ARTICLE

THE POLITICAL COMMITMENT OF THE SUPREME COURT OF TEXAS TO PROTECTING CONTROLLING EQUITY OWNERS

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The Supreme Court of Texas has revealed a political commitment to protecting controlling equity owners—e.g., shareholders, LLC members, limited partners—from liability related to their equity ownership. The Court does not say this, of course. The commitment the Court intends to reveal is a legal one. The political commitment must be teased out of what the Court does. The purpose of this article is to tease. Its method is to examine how the Supreme Court of Texas, in cases involving controlling or significant equity owners, extends the reasoning of its opinions out beyond law, and sometimes in conflict with it. When the Court moves beyond law, the most likely explanation for the Court's moves is political commitment. This Article has particular significance now, as Texas makes a play for businesses to invest in—and re-locate to—the state. The Article helps define what it means to say, as Texans in statewide office have long said, that Texas is "open for business."

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INTRODUCTION

The Supreme Court of Texas has revealed a political commitment to protecting controlling equity owners—*e.g.*, shareholders, LLC members, limited partners—from liability related to their equity ownership. That is my thesis. The Court[1] does not say this, of course. The commitment the Court intends to reveal is a legal one. The political commitment must be teased out of what the Court does. The purpose of this article is to tease.

A. Everyone's Talking About It

The status of large-stake equity owners has been all the rage of late. The hubbub began in early 2024 when the Delaware Chancery Court struck down Elon Musk's >$50 billion Tesla compensation package because the awarding board of directors

1. Under typical law journal citation formatting rules, *court* used alone is not capitalized unless the subject is the Supreme Court of the United States. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. B8, R8(c)(ii) (21st ed. 2020). However, lawyers in Texas often capitalize *court* when referring to the Supreme Court of Texas, in deference to the institution and out of respect for the justices. Given what I am doing here, deference and respect is specifically in order.

lacked independence from Musk.[2] The Tesla shareholders' uninformed approval of the compensation was not enough to save it.[3] Musk and the Tesla board then tried to submit the package to the shareholders for ratification a second time with more disclosure, but the court held that effort to be (i) too late—six years into the litigation and after a bench trial—and (ii) reliant on false statements made to shareholders.[4] An angry Musk asked shareholders to move Tesla's state of incorporation to Texas—away from Delaware; to no one's surprise, the shareholders complied.[5] In part in response to such events, Delaware passed a law formalizing the entity-level review process for conflicted transactions. The law clarified that controlling shareholder conflicts are covered and holds that entity-level review effectively precludes judicial review ("may not be the subject of equitable relief, or give rise to an award of damages").[6]

The Delaware Chancery Court made news again in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*[7] The court there invalidated an agreement between one party, Moelis & Co., and counterparties Ken Moelis (the company's founder, CEO, and Board Chair) and three affiliated companies who all together held

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2. Tornetta v. Musk, 310 A.3d 430, 497–544 (Del. Ch. 2024).

3. *Id.* at 543–44.

4. *See* Tornetta v. Musk, 326 A.3d 1203, 1127–35 (Del. Ch. 2024).

5. *See* Grace Eliza Goodwin, *Tesla Gives Delaware the Cold Shoulder and Pitches a Move to Texas*, BUS. INSIDER (Apr. 17, 2024, at 11:00 ET), https://www.businessinsider.com/tesla-shareholder-vote-delaware-texas-move-2024-4 [https://perma.cc/Y5SC-MHCT]; Natasha Solo-Lyons, *Your Evening Briefing: Elon Musk Officially Shifts Tesla's Incorporation to Texas After Vote*, BLOOMBERG (June 14, 2024, at 16:56 ET), https://www.bloomberg.com/news/newsletters/2024-06-14/bloomberg-evening-briefing-elon-musk-moves-tesla-incorporation-to-texas [https://perma.cc/VH4Y-7J6G].

6. Senate Subst. 1 for S.B. 21, 153rd Gen. Assembly, Reg. Sess. (Del. 2025) (signed Mar. 25, 2025) (also modifying the books and records statute, DEL. CODE ANN. tit. 8, § 220 (2025), to make it harder for shareholders to obtain details of conflicted transactions). A challenge to the constitutionality of this act is currently before the Delaware Supreme Court. *See* Appellant's Opening Brief, Rutledge v. Clearway Energy Grp. LLC, C.A. No. 248 (Del.) (filed July 31, 2025), https://assets.alm.com/a5/d5/8dd2fb96427995f4a79ac4ffe462/rutledge-opening-brief.pdf [https://perma.cc/N46G-3W5U].

7. 311 A.3d 809 (Del. Ch. 2024).

40.4% of Moelis & Co.'s stock.[8] The agreement violated the Delaware statute requiring that the board of directors manage the company, because it gave Ken Moelis pre-approval rights over almost every important board action.[9] The judge quite clearly would have let many provisions stay if they appeared in the corporation's charter rather than only in a quasi-private stockholder agreement.[10] Even so, lawyers representing other Moelis-like corporate actors complained loudly enough that the Delaware legislature modified its corporate code to allow something like the Moelis & Co. provisions.[11] Texas, in a similar legislative furor, passed provisions beefing up protections for business entity managers (such as Musk) and placing greater limits on derivative suits.[12]

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8. *See id.* at 816–18, 828.

