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Although the prohibition of the desecration of national symbols is not the same as compelling acts of allegiance, such a prohibition may be going beyond the limits of persuasion and example.

Despite Barnette, however, the dissenters in Street seem to have asserted that there is a legitimate and substantial governmental interest in promoting patriotism by means of national symbols. In saying that desecration of the flag can be proscribed, Chief Justice Warren spoke of the “power to protect the flag from acts of desecration and disgrace”\textsuperscript{67} rather than a power to avoid the disruption attendant an act of abusing the flag. Justice Fortas, moreover, termed the flag “a special kind of personality . . . burdened with peculiar obligations and restrictions.”\textsuperscript{68}

From the emphatic nature of the dissenting opinions, from lower court decisions sustaining flag-desecration statutes and from the lack of any strong precedent upholding such activity, the majority's refusal to meet the issue of flag-burning should be taken as a rejection of Street’s contention that such an avenue of expression is protected by the first amendment. Nevertheless, the Court should realize that there are many factors in favor of expanding the first amendment’s protection to include peaceful symbolic communication of any kind. Moreover, the recognition of an interest in promoting patriotic values should be a very limited one, for such an interest could lead to the kind of enforced conformity that is abhorrent to a system of government founded upon individual rights.

WILLIAM M. TROTT

Corporations—Voting Trusts—Should Trust Principles Apply to Close Corporations?

Ever since the corporate form of doing business became prevalent around the turn of the century, the attorney for the close corporation has been troubled by many difficult problems; and in trying to solve them, he has been “hampered by doctrines which are meaningful only in the context of the large, publicly held company.”\textsuperscript{1} One of these problems is that of providing some method for ensuring continuity and stability of management when no one stockholder, or faction of stockholders, owns a majority of voting stock. Another is that of providing means for resolving

\textsuperscript{68} Id. at 616-17.
\textsuperscript{1} Note, Close Corporations: Voting Trust Legislation and Resolution of Deadlocks, 67 COLUM. L. REV. 590 (1967).
deadlocks if two stockholders or factions each own half of the voting stock, or if there are high voting or quorum requirements with no stockholder or faction owning enough stock to meet them. As a practical matter, such difficulties do not arise in the widely-held corporation, “[w]here the shareholder . . . is rarely able to exercise any meaningful control”2 and the “ability of management . . . to sustain itself . . . is a fact of economic life.”3 In the close corporation, however, a slight shift of stock ownership or the lost alliance of only one voting shareholder can transfer control of the corporation to a competing faction; and if the voting power resides in two equally-divided groups, deadlock is always a threat. Furthermore, when close corporations have been unsuccessful in preventing such deadlocks or crippling disputes and litigation results, the courts generally have been unable satisfactorily to resolve them because of inadequate statutory remedies.4

A recent Massachusetts case, Selig v. Wexler,5 presents a classic example of an unsuccessful use of the voting trust to prevent deadlock and ensure stability. It also illustrates the inability of the court to satisfactorily deal with the problem because it felt constrained to apply trust law in the absence of other statutory provisions dealing specifically with this area of corporate control.

Selig involved a manufacturing corporation whose stock was owned equally by plaintiff Selig and defendant Wexler. The two owners, often unable to agree on the management policy of the corporation, entered into a voting trust agreement whereby all of the stock was placed in trust, and the owners and the corporate counsel, Mr. Riemer, were selected trustees. Riemer was considered a neutral trustee-director possessing the tie-breaking vote. This arrangement allowed the corporation to function smoothly, even to prosper, for about eight years. Selig, however, was not content. Riemer, the “neutral” trustee, constantly sided with Wexler.6

Two years before the agreement was to expire, Wexler and Riemer urged that it be renewed; and after extensive negotiations, during which both parties were represented by counsel and business advisors,7 a new

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3 Id. 1212.
4 In most states the only remedy is dissolution. See 2 F. O'NEAL, CLOSE CORPORATIONS § 9.29 (1958).
voting trust agreement was executed. It provided for an additional director to resolve deadlocks by means of a rather intricate formula. Both Selig and Wexler entered into lifetime employment contracts with the corporation, and the agreement provided that the trust was to continue at least until the death of the survivor. Thus both Selig and Wexler, who apparently had complete knowledge of what the agreement entailed, irrevocably bound themselves to abide by it for the remainder of their lives.

