Restricting Shareholder Voting Rights Under the Utah Revised Business Corporation Act

Erik G. Davis
Restricting Shareholder Voting Rights Under the Utah Revised Business Corporation Act

I. INTRODUCTION: THE BACKGROUND OF THE UTAH REVISED BUSINESS CORPORATION ACT

In 1992 the Utah Legislature repealed the Utah Business Corporation Act and enacted in its place the Utah Revised Business Corporation Act ("Utah Revised Act"). The Utah Revised Act was drafted by the Utah Business Corporation Act Revision Committee ("Revision Committee"), established through the Business Law Section of the Utah State Bar. The Revision Committee based the Utah Revised Act on the Revised Model Business Corporation Act ("Model Act"), which was adopted in 1984 by the Committee on Corporate Laws of the American Bar Association's Business Law Section. Utah’s Revised Act is essentially an adoption of the ABA’s Model Act. But the Revision Committee modified various provisions of the Model Act to respond to local needs and concerns. One of these changes involves restrictions on shareholder voting.

The Utah Revised Act, like the Model Act, permits corporations to create shares designated as nonvoting, but under both the Model Act and the Utah Revised Act even nonvoting shares have a right to vote as separate “voting groups” on certain kinds of amendments. However, Utah’s Revision Committee included a provision in subsection 1004(5) of the Utah Revised Act that was not part of the ABA’s Model Act and that does not appear in the corporations code of any

2. UTAH BUSINESS CORPORATION ACT REVISION COMMITTEE, COMMENTARY TO UTAH REVISED BUSINESS CORPORATION ACT 1 (1992) [hereinafter COMMENTARY TO REVISED ACT].
3. Id.
4. Id.
5. Id.
6. UTAH CODE ANN. § 16-10a-601(3).
7. Id. § 16-10a-1004(1); REVISED MODEL BUSINESS CORP. ACT § 10.04(a) (Comm. on Corporate Laws of the Section of Corp., Banking and Business Law of the Am. Bar Ass’n 1984).
other state. On its face, this provision seems to make it possible for corporations to create shares with no voting rights of any kind—not even the limited right to form separate voting groups. Unfortunately, the language of the statute is ambiguous, and the commentary published with the statute, which was written for the Model Act and not modified to account for changes in the Utah Revised Act, only adds to the ambiguity. In fact, the commentary leaves readers with the impression that the legislature intended just the opposite of what the statute says. Nevertheless, a close examination of the statute indicates that Utah corporations can in fact create shares without any voting rights at all, provided that the shareholders to whom the shares are issued have notice of the restrictions associated with their shares or give their approval for such restrictions to be imposed.

This Comment argues that the drafters of Utah’s Revised Act have attempted to create a means by which corporations may, subject to the prior notice or approval of the affected class, restrict shareholders from voting in even the limited capacity of voting groups. Unfortunately, the statute as drafted creates a level of ambiguity that may prevent corporations from taking advantage of this innovative provision.

II. SHAREHOLDER VOTING RIGHTS UNDER THE UTAH REVISED ACT AND THE MODEL ACT

Under Utah’s Revised Act, as under the ABA’s Model Act, shareholders are classified within one or more classes of shares, which classes may be further subdivided into various “series.” These classes and series are distinguished by the “preferences, limitations, and relative rights”—including voting rights—accorded to each in the company’s articles of incorporation. The Utah Revised Act states that “[t]he articles of incorporation may authorize one or more classes of shares and one or more series of shares within any class that: (a) have special, conditional, or limited voting rights, or no right to vote,

9. See id.
10. See discussion infra part III.A.1.
11. See COMMENTARY TO REVISED ACT, supra note 2, at 106-07.
12. Utah Code Ann. § 16-10a-601(1), (3) (Supp. 1994); see also REVISED MODEL BUSINESS CORPORATION ACT, supra note 7, § 6.01(a).
SHAREHOLDER VOTING RIGHTS

except to the extent prohibited by this chapter." Thus articles of incorporation may designate certain shares as nonvoting, but this designation is subject to certain limitations.

The official commentaries published with both the Model Act and the Utah Revised Act state that "[t]his 'except' clause refers to the provisions in the [Utah] Revised Act that permit shares that are designated to be nonvoting to vote as separate voting groups on amendments to articles of incorporation and other organic changes in the corporation that directly affect that class (see sections 726 and 1004)." Unfortunately, sections 726 and 1004 of the Utah Revised Act are ambiguous about the extent to which shareholder voting rights may be limited.