9. *See id.* at 816–81; *id.* at 821 ("Because of the Pre-Approval Requirements, the business and affairs of the Company are managed under the direction of Moelis, not the Board. The Pre-Approval Requirements therefore violate Section 141(a).").

10. *Id.* at 822 (opining that Moelis "could have accomplished the vast majority of what he wanted through the Company's certificate of incorporation"). Just how private the agreement was is debatable. It was filed with the SEC and made public on the SEC's EDGAR database on April 22, 2014, five days after Moelis & Co. began trading publicly. *See* Moelis & Co., Stockholders Agreement (Exhibit to Form 8-K) (Apr. 15, 2014), https://www.sec.gov/Archives/edgar/data/1596967/000110465914029215/a14-10912_1ex10d1.htm [https://perma.cc/UY3L-76ME]. However, the primary terms of the agreement were reported in the Prospectus. *See* Moelis & Co., 6,500,000 Shares Moelis & Co., Class A Common Stock (Form 424B4), at 39–41 (Apr. 17, 2014), https://www.sec.gov/Archives/edgar/data/1596967/000104746914003908/a2219707z424b4.htm#bg47901_table_of_contents [https://perma.cc/DSR7-FJMP]. Even if the initial buyers of Moelis & Co. stock were somewhat in the dark, everything was revealed within a week, long before the litigation.

11. *See* DEL. CODE. ANN. tit. 8, § 122(18) (2025); Mohsen Manesh, *A New Cardinal Precept in Corporate Law*, 86 LA. L. REV. (forthcoming 2025), https://papers.ssrn.com/abstract_id=5257693 [https://perma.cc/W28Z-LGKC]. For a sensible but concise take on the aftermath of *Moelis*, see Mark Lebovitch, *The Drama Around Moelis and New DGCL Section 122(18) Just Got Hotter*, CLS BLUE SKY BLOG (Nov. 19, 2024), https://clsbluesky.law.columbia.edu/2024/11/18/the-drama-around-moelis-and-new-dgcl-section-12218-just-got-hotter/ [https://perma.cc/6V5W-Y2F6].

12. S.B. 29, 89th Leg., Reg. Sess. (Tex. 2025) (enacted and codified at TEX. BUS. ORG. CODE ANN. § 2.115(b) (West 2025) (allowing forum selection for "internal entity claims"); § 2.116 (allowing waiver of trial by jury for "internal entity claim"); § 21.218 (tightening

After these high-profile events, news happens whenever another company de-camps from Delaware. Dropbox and The Trade Desk have reincorporated in Nevada,[13] and Roblox wants to move there.[14] Archer Aviation recently proposed joining Tesla and SpaceX in Texas.[15]

The movements even have scholars talking.[16] Scholars have studied why corporations change states of incorporation[17] and why equity control seems to be such an issue.[18] At least one scholar

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standards for books and records requests); §§ 21.416, 21.4161, 21.418, 21.419 (reforming how certain conflict-of-interest transactions may be handled and setting an intentionally high conduct bar for liability of public company directors); § 101.256 (applying the standards of Section 21.419 to limited liability company managers); § 101.401 (allowing the elimination of fiduciary duties by agreement); §§ 152.002 & 152.006 (allowing a limited partnership agreement to eliminate the duties of loyalty, care, and good faith for partners, at least for publicly traded limited partnerships); and §§ 152.006 & 153.163 (applying the standards of Section 21.419 to managers of limited partnerships, at least those publicly traded)).

13. Tom Hals, *In Tesla's Wake, More Big Companies Propose Voting 'Dexit' to Depart Delaware*, REUTERS (May 14, 2025, at 22:29 EDT), https://www.reuters.com/business/autos-transportation/teslas-wake-more-big-companies-propose-voting-dexit-to-depart-delaware-2025-05-14/ [https://perma.cc/XPV5-R683].

14. *Id.*

15. Ryan Autullo, *Texas Investor Law Moves Archer Aviation to Plot Delaware Exit*, BLOOMBERG L. (May 19, 2025, at 05:00 ET), https://news.bloomberglaw.com/litigation/texas-investor-law-moves-archer-aviation-to-plot-delaware-exit [https://perma.cc/P5BL-2TKU].

16. *E.g.*, Bailey Swartz, Anthony Rickey, Robert Ragazzo, Benjamin Edwards & George A. Mocsary, *Panel: Shifting Landscapes in Corporate Law: The View from Delaware, Texas, Nevada, and Wyoming*, 30 FORDHAM J. CORP. & FIN. L. 267 (2025).

17. *See* William J. Moon, *Havens for Corporate Lawbreaking*, 103 WASH. U. L. REV. (forthcoming 2026), https://ssrn.com/abstract=5148347 [https://perma.cc/LZ9Q-WVW3]; Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened*, 50 J. CORP. L. 824 (2025).

18. Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641 (2025); Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, 50 J. CORP. L. 1095 (2025); Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525 (2025).

sized up Texas v. Delaware (and concluded that Delaware loomed larger still, in many ways).[19]

B. Texas Was Already Talking

Texas was already actively courting business litigation. In September 2024, Texas began hearing cases in its own Texas Business Court, a "statewide, specialized trial court created to resolve certain complex business disputes."[20] After a spate of decisions regarding its own jurisdiction, the court has begun to opine on business issues.[21] Appeals from the Business Court go to the newly created 15th Court of Appeals, with further review available in the Supreme Court of Texas itself.[22] In 2025, the legislature reduced the amount in controversy required for Business Court jurisdiction, from $10 million to $5 million, and expanded the court's jurisdiction to more subjects, including consumer claims.[23] Expect the Business Court to make news.[24]

But at the highest level, Texas courts have been actively protecting large equity holders for many years. The Court's (and

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19. Christine Hurt, *Texas, Delaware, and the New Controller Primacy*, 67 ARIZ. L. REV. 693 (2025); *see also* Swartz et al., *supra* note 16, at 272–74 (comments of Robert Ragazzo).

20. *About the Texas Business Court*, TEX. JUD. BRANCH, https://www.txcourts.gov/businesscourt/ [https://perma.cc/NQ2D-BV6B] (last accessed May 22, 2025); *see* OFFICE OF COURT ADMINISTRATION, THE TEXAS JUDICIAL SYSTEM 9 (Mar. 2025), https://www.txcourts.gov/media/1460294/judicial-system-pamphlet-2025.pdf [https://perma.cc/KSN5-3PJR].

21. For decisions of the Court, see *Opinions*, TEX. JUD. BRANCH, https://www.txcourts.gov/businesscourt/opinions/ (last visited October 31, 2025).

22. TEX. JUD. BRANCH, COURT STRUCTURE OF TEXAS: OCTOBER 2025, https://www.txcourts.gov/media/1461304/court-structure-chart-october-2025.pdf [https://perma.cc/TUZ7-YAGG].

23. *See* H.B. 40, 89th Leg., Reg. Sess. (Tex. 2025).

24. *E.g.*, Primexx Energy Opp. Fund, LP v. Primexx Energy Corp., 709 S.W.3d 619, 627 (Tex. Bus. Ct.), *reconsideration denied*, 713 S.W.3d 416 (Tex. Bus. Ct. 2025) (addressing the limits to which a partner's duties of loyalty, care, and good faith can be eliminated); Ryan Autullo, *Texas Business Courts Hit Milestone with First Merits Decision*, BLOOMBERG L. (June 18, 2025, at 18:38 ET), https://news.bloomberglaw.com/litigation/texas-business-courts-hit-milestone-with-first-merits-decision [https://perma.cc/CQQ9-4MXC] (reporting the *Primexx* final judgment).

the legislature's) reticence to allow veil-piercing is well-known.[25] And cases such as *Ritchie v. Rupe*,[26] which in 2014 disallowed a cause of action for oppression of minority shareholders, caused a stir.[27] That the Court leans toward management should surprise no one. Texans take pride that the state is "open for business,"[28] and that means in part a commitment to support the decisions of those who control businesses.

C. The Methodology

This Article's methodology is to examine how the Supreme Court of Texas, in cases involving controlling or influential equity owners, extends the reasoning of its opinions beyond law, and sometimes in conflict with it. When the Court moves beyond law,

25. *See, e.g.*, 20 ELIZABETH S. MILLER, & ROBERT A. RAGAZZO, TEX. PRAC., BUS. ORG. § 29 (Dec. 2024 Update).

26. 443 S.W.3d 856 (Tex. 2014). Sometimes the Court goes out of its way to emphasize a business entity's "liability shield" function. *See* Reider v. Woods, 603 S.W.3d 86, 97–98, 101–02 (Tex. 2020) (emphasizing the "shield" function at length when merely the legal separateness of business entities was at issue).

27. *See, e.g.*, James Dawson, Ritchie v. Rupe *and the Future of Shareholder Oppression*, 124 YALE L.J. FORUM 89 (2014); Eric T. Stahl, *Minority Shareholder Claims in the Wake of* Ritchie v. Rupe, 34 CORP. COUNSEL REV. 35 (2015); Lyndon Bittle & Kelli Hinson, *Texas Turns a Corner: Resolving Shareholder Disputes in Closely Held Businesses After* Ritchie v. Rupe, 67 BAYLOR L. REV. 339 (2015); *see* Eric Fryar, *Filling in the Gaps: Shareholder Oppression After* Ritchie v. Rupe: Part I, 47 TEX. J. BUS. L. 47 (2017) [hereinafter Fryar, Part I]; Eric Fryar, *Filling in the Gaps: Shareholder Oppression After* Ritchie v. Rupe: Part II, https://shