The decision (along with *Whitson*) was criticized in a note in the Texas Law Review in 1958, and this note recommends such a provision. Reynolds, *supra* note 100, at 511 (“In the event the Legislature chooses to sanction directly the voting agreement in Texas, it would seem desirable to include a similar provision for the benefit of shareholders not parties to the agreement, so that they too may know by whom and in what manner the corporation is controlled.”). Reynolds notes that the state bar committee proposing legislation considered a voting agreement provision even before *Abercrombie*, but withdrew it. *Id.* at 511 n.16.

²⁸²Act of May 29, 1955, 54th Leg., R.S., ch. 64, art. 2.30, 1955 Tex. Gen. Laws 239, 256 (codified at TEX. BUS. CORP. ACT art. 2.30 (expired Jan. 1, 2010)).

²⁸³See *supra* notes 254–255 and accompanying text.

²⁸⁴TEX. BUS. ORGS. CODE ANN. § 21.401 (West Supp. 2015).

²⁸⁵See *id.* § 21.101 (West Supp. 2015), § 21.714 (West 2012).

²⁸⁶*Macht v. Merchs. Mortg. & Credit Co.*, 194 A. 19, 22 (Del. Ch. 1937); *Hewlett v. Hewlett-Packard Co.*, No. CIV.A. 19513–NC, 2002 WL 818091, at *12, *15 (Del. Ch. Apr. 30, 2002)

shareholders, thus impinging on their rights,²⁸⁷ or separates economic and voting interests of shares, thus undermining the purpose of shareholder voting.²⁸⁸ Plenty of independently significant laws support those results²⁸⁹ without a separate “prejudice” provision of law governing voting agreements generally. And of course a voting agreement that involved an independent breach of fiduciary duty would be unenforceable for that reason.

IV. AMENDMENT

In the end, I thus have no quarrel with the statute as it stands, provided it is interpreted according to its clear language, as this Article outlines. However, the statute’s language, while clear enough to govern, is hardly a model of clarity. If its meaning becomes clear only after an examination of the prior case law and statutes and an in-depth examination of its logic and language, perhaps an amendment would be helpful. My studies of other states’ code provisions suggest that the Texas statute could be re-stated to helpful effect.

It appears the Texas statute performs seven functions:

- 1) Permits owners to enter into a written voting agreement as a condition of specific enforcement (subsection (a));
- 2) Declares that such a voting agreement is not a governing document (subsection (a));
- 3) Holds that the voting agreement is specifically enforceable against the parties to the agreement (subsection (d));
- 4) Holds that the voting agreement is specifically enforceable against all transferees and successors if the voting agreement is endorsed on the shares or, for

(ruling on allegations that HP management had improperly coerced a shareholder into voting for the HP-Compaq merger, and exonerating HP’s management); *Brady v. Bean*, 221 Ill. App. 279, 283–84 (1921).

²⁸⁷ *Schreiber v. Carney*, 447 A.2d 17, 24–26 (Del. Ch. 1982).

²⁸⁸ *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 388 (Del. 2010); *Kurz v. Holbrook*, 989 A.2d 140, 178–81 (Del. Ch. 2010), *aff’d in part, rev’d in part sub nom.*, *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377 (Del. 2010).

²⁸⁹ See in particular the discussion in *Holbrook*, 989 A.2d at 179–80.

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uncertificated shares, the subject of a notice sent by the corporation to the transferee or successor (subsection (c)),

5) Holds that the voting agreement is specifically enforceable against any transferee or successor from the time the transferee or successor knows of the existence of the agreement binding the shares (presumably the agreement will not be enforceable against anyone contrary to its terms?), except a transferee for value (subsection (d)).

6) Declares that the voting agreement is not a voting trust.

7) Suggests that a copy of the voting agreement be deposited with the corporation and be examinable.