A. Section 1004: The Voting Group Entitlement

Section 726 simply explains the mechanics of voting by "voting groups." The substantive provisions of the voting group entitlement are contained in section 1004, which sets forth the nine kinds of amendments upon which shares designated as nonvoting may nevertheless vote as a separate voting group. Section 1004 is straightforward, and makes sense

13. UTAH CODE ANN. § 16-10a-601(3).
14. COMMENTARY TO REVISED ACT, supra note 2, at 28; REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 6.01 cmt. 3.b, at 89.
15. See UTAH CODE ANN. § 16-10a-726; COMMENTARY TO REVISED ACT, supra note 2, at 61-63. "Section 726(2) basically requires that if more than one voting group is entitled to vote on a matter, favorable action on a matter is taken only when it is voted upon favorably by each voting group, counted separately." Id. at 61. A class or series of shareholders voting as a separate voting group is thus able to block an amendment to the articles of incorporation even when a majority of the shareholders favors it.
16. UTAH CODE ANN. § 16-10a-1004(1). The text of this subsection reads as follows:

(1) Except as otherwise provided in Subsection (5), the holders of the outstanding shares of a class are entitled to vote as a separate voting group, if shareholder voting is otherwise required by this chapter, on a proposed amendment if the amendment would:

(a) increase or decrease the aggregate number of authorized shares of the class;
(b) effect an exchange or reclassification of all or part of the shares of the class into shares of another class;
(c) effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;
(d) change the designation, rights, preferences, or limitations of all or part of the shares of the class;
from a policy standpoint since the nine situations in which the section creates a separate voting group all represent potential amendments that would directly and adversely affect the given class. 17

As the Official Comment to section 1004 explains: "The right to vote as a separate voting group provides a major protection for classes or series of shares with preferential rights or classes or series of limited or nonvoting shares against amendments that are especially burdensome to that class." 18 It would be manifestly unfair for the board of directors or other unaffected shareholders to unilaterally amend the articles of incorporation in a way that would seriously depreciate the value of the nonvoting shares. Section 1004 gives nonvoting shareholders the power, by forming a separate voting group, to prevent the other shareholders from adopting such amendments.

These general provisions, common to both the Model Act and the Utah Revised Act, may be summarized by saying that while corporations may create classes and series of shares with no voting rights under section 601, section 1004 guarantees that even these "nonvoting" shareholders have the limited right to form voting groups to block certain kinds of amendments that would directly and adversely affect the value of their shares. 19 It is clear that under Utah law, as under the Model Act, shareholder voting rights may at least be limited to the

(e) change the shares of all or part of the class into a different number of shares of the same class;
(f) create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;
(g) increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;
(h) limit or deny an existing preemptive right of all or part of the share of the class; or
(i) cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class.

UTAH CODE ANN. § 16-10a-1004(1)(a)-(i); see also REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 6.01(a)(1)-(9).
17. See UTAH CODE ANN. § 16-10a-1004(1)(a)-(i).
18. COMMENTARY TO REVISED ACT, supra note 2, at 107; REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.04 cmt. at 275.
19. Compare UTAH CODE ANN. § 16-10a-1004(1)(a)-(i) with REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.04(a)(1)-(9).
right to vote as a separate voting group under subsection 1004(1), but it is not as easy to determine whether or to what extent Utah law permits further limitations of shareholder voting rights.

B. Subsection 1004(5): An Exception to the Voting Group Entitlement?

Section 1004 of the Utah Code differs in important ways from the analogous section of the Model Act promulgated by the ABA. In subsection 1004(5) the drafters of Utah's Revised Act appear to have created an exception to the voting group rights that would evidently permit corporations to restrict shareholder voting rights even more completely than under the Model Act. The changes made to the Utah Revised Act are incomplete, however, and corporations are left uncertain as to whether the ostensible exception to the voting group right actually exists.

Section 1004 of Utah's Revised Act, unlike the corresponding section of the Model Act, contains language suggesting that the voting group entitlement is only a qualified right: voting group rights are guaranteed "[e]xcept as otherwise provided in Subsection (5)." Subsection (5) itself is unique to the Utah Code and states:

Notwithstanding the rights granted by this section to holders of the outstanding shares of a class or series to vote as a separate voting group, the rights may be otherwise restricted if so provided in the original articles of incorporation, in any amendment thereto which created the class or series or which was adopted prior to the issuance of any shares of the class or series, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of the class or series.

This subsection appears directly to contradict subsection 1004(4), which states that "a class or series of shares is entitled to the voting rights granted by this section although the articles of incorporation provide that the shares are nonvoting

20. Compare UTAH CODE ANN. § 16-10a-1004(5) with REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.04 (which has no subsection analogous to the Utah Revised Act's § 1004(5)).
21. UTAH CODE ANN. § 16-10a-1004(1), (4).
22. Id. § 16-10a-1004(5).
However, subsections (1) and (4), which establish the voting group right, describe subsection (5) as an exception to that right; both subsections begin with the caveat: "Except as otherwise provided in Subsection (5) . . . ." Reading these "except" clauses together with the language of subsection (5), Utah's Revised Act appears to say that shareholders may vote on certain types of amendments even if the articles of incorporation designate the shares as nonvoting, except when the articles of incorporation say that they can't. This is somewhat baffling.

III. POSSIBLE INTERPRETATIONS OF UTAH'S SUBSECTION 1004(5)

While this conflict between subsections 1004(4) and 1004(5) is potentially confusing, there are really only two possible readings of the section. Either the articles of incorporation can restrict shareholders from voting on the nine kinds of amendments set forth in 1004(1) or they cannot. To put it another way, subsection 1004(5) either creates an exception to the right to vote as a separate voting group or it leaves that right intact and unconditionally guaranteed.

On the one hand, the language in subsection 1004(5) which states that "[n]otwithstanding the rights granted by this section . . . to vote as a separate voting group, [shareholder voting] rights may be otherwise restricted if so provided in the original articles of incorporation," suggests that, while group voting rights are guaranteed under the nine circumstances listed in subsection (1), the voting rights of shareholders may be restricted in any other way. This reading would favor the persistence of an unconditional right, under the specified conditions, to vote in voting groups.

On the other hand, subsection (5) could be treated as an explicit exception to the voting group entitlement set forth in subsection (1). This interpretation is perhaps less evident from the language on the face of the subsection, but reading the entire statute according to the principles of statutory construction established in Utah case law suggests the existence of a

23. Id. § 16-10a-1004(4); see also REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.04(a).
24. Compare UTAH CODE ANN. § 16-10a-1004(1), (4) with REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.04(a), (d).
25. UTAH CODE ANN. § 16-10a-1004(5).
legislative intent to permit companies, subject to certain pro-
cedural restrictions and through their articles of incorporation,
to create classes or series of shares with no rights to vote on
any matters, not even on the nine types of critical amendments
set forth in 1004(1).

A. Statutory Construction: Legislative Intent

The first principle of statutory interpretation is to some-
how divine the legislature's intent in enacting the law. The
Utah Supreme Court has stated:

This court's primary responsibility in construing legislative
enactments is to give effect to the legislature's underlying
intent. "In determining the legislative intent of the statute,
'the statute should be considered in the light of the purpose it
was designed to serve and so applied as to carry out that
purpose if it can be done consistent with its language."

I. Commentary to the Utah Revised Business Corporation Act

As an aid in interpreting the Utah Revised Act, the Revi-
sion Committee, in adopting the Model Act, also adopted the
Official Comments published with the Model Act. Of these com-
ments, Utah's Revision Committee states the following:

The Model Act is accompanied by Official Comments that
were considered, approved and adopted by the [ABA] Com-
nittee on Corporate Laws. We believe that such a comen-
tary can be helpful to business persons and legal practitioners
trying to understand, interpret and comply with the provi-
sions of the [Utah] Revised Act, and the availability of such a
commentary was a motivating factor in enacting a corpora-
tions code based on the Model Act. Accordingly, the comen-
tary to the Model Act was been [sic] reproduced, revised and
adapted for use with the [Utah] Revised Act. . .

This commentary is intended to provide an explanation
of the meaning, purpose, application and historical develop-
ment of referenced sections of the [Utah] Revised Act. It also

(citing Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980); Salt Lake City
v. Salt Lake County, 568 P.2d 738, 741 (Utah 1977); Utah Farm Bureau Ins. Co.
v. Utah Ins. Guar. Ass'n, 564 P.2d 751, 754 (Utah 1977); and quoting Utah Power
v. State Tax Comm'n, 411 P.2d 831, 832 (Utah 1966))).
describes some of the substantive decisions made in the drafting of the [Utah] Revised Act and highlights certain differences between the Model Act, the [Utah] Revised Act and the Prior Act. The Utah legislature has endorsed the use of this commentary as an aid in understanding and interpreting the [Utah] Revised Act, and directed that it be published as a companion to the [Utah] Revised Act. 27

This suggests that the commentary would be a good source to examine for indications of the legislative intent behind changes to the Model Act. Unfortunately, an examination of the commentary to section 1004 only compounds the confusion of the Utah Revised Act.

At first glance, the commentary to subsection 1004(4) seems to suggest an unconditional right to vote in voting groups, and to flatly contradict the exception language of subsections 1004(1), (4) and (5). The commentary to section 1004 of the Utah Revised Act states in part:

Shares are entitled to vote as separate voting groups under this section even though they are designated as nonvoting shares in the articles of incorporation, or the articles of incorporation purport to deny them entirely the right to vote on the proposal in question, or purport to allow other classes or series of shares to vote as part of the same voting group. 28

The commentary further states:

Section 1004(4) makes clear that the limited right to vote by separate voting groups provided by section 1004 may not be narrowed or eliminated by the articles of incorporation. Even if a class or series of shares is described as "nonvoting" and the articles purport to make that class or series nonvoting "for all purposes," that class or series nevertheless has the limited voting right provided by this section. 29

This language, which is common to both the Model Act and the Utah Revised Act, seems to indicate that the right to vote in voting groups cannot be denied, and that is undoubtedly its intent and effect in the Official Comments to the Model Act.

27. COMMENTARY TO REVISED ACT, supra note 2, at 1.
28. Id. at 106-07; see also REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.04 cmt. at 275.
29. COMMENTARY TO REVISED ACT, supra note 2, at 107; see also REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.04 cmt. at 276.
However, section 1004 of the Utah Revised Act differs from the Model Act in significant ways, most notably by the addition of subsection (5). Unfortunately, the commentary published with Utah's Revised Act fails to account for or even reflect these changes.\textsuperscript{30} In fact, the commentary to section 1004 of the Utah Revised Act merely reproduces the Official Comments to the Model Act verbatim. These comments provide a helpful discussion on each of the subsections (1) through (4), but quite naturally fail to mention anything about Utah's unique subsection (5).\textsuperscript{31}

This omission suggests that the commentary published with Utah's Revised Act is incomplete. The failure of the commentary to explain subsection (5) seems to indicate that the discussion in the commentary is there simply by default, or as a mere vestige of the Model Act. One is forced to conclude that the Revision Committee simply reproduced the Official Comment from the Model Act, and that its continuing and unaltered presence in the commentary to Utah's Revised Act is the result of an oversight by the Revision Committee rather than any indication of legislative intent. If this is the case, the commentary to section 1004 can be of limited help in understanding the legislative intent behind the voting group provisions of that section.\textsuperscript{32} One is forced to look elsewhere for indications of legislative intent.

2. Legislative history

The legislative history of the Utah Revised Act indicates that it was not so much the legislature as the Utah Business Corporation Act Revision Committee\textsuperscript{33} that reviewed the Mod-

\textsuperscript{30} See COMMENTARY TO REVISED ACT, supra note 2, at 107.
\textsuperscript{31} See \textit{id.}; cf. REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 10.06 cmt.
\textsuperscript{32} See COMMENTARY TO REVISED ACT, supra note 2, at 106-07.
\textsuperscript{33} The Utah Business Corporation Act Revision Committee was "established through the Business Law Section of the Utah State Bar, in cooperation with Representative Nancy Lyon and the Legislative Research and General Counsel's Office." COMMENTARY TO REVISED ACT, supra note 2, at 1. The Revision Committee was comprised of "private attorneys specializing in the business law area; in-house attorneys for several large Utah corporations, including Union Pacific Railroad Company, Questar Corporation, and Huntsman Chemical Corporation; a law professor from Brigham Young University's J. Reuben Clark School of Law [Professor David Thomas]; House Representative Nancy Lyon; George Danielson of the Utah Legislative Research and General Counsel's office; and Peter Van Alstyne, Director of the Division of Corporations and Commercial
el Act and drafted this particular legislation. The Revision Committee made various modifications to the Model Act in order to "address concerns and issues raised by Committee members, to retain certain ... provisions [of the former Utah Business Corporation Act of 1961] considered to be appropriate, to incorporate statutory provisions that have been proposed in Colorado and adopted in other states, and to respond to comments received by interested Utah companies and individuals." One of these modifications clearly was the addition of subsection (5) to section 1004 of the Utah Revised Act.

There was no floor debate on section 1004 in either the Utah House of Representatives or the Utah Senate. Nor is there a record of any discussion of the changes to that section in committee. The changes to section 1004 were made by the Revision Committee in an early draft of the bill, but no explanation accompanies the alterations. Interviews with members of the drafting committee who worked specifically on chapter 10 of the bill revealed no pertinent documentation that would help with the interpretation of section 1004.

However, Dorothy Pleshe, who served on the drafting committee that worked specifically on chapter 10, recalled that the

34. P. CHRISTIAN ANDERSON, INTRODUCTION TO PROPOSED NEW UTAH REVISED BUSINESS CORPORATION ACT 1 (November 5, 1991) (on file with the Utah Legislative Research and General Counsel's Office (H.B. 50, 1992)).
35. COMMENTARY TO REVISED ACT, supra note 2, at 1.

Most of the members of the Revision Committee with whom I spoke had no recollection of the changes to § 1004 or of the reasons for those changes, nor had they preserved any records of the change. Telephone interview with George Danielson, former Director, Utah Office of Legislative Research and General Counsel (July 18, 1995); telephone interview with P. Christian Anderson, Attorney, Holme Roberts & Owen, Chair of Utah Business Act Revision Committee, Utah State Bar Association (July 18, 1995); telephone interview with Connie Cannon Holbrook, Legal Department, Mountain Fuel/Questar Corp. (July 18, 1995); telephone interview with Steven A. Goodsell, Legal Department, Union Pacific Corp. (July 19, 1995); telephone interview with Julie Matis, Attorney, VanCott Bagley Cornwall & McCarthy (August 11, 1995); telephone interview with David Thomas, Professor of Law, Brigham Young University (July 31, 1995); telephone interview with Randall L. Romrell, Attorney, Huntsman Chemical Corp. (August 9, 1995).
Revision Committee had intended to give corporations a way to completely restrict shareholder voting rights. Likewise, Gordon Hansen, a member of the Revision Committee who worked on the related provisions of chapter 11, indicated that it was his understanding that if shareholder voting rights were restricted from the beginning in the original articles of incorporation, shares could be denied the right to vote entirely, even on issues that directly affect them.

No other states have adopted provisions similar to Utah's subsection 1004(5), and no reported cases from any state suggest the existence of any controversy over the rights of voting groups that may have motivated the Revision Committee to include this particular modification in the Utah Revised Act. The recollection of Dorothy Pleshe was that the changes to the Model Act were the result of discussions among the Revision Committee members and were motivated simply by their perception that corporations, especially small corporations and start-up companies, should be permitted to limit the voting rights of shareholders so as to give the directors more complete control of their corporations.

Ultimately, the commentary published with the Utah Revised Act is of little use in determining the legislative intent behind the changes to section 1004. This fact, combined with the lack of meaningful documentation of the legislative history of subsection 1004(5), makes it difficult to reconstruct any notion of legislative intent from extrinsic documents. Nevertheless, the recollection of those who served on the Revision Committee is that the Act was drafted with the intention of increasing corporate flexibility. Creating an exception to the voting group entitlements would comport with this general aim.

37. Telephone interview with Dorothy C. Pleshe, Attorney, Callister Nebeker & McCullough, member of Utah Business Corporation Act Revision Committee (August 9, 1995).
38. Telephone interview with J. Gordon Hansen, Attorney, Parsons Behle & Latimer, member of Utah Business Corporation Act Revision Committee (August 9, 1995).
39. This information is based on various (fruitless) searches of the LEXIS and Westlaw electronic databases.
40. Telephone Interview with Dorothy C. Pleshe, Attorney, Callister Nebeker & McCullough, member of Utah Business Corporation Act Revision Committee (August 9, 1995).
B. Statutory Construction:
The Interpretation of Critical Words

Utah cases indicate that if nothing in the legislative record or other history of a statute indicates the legislative intent behind its enactment, the courts will look to the "plain meaning of the language at issue in the statute." Realizing perhaps that an attempt to find "plain meaning" within the statutory language of the Utah Code was unduly optimistic, the courts have set forth a three-step procedure to be followed in the statutory construction of critical words:

First, terms of related code provisions should be construed in a harmonious fashion. Second, statutory terms should be interpreted and applied according to their commonly accepted meaning unless the ordinary meaning of the term results in an application that is either "unreasonably confused, inoperable, [or] in blatant contradiction of the express purpose of the statute." Third, "[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose."

Analysis of subsection 1004 under each of these three principles indicates that the drafters of the Utah Revised Act intended to create an exception to the voting group rights established under the Model Act.

1. Construing related provisions harmoniously

In Grayson Roper Ltd. Partnership v. Finlinson the Utah Supreme Court established that terms of related code provisions should be construed harmoniously. While the language of section 1004 of the Utah Revised Act suggests two possible interpretations, neither of them is without a certain amount of disharmony. Nevertheless, the reading that would...
create an exception to the voting group right is more easily reconcilable with the related code provisions.

If one reads subsection (5) to say that voting group rights may be restricted in any way other than being restricted from voting on the nine types of amendments listed in subsection (1), then the right to vote as a separate voting group on the subsection (1) amendments would be unconditionally guaranteed, while shareholder voting rights on other, unspecified types of amendments would be susceptible to an absolute limitation.

This reading would force one to conclude that subsection (5) is not so much an exception to subsections (1) and (4) as a reiteration of them. This reading also represents no change from the Model Act, which also guarantees an unconditional voting group right with respect to the critical subsection (1) amendments.45 If this is the correct interpretation then subsection (5) is simply surplusage—a redundancy that the drafters of the Utah statute added, perhaps with the object (ironically) of clarifying section 1004 of the Utah Revised Act.

It may be argued that nothing could be more harmonious than redundancy, but statutory provisions are generally assumed to have independent meaning. Furthermore, harmony with one statutory term may create disharmony with others. If subsection 1004(5) is not an exception to subsections (1) and (4), then it becomes difficult to explain why the drafters of the Utah Revised Act added the "except" clause to subsections (1) and (4) of the Model Act. Those subsections state that shareholders may, even if designated as "nonvoting" shares, vote as a separate voting group on certain matters, "[e]xcept as otherwise provided in Subsection (5)."46 Under the first interpretation of the statute, it also becomes difficult to account for the language in subsection (5), which states that "[n]otwithstanding the rights granted by this section," the right to vote in voting groups may be restricted.47

The second, more liberal, reading of section 1004 would treat subsection (5) as an explicit exception to the voting group entitlement set forth in subsections (1) and (4). This reading is in harmony with the "except as otherwise provided" language that precedes those two subsections. If subsection (5) is an

45. See Revised Model Business Corp. Act, supra note 7, § 10.04 cmt., at 275.
47. Id. § 1004(5).
exception (stating that notwithstanding language in subsections (1) and (4), shareholders may be prevented from voting “if so provided in the articles of incorporation or any amendment thereto”48), it appears to swallow the rule of subsection (4), which states that a shareholder may vote in a separate voting group “although the articles of incorporation provide that the shares are nonvoting”. An exception cannot logically swallow the entire rule. Either the articles of incorporation can restrict voting group rights or they cannot. Thus, for the exception to make sense, it must be limited to a more narrow object than the general rule.

Applying this principle to section 1004, subsection (5) must apply to a narrower set of circumstances than subsections (1) and (4) if it is to make sense as an exception to those subsections. While such a distinction is perhaps not self-evident in the language of subsection (5), it is discernable upon close examination. Subsection (4) talks about “the articles of incorporation,”49 and subsection (1) discusses “amendments.”50 These may be distinguished from “the original articles of incorporation” discussed in subsection (5) or from an “amendment . . . which created the class or series or which was adopted prior to the issuance of any shares of the class or series” or an “amendment . . . which was authorized by a resolution . . . adopted by the affirmative vote of the holders of a majority of the class or series.”51

This distinction suggests that even on those subsection (1) matters that directly and adversely affect a class or series of shares, shareholders may be prohibited from voting if the prohibition is documented in such a way that shareholders receive notice of the restrictions associated with their shares before the shares are purchased or issued. This may be done by establishing those restrictions in a provision of the original articles of incorporation drafted at the very inception of the corporation, or in an amendment adopted at or before the time the class of shares was created.52

However, notice would be unnecessary if a majority of the affected class or series had itself approved the voting restric-

48. Id.
49. Id. § 1004(4).
50. Id. § 1004(1).
51. See id. § 1004(5) (emphasis added).
52. Id.
tions. Consequently, the second reading of subsection (5), consistent with this purpose, would also allow a corporation to restrict voting group rights in the articles of incorporation by "any amendment [of the articles] which was . . . adopted by the affirmative vote of the holders of a majority of the class or series." The overall effect of this reading is that as long as the restrictions are placed on the shares before anyone buys them, or are imposed with the approval of affected shareholders, the Utah Code permits the complete restriction of shareholder voting rights.