The trust remained in effect for about two years. Selig again grew dissatisfied because Riemer and Silverman, the two supposedly neutral directors, always sided with Wexler. After Selig attempted without success to take control at the annual meeting, when the terms of the two neutral directors were to expire, he brought suit against Wexler and Riemer and asked the court to terminate the trust.

The trial court, apparently without authority to provide specific positive relief, ordered that if the voting trust could be amended within sixty days so as to provide for a truly neutral trustee and one or more neutral directors, the bill would be dismissed. Since no amendment was made, the court granted the termination requested by Selig, and the Supreme Court of Massachusetts affirmed.

After finding that the neutral directors had in fact been partial, and that this lack of impartiality frustrated the trust's purposes, the court set forth the principles of law on which it based its decision to terminate the trust:

--- Mass. at —, 247 N.E.2d at 570.

--- Id.

--- Id. at —, 247 N.E.2d at 571.

--- Id. Selig had the two members of his family who were directors resign in order to be eligible for election as "neutral" directors under the deadlock-breaking plan. These vacancies were to be filled by other members of the Selig family. Wexler prevented this action by adjourning the meeting.

--- Id. at —, 247 N.E.2d at 572.

--- Id.
There is no question that voting trusts are valid in this Commonwealth. The rules of trust law in general apply to voting trusts, unless the terms of the trust agreement provide otherwise. Undoubtedly a trust may be terminated if the purposes for which it was created become impossible of accomplishment. We are of the opinion that under this principle a voting trust may likewise be terminated when its purposes have become frustrated or impossible.\textsuperscript{14}

The court then stated that impossibility and frustration are not exactly the same, and that although it was not impossible to carry out the terms of the trust, its objectives had been defeated. In order to support its decision, the court resorted to contract law and a Connecticut case holding that

\[\text{[t]he doctrine of frustration of purpose, which has more modern origins . . . [than the doctrine of impossibility] excuses a promisor in certain situations where the objectives of the contract have been utterly defeated by circumstances arising after the formation of the agreement . . . . Excuse is allowed under this rule even though there is no impediment to actual performance.}\textsuperscript{15}

It is important first to point out that the court did not declare this trust to be invalid but held only that its purpose had been frustrated. Assuming this determination to be correct, and assuming that the court was justified in following the established,\textsuperscript{16} though questioned,\textsuperscript{17} authority that the rules of trust law in general apply to voting trusts, it is necessary to determine whether such law was correctly applied. There is much authority supporting the termination of regular trusts if the purpose has been accomplished or if such accomplishment has become impossible or illegal.\textsuperscript{18} But the treatises, including the ones cited by the court, do not mention frustration of purpose as a ground for termination, and Selig appears to be the first case expressly holding that a voting trust is terminable for such a reason.

\begin{itemize}
  \item \textsuperscript{14} \textit{Id. at} ——, 247 N.E.2d at 572-73. (Citations omitted).
  \item \textsuperscript{15} Hess v. Dumouchell Paper Co., 154 Conn. 343, 350-51, 225 A.2d 797, 801 (1966).
  \item \textsuperscript{16} G. BOGERT, TRUSTS AND TRUSTEES § 251 (2d ed. 1964) [hereinafter cited as \textit{BOGERT}]; Gose, Legal Characteristics and Consequences of Voting Trusts, 20 WASH. L. REV. 129 (1945).
\end{itemize}
It is true that both impossibility and frustration are grounds for discharge of the duty to perform a contract, but no authority has been found for extending the excuse of frustration to trust law. The case cited by the court in support of its analogy to contract law does not justify such an extension: It dealt exclusively with a contract, and no trust was involved.

The court in Selig distinguished between the partiality of the trustee and the frustration of the purpose of the trust as grounds for termination. It emphasized that the reason for termination was not Riemer's lack of independence as a trustee, but the frustration of the trust's purposes.

The decision that the trust's purposes had been frustrated was based on the conclusion that the neutral trustee and the neutral directors were not in fact independent or impartial and since the existing neutral directors would be entitled to vote and since Riemer and Silverman were in fact not neutral directors; therefore the procedure could not have been carried out as intended, and the purpose of the trust was frustrated.

Since the frustration of purpose resulted from the partisan alliance of the neutral trustee and directors, the distinction seems technical at best. The fiction was necessary, however, since under trust law the lack of independence of the trustee would be grounds only for his removal and not for termination of the trust since equity will not permit a trust to fail for lack of a trustee. The court applied its interpretation of trust law not only to the trustee but also to the directors; a distinction between the function of the two should have been made. That two of the existing directors were no longer neutral would not seem to impeach the validity of the underlying agreement by which they were elected, but would raise only the question of their competency as directors and whether they had violated their fiduciary duty as such. Trust law would certainly not be applicable to resolve such a question.

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10 6 A. CORBIN, CONTRACTS § 1322 (1950).
21 Id. at —, 247 N.E.2d at 572 n.5.
22 Id. at —, 247 N.E.2d at 573.
23 BOGERT § 527 (2d ed. 1960); RESTATEMENT (SECOND) OF TRUSTS § 107 (1950).
25 According to corporation law, however, a removal-for-cause action can be brought against a director by the corporation itself or by a shareholder. Cause includes incompetency and breach of fiduciary duty. W. FLETCHER, PRIVATE CORPORATIONS §§ 351-56 (perm. ed. rev. 1969).
The most significant aspect of Selig is the fact that the court felt constrained to apply trust law in the first place. Without a single reference to the principles of corporation law, the court "solved" what was essentially a corporate power struggle. While it is true that the legal mechanism employed in this case was a voting "trust," substance rather than form should control.

The voting trust was devised to avoid the effect of the anti-separation doctrine, which invalidates any agreement or device separating irrevocably the voting power of stock from its ownership. Use of a trust transfers the legal ownership of the stock, including the voting rights, to a trustee; the stockholder receives trust certificates evidencing his "beneficial ownership." Since there is considerable evidence that such separation is no longer contrary to public policy when there are valid reasons for it, the fiction of the voting trust is no longer justified. When such a device is encountered, the courts should look past the trust form and consider the substance of the agreement itself.

Furthermore, it is at least questionable whether voting trusts are true trusts. Although the courts have generally stated that they are and that trust law applies, there is authority to the contrary. In Warren v. Pim the court said:

But in truth and in essence, and for all purposes of a court of equity, a voting trust that has for its sole object the permanent separation

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26 It is quite possible that the parties are in a worse situation than before since continued litigation is almost certain and the continued existence of this profitable company is placed in jeopardy.
27 1 F. O'Neal, Close Corporations § 5.04, at 227 (1958).
28 Id. § 5.31.
29 18 Stan. L. Rev., supra note 2, at 1217.
31 See note 17 supra.
32 See note 16 supra.
of the voting power from the substantial ownership of the shares is not a putting of the shares in trust.

A New York court has agreed.

Equally untenable is the suggestion that the court should treat this as a genuine trust agreement, and under general equity powers designate a trustee to effectuate its purposes. It is not a real trust agreement under which equity exercises such function, but a mere voting trust agreement.34

Legislatures, by commonly using the word "trustee," have implied that voting trusts are true trusts; however, they have not been satisfied to permit these voting agreements to be governed solely by common trust law but have imposed restrictions completely repugnant to established trust-law principles. Typical is the North Carolina statute35 limiting the duration of voting trusts to ten years and preserving for the "beneficial owners" many of the attributes of legal owners or stockholders. In California the legislature has made voting trusts terminable at will by a majority of the beneficiaries.36

Attitudes surrounding the voting trust and the restrictions placed on them have little relevance to the close corporation.

A close corporation is, in essence, a contractual agreement among a few shareholders; hence freedom of contract has exerted a strong influence upon the law's attitude toward such enterprises. The emerging view is that a unanimous agreement of the shareholders should be permitted to accomplish any lawful objective.37

The basic tests of the validity of any provisions of a shareholders' agreement are whether they are compatible with public policy, whether they adhere to state laws and the corporate charter, and whether they adversely affect the rights of creditors or other shareholders.38 In Selig, the court failed to consider the first two of these tests, and in dealing with the third, it gave no weight to the fact that the agreement was the result of unanimous stockholder action.39

35 N.C. GEN. STAT. § 55-72 (1967).
36 CAL. CORP. CODE § 2231 (1965).
37 67 COLUM. L. REV., supra note 1, at 596.
39 See Woodruff v. Wentworth, 133 Mass. 309, 314 (1882), in which the court held that agreements resulting from unanimous shareholder action should be given weight against attack. See also 1 O'Neal, supra note 27, at § 5.24.
There is evidence of a trend toward a more realistic and enlightened view that increased contractual flexibility and freedom will be allowed and enforced in situations involving close corporations.40 Furthermore, indications are that the more enlightened state legislatures have recognized the need for statutory provisions dealing specifically with control problems of close corporations.41 California has a procedure42 whereby a provisional director may be appointed by the court in case of deadlock. This provisional director has all of the powers of other directors and is thus able to cast the tie-breaking vote and break the deadlock.

A more far-reaching remedy is the compulsory buy-out of shares of a dissenting stockholder. This provision was developed under section 210 of the English Companies Act of 1948,43 and has been substantially enacted in Connecticut.44 It authorizes the court to order the majority stockholder or "oppressor" shareholder to buy the injured stockholder's shares at a fair price as determined by the court. While this remedy may seem harsh, it does prevent the possible dissolution of a viable corporation and at the same time insures that the injured shareholders are fairly compensated.

A third remedy, and by far the most comprehensive, is also taken from section 210 of the English Companies Act. This provision, which has been adopted only by South Carolina in the United States, allows the court to "make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate."45

Selig emphasizes the need for legislation providing such remedies. If any of these legislative solutions had been available to the court, it would have been able to deal with the problem much more effectively and realistically. Until such statutory remedies are available, however, court analysis in situations involving voting trusts should deal with the sub-

43 Companies Act, 11 & 12 Geo. 6, c. 38, § 210 (1948).
45 S. C. Code Ann. § 12022.23 (Supp. 1968). Such relief includes but is not limited to amending the by-laws; changing any resolution of the corporation; directing or prohibiting any act of the corporation, shareholders, directors, or officers; and providing for purchase of a shareholder's stock at a fair price.
stance of the agreement and should more accurately reflect the true nature of the voting "trust"—a corporate control device.

TURNER VANN ADAMS

Criminal Law—Involuntary Manslaughter Arising Out of Business Transactions

In Commonwealth v. Feinberg\(^1\) the Supreme Court of Pennsylvania affirmed the conviction of a merchant on five counts of involuntary manslaughter arising out of the sale to and consumption by certain individuals of Sterno, a jelly-like substance intended for heating purposes. Sitting without a jury, the trial court determined that the defendant knew or should have known first, that some of his purchasers intended to consume rather than to burn the substance and second, that consumption of it could be lethal.\(^2\) Evidence on the former issue was that in selling Sterno the defendant recognized an order to "make one" as a request for a can of Sterno to drink, often referred to Sterno as shoe polish, and frequently requested customers to hide their purchased Sterno as they left the premises.\(^3\) Directed toward the latter issue was evidence that each can of the lethal Sterno was marked on the lid as follows: "Institutional Sterno. Danger. Poison. Not for home use. For commercial and industrial use only.\(^4\) The chemical contents of the industrial Sterno were not stated on the container, and the defendant was not otherwise informed of those contents. The non-lethal Sterno that the defendant had apparently been selling for some time was marked "Caution. Flammable. For use only as a fuel."\(^5\) Both containers were identical except that the industrial Sterno did not have a paper wrap-around label.

The supreme court applied contrasting legal tests to each of these two problems. It repeatedly stated that the defendant "knew or should have known" that the Sterno would be lethal if consumed.\(^6\) Evidence in the nature of objective facts, such as the contrasting markings on the containers of lethal and non-lethal Sterno, supported this conclusion. Applying an objective standard, the court found that since a reasonable man would have been aware of the poisonous nature of the Sterno, the defen-

\(^2\) Id. at ———, 253 A.2d at 641.
\(^3\) Commonwealth v. Feinberg, 211 Pa. Super. 100, 103 n.3, 234 A.2d 913, 914 n.3 (1967).
\(^4\) Id. at 103, 234 A.2d at 914.
\(^5\) Id.
\(^6\) 433 Pa. at ———, 253 A.2d at 641, 643, 644.