Some things the statute does not do. Most significantly, the Texas statute does not explicitly provide for specific enforcement when the transferee for value actually knows that the voting agreement binds the shares but the shares lack an endorsement (or notice if uncertificated). Under subsection (d), the knowledge section does not apply to transferees for value at all. Subsection (e) makes quite clear that the statute is serious about the exception for transferees for value in subsection (d), and includes subsequent transferees, but it appears to perform no other function. The sections work well for the transferee who gained knowledge after paying for the shares, but what if the knowledge came before? Did the statute mean to except transferees with actual knowledge from liability? It seems an odd thing to do if transferees are to be bound at all (which is not a foregone conclusion, as binding transferees is to bind outside the bounds of contract; only a property concept of shares could allow a contract liability to come to “run with the shares”).²⁹⁰ For example, the transferee may have signed a stock purchase agreement with the voting agreement incorporated and attached, and she would not be bound to specifically perform this? Really? Why not?

²⁹⁰So, the Minnesota legislature notes in the comments to its voting agreement statute:

The agreement is valid and binding upon all those who sign it, even though less than all or even less than a majority of, shareholders are parties to the agreement. Successors to or transferees of the shares of parties are not bound by the agreement unless they become parties to the agreement. This is consistent with the notion that the voting agreement is based on individual contract and not on status as a shareholder.

MINN. STAT. § 302A.455 reporter’s notes, gen. cmt. (1981).

Along the same lines, the Texas statute appears to impose liability on transferees and successors whether the voting agreement by its terms binds them or not. This is odd. The voting agreement is a contract. Shareholders cannot by agreeing among themselves change the terms of their contract with the corporation, so they cannot change the property rights in the shares themselves. However, they can bind their transferees and successors by contract, but the contract itself should so provide. Nowhere is that required in the Texas provision, and it should be.

Having established what the statute does and does not do, one could ask still why it needs to be re-written. Here are my reasons. The statute reads like a permission but leaves unclear whether it preempts the field—does the common law survive or not? The case law suggests that the common law survives. The deposit and examine requirement is toothless, unclear, and not justified as a matter of policy; it should be removed. The statute should say clearly (and without needing a 64-page Article to explain) that the parties to a written voting agreement are bound to perform it specifically; what the statute says now is clear but only to those who dig very deep. The transferee provisions should be cut off from the statement about the parties and handled separately, so they confuse no one. The common law that continues to allow binding voting contracts outside of the statute should be preserved, or not, but at least the matter should be made clear. And what the statute leaves out should be included: a transferee for value with actual knowledge at the time of the transfer should be bound specifically to perform an agreement that purports to bind her. Liability of transferees and successors should follow only when the contract provides it.

How to do these things? I would suggest beginning with the Model Act. This is, after all, where the Texas statute ends up, substantively. The Model Act is clear and concise. It could be modified to fit Texas nomenclature. After that, other states have successful statutes from which provisions could be borrowed, also modified slightly. In what follows, I have borrowed provisions from the statutes of Delaware, Florida, Kansas, Rhode Island, and Tennessee. The following statute reaches all the goals I set forth. Of course, no one will enact it as written here, because statutes are drafted by committees and passed by legislatures. But this is a good start, and I hope the statute will in the end look something like this. It is better, and it illustrates, in conclusion, the arguments made in this Article. Thank you for reading.

- (a) Two or more owners or one or more owners and the domestic entity may provide for the manner in which they

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will vote their ownership interests by signing a written agreement for that purpose. A voting agreement created under this section is not subject to the provisions of section ____ [as a voting trust].

(b) A voting agreement created under this section is specifically enforceable against the parties thereto.

(c) A transferee or successor of ownership interests subject to the terms of a voting agreement authorized by subsection (a) shall be bound by such agreement and such agreement shall be specifically enforceable against such transferee or successor if the transferee or successor (1) takes such interests with notice of such agreement or, (2) except for a transferee for value or a successor thereof, has actual knowledge of such agreement, whether at the time of the transfer or later, from the time the transferee or successor has such actual knowledge. A transferee or successor shall be deemed to have notice of any such agreement if:

(1) the existence thereof is noted conspicuously on the certificate representing the ownership interests;

(2) a notation of the voting agreement is contained in a notice sent by or on behalf of the domestic entity in accordance with Section 3.205, if the ownership interest is not represented by a certificate; or

(3) the transferee or successor has actual knowledge of such agreement at the time of the transfer;

(d) This section is permissive and should not be interpreted to invalidate any voting or other agreement among shareholders.

(e) Nothing in this section shall impair the right of the domestic entity to treat owners of record as entitled to vote the ownership interest standing in their names.