The second reading is also supported by another "well-established rule[] of statutory construction" developed by the Utah Supreme Court, namely, that "specific statutory provisions take precedence over general statutory provisions." Applying this rule to section 1004 of the Utah Revised Act, the provisions of subsection (5) pertaining to "original articles of incorporation" would take precedence over the general discussion of "articles of incorporation" in subsection (4). Likewise, the more specific provision in subsection (5), concerning an "amendment . . . which created the class or series or which was adopted prior to the issuance of any shares of the class or series," is more specific than the provisions of subsection (1) creating group voting rights for voting on "a proposed amendment," and would thus take precedence over them.

The more harmonious reading of section 1004 suggests that the drafters of the Utah Revised Act intended subsection (5) to create an exception to the voting group entitlement based on the principle of notice or approval. If this was in fact their intent, it is unfortunate that they did not make that purpose more clear in the language or commentary to section 1004.

2. Applying the ordinary meaning of statutory terms

While the arguments for characterizing subsection (5) as an exception to the rule established in subsections (1) and (4) are compelling, they might be conclusive but for the incongruity of the word "otherwise" in the phrase "[n]otwithstanding the rights granted by this section . . . to vote as a separate voting group, the rights may be otherwise restricted if so provided in

53. Id.
55. Id.
56. Compare UTAH CODE ANN. § 16-10a-1004(5) with id. § 1004(4).
the original articles of incorporation." If in fact the drafters wrote subsection (5) as an exception to the right to vote in voting groups, it would have made more sense for them to have written "notwithstanding the rights granted by this section . . . to vote as a separate voting group, the rights may nevertheless be restricted," or simply, "the rights may be restricted."

The Utah Supreme Court has endorsed the "well-established rule of statutory construction that a statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute."58

"Otherwise" usually means "in a different manner" or "in another way."59 Interpreting subsection (5) according to the generally accepted meaning of "otherwise" would indicate that the first suggested interpretation should be applied, allowing complete restriction of voting rights only for amendments other than those set forth in subsection (1). Under this reading corporations could not deny any shareholders their right to vote in voting groups on critical amendments, regardless of what the articles of incorporation said and regardless of whether the shareholders were on notice of such purported limitations before they bought their shares.

However, as indicated above,60 such an interpretation is ultimately both "unreasonably confused" and "inoperable," if not "in blatant contradiction of the express purpose of the statute."61 Besides being unnecessary and redundant, it contradicts the language added to subsections (1) and (4) that explicitly recognizes an exception to the voting group rights: "Except as otherwise provided in subsection (5) . . ."62

Moreover, it is possible to construe the word "otherwise" so as to give the statutory language the effect of the second interpretation. While "otherwise" is primarily defined as "in a differ-

57. UTAH CODE ANN. § 16-10a-1004(5) (emphasis added).
59. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1729 (2d ed. 1943).
60. See supra part III.B.1.
61. See Morton, 814 P.2d at 590.
62. See discussion supra part III.B.1.
ent manner,” or “in another way,” it may also be defined as “contrarily,” or more rarely, “on the other hand.” Inserting this alternative definition into the Utah statute, subsection (5) clearly assumes the effect of an exception to the voting group entitlements created in subsections (1) and (4): “Notwithstanding the rights granted by this section . . . to vote as a separate voting group, the rights may on the other hand be restricted if so provided in the original articles of incorporation . . . .” This alternative definition of “otherwise” reinforces the understanding that subsection (5) constitutes an exception to the voting group entitlement set forth in subsection (1), rather than excluding the situations described in subsection (1) from the application of subsection (5).

3. **Harmonizing the provision with the objectives of the entire act**

   As a third method of interpreting critical words, the Utah Supreme Court has suggested that “[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose.”

   Reading subsection (5) to permit the restriction of voting group rights upon condition of sufficient notice or approval avoids the redundancy and contradictions of the first alternative reading and is consistent with accepted meanings of the statutory terms. It also comports with one of the general objectives of the Utah Revised Act, as explained in the commentary to section 601(3):

   Section 601 authorizes the creation of new or innovative classes of shares without limitation or restriction. This section is basically enabling rather than restrictive since corporations often find it necessary to create new and innovative classes of shares for a variety of reasons, and with the disclosure of the terms of the new classes in the articles of incorporation that are a matter of public record there is no reason to restrict the

63. WEBSTER'S NEW INTERNATIONAL DICTIONARY, supra note 59, at 1729.
65. Section 601(3) states: “The articles of incorporation may authorize one or more classes of shares . . . that: (a) have special, conditional, or limited voting rights, or no right to vote . . . .” UTAH CODE ANN. § 16-10a-601(3).
power to create these classes. . . . Novel classes of shares may 
. . . be created in order to effectuate desired control relation-
ships among the participants in the venture. 66

This commentary hardly compels the reading of subsection 
1004(5) as an exception to the right to vote by voting groups, 
since the identical statement appears in the Official Comment 
to the Model Act, 67 and there is clearly no such exception in 
that statute. 68 Nevertheless, the commentary does indicate 
that a general purpose behind both Acts is to expand possible 
ways in which a corporation may be organized. Furthermore, 
those who worked on the Revision Committee have indicated 
that the general impetus of the committee in revising the Utah 
Business Corporation Act, consistent with the tendency of the 
Model Act, was to give greater flexibility to corporations and to 
make the provisions for designating classes and series of shares 
as liberal as possible. 69

In harmony with the general policy of enabling corpora-
tions “to create new and innovative classes of shares,” and with 
the rationale that the terms of a class “are a matter of public 
record,” subsection 1004(5) of the Utah Revised Act establishes 
a means for Utah corporations to create classes and series of 
shares with no voting rights at all. Of course, subsection (5) 
would be even more effective had the drafters expressed their 
intent less ambiguously.

C. Public Policy

The Utah Supreme Court has also indicated that it might 
be willing to consider policy arguments if it can find no indica-
tion of legislative intent through the usual means of statutory 
interpretation. “[I]n the absence of a discernible legislative 
intent concerning the specific question in issue, a choice among 
permissible interpretations of a statute is largely a policy de-
termination.”70 While there are policy arguments on both

66. COMMENTARY TO REVISED ACT, supra note 2, at 29.
67. REVISED MODEL BUSINESS CORP. ACT, supra note 7, § 6.01(d) and cmt.
68. Id. § 10.04 cmt. at 275-76.
69. Telephone Interview with David K. Redd, Attorney, Kimball Parr 
Waddoups Brown & Gee, member of Utah Business Corporation Act Revision 
Committee (August 9, 1995); Telephone Interview with J. Gordon Hansen, Attorney, 
Parsons Behle & Latimer, member of Utah Business Corporation Act Revision 
Committee (August 9, 1995).
70. Morton Intl, Inc. v. Auditing Div. of the Utah State Tax Comm’n, 814
sides, the more convincing argument favors permitting an exception to the voting group entitlement.

On the one hand, certain problems are raised by reading subsection 1004(5) as an exception to the right to vote in separate voting groups. Allowing corporations to create classes of shares that cannot vote, even on amendments that directly affect the value of their shares, substantially weakens the drafters' avowed policy of providing "protection for . . . nonvoting shares against amendments that are especially burdensome to that class." It should also be noted that shareholders who are issued shares after restrictions are already in place—either through a provision in the original articles of incorporation or subsequent amendment to those articles—are assumed to take their shares with the knowledge and understanding that those restrictions apply to their shares. Language in the articles of incorporation would presumably create constructive notice of the limits associated with those shares. It may be argued that reliance on constructive notice potentially leaves room for the deception or abuse of unwary investors.

On the other hand, it does not seem unreasonable to assume that purchasers of shares in a corporation will make themselves familiar with the terms associated with their shares. The commentary to the Utah Revised Act seems comfortably to assume that constructive notice in the articles of incorporation is entirely adequate. Besides this notice of restrictions, nonvoting shareholders are afforded two levels of protection for the nine essential interests defined in § 1004(1)(a) through (i).

First, absent a provision in the articles of incorporation adopted in a manner prescribed by subsection (5), shareholders are still entitled under subsections (1) and (4) to vote as a separate voting group on any amendment that would affect their essential interests. Second, under subsection (5), this voting group entitlement is itself afforded heightened protection by the fact that it may not be waived by an ordinary amendment,


71. COMMENTARY TO REVISED ACT, supra note 2, at 107; see also discussion supra part II.A.

72. See COMMENTARY TO REVISED ACT, supra note 2, at 29 ("[W]ith the disclosure of the terms of the new classes in the articles of incorporation that are a matter of public record there is no reason to restrict the power to create these classes.").

73. UTAH CODE ANN. § 16-10a-1004(1), (4); see supra note 15.
but only by an amendment approved by affirmative vote of a majority of the shares within the affected class or series itself.\textsuperscript{74} Ordinary actions may be approved by a majority of the voting group members present at the meeting, as long as a quorum of members is present.\textsuperscript{75} By requiring a majority of all the shares within the affected class, the drafters of the Utah statute have imposed stricter voting requirements for the alienation of the voting group entitlement than for other amendments, even the "particularly burdensome" amendments set forth in section 1004(1). This rule treats abstentions and absentees as negative votes. The combination of these provisions aggressively protects the interests of "nonvoting" shareholders.

Allowing corporations to completely restrict the voting rights of some shareholders gives the corporation considerably more freedom, while imposing only minimal burdens on the shareholders. So long as all interested parties are put on notice of the voting restrictions associated with their shares before they acquire them, there is no unfairness in imposing those burdens on their shares, and no reason to limit the types of classes or series that a corporation may create. Likewise, there is no reason why a corporation should not be able to restrict the voting rights of a given class when the restriction has been approved by "the affirmative vote of the holders of a majority of the class or series."\textsuperscript{76} Nevertheless, when a class of shareholders brings an action against a corporation for denying them a right to vote on an amendment that "increase[d] . . . the aggregate number of authorized shares of the class,"\textsuperscript{77} thus decreasing the value of shares within the class, a court looking at the equities of the case may be unpersuaded by the public policy argument for increasing corporate freedom and flexibility regardless of what the articles of incorporation might say.

\textbf{IV. CONCLUSION}

Under Utah's Revised Business Corporation Act, as under the Revised Model Business Corporation Act, corporations may

\begin{itemize}
\item \textsuperscript{74} See id. § 16-10a-726; COMMENTARY TO REVISED ACT, supra note 2, at 61-63.
\item \textsuperscript{75} UTAH CODE ANN. § 16-10a-725(3). A quorum is usually simply "a majority of the votes entitled to be cast." Id. § 16-10a-725(1).
\item \textsuperscript{76} See id. § 16-10a-1004(5).
\item \textsuperscript{77} See id. § 1004(1)(a).
\end{itemize}
create classes and series of shares that are designated as non-voting.\(^78\) However, these shares still have the limited right to vote as separate voting groups on certain specific kinds of amendments that would directly affect their interests.\(^79\) These limited voting rights cannot be denied to shareholders by ordinary amendments to the articles of incorporation.\(^80\)

Section 1004(5), however, may allow the creation of classes and series of shares that lack even the limited right to vote on issues that directly affect the given class or series. The available indications of legislative intent, the more consistent construction of the statute, and the more compelling considerations of public policy all suggest that corporations can create classes of shares under the Revised Business Corporation Act that are without voting rights of any kind, so long as this limitation is specifically spelled out in the original articles of incorporation, an amendment that created the shares so restricted, or any other amendment adopted before the shares of the class or series were first issued.\(^81\) In this way, anyone who purchases shares that are burdened by a total restriction of voting rights will have sufficient notice of the limitations associated with those shares. Likewise, restrictions on voting group rights may be imposed on a class or series by amendment to the articles of incorporation, but only if approved by a majority of all shareholders in the affected class or series.\(^82\)

Although the addition of subsection (5) to Utah's Revised Business Corporation Act is a laudable extension of the free agency of Utah corporations, the statute in its current form is unlikely to achieve the objective that the Revision Committee and the legislature apparently intended. Because the statute is written so ambiguously, and because the commentary published with the Utah Revised Act fails to explain how Utah's statutory innovation allows corporations to restrict voting group rights, corporations that might otherwise take advantage of the new statute will be rightfully hesitant to do so under the current law. The ambiguity of Utah's section 1004 invites disgruntled shareholders to sue the first corporation that attempts

---

78. Id. § 16-10a-601(3)(a); Revised Model Business Corp. Act, supra note 7, § 6.01(c)(1).
80. Id. § 1004(4).
81. Id. § 1004(5).
82. Id.
to restrict voting rights in the ways apparently authorized by subsection 1004(5). And while a company's right to restrict voting rights under 1004(5) would probably be upheld in court, few companies will want to go to court to vindicate such a right.

If, however, a corporation should decide that it nevertheless wants to create a class or series of shares with absolutely no voting rights, it is essential that these restrictions be plainly spelled out in (i) the original articles of incorporation drafted at the inception of the corporation, (ii) an amendment to the articles that is prior to or contemporaneous with the issuance of the affected shares, or (iii) an amendment authorized by a resolution adopted by the affirmative vote of a majority of the affected shareholders. It might also be wise to list and explicitly deny the right to vote on each of the nine types of amendments set forth in subsection 1004(1), rather than simply relying on a statement that the class or series is nonvoting "for all purposes." Even after taking these precautions a corporation might think twice about antagonizing a "nonvoting" class of shares by proposing amendments particularly burdensome to the class and denying the class members any opportunity to vote on the amendment.

The best solution to the problems associated with section 1004 of the Utah Revised Act would be for the Utah Legislature to resolve the ambiguities of that section by amending it. A simple amendment, such as striking out the word "otherwise" in subsection (5) or replacing it with the word "nevertheless" would make the meaning of the statute more clear. Any such amendment should be accompanied by changes to the Commentary as well. A short paragraph explaining the presence and import of subsection (5) would clarify the purpose of the statute and make it more useful. Although a legislative intent is

83. See COMMENTARY TO REVISED ACT, supra note 2, at 107 (stating that "even if a class or series of shares is described as 'nonvoting' and the articles purport to make that class or series nonvoting 'for all purposes,' that class or series nevertheless has the limited voting right provided by [section 1004]”).

84. This paragraph might read as follows: Subsection 1004(5) was included in the Revised Act and subsections (1) and (4) were amended to create an exception to the right described in subsections (1) and (4) of voting in separate voting groups. The change was made in order to permit corporations to create classes and series of shares with no voting rights of any kind, thus giving boards of directors and voting shareholders more control over their corporations. The complete restriction of shareholder voting rights contemplated by subsection (5) is permitted subject to certain procedural safeguards designed to insure that affected shareholders
discernable in section 16-10a-1004, the ambiguity inherent in the statute in its present form creates a risk that that intent will be frustrated.

Erik G. Davis

are given notice of the restrictions affecting their shares before they buy them, or approve the restrictions subsequent to purchase by an affirmative vote of the shareholders affected by the proposed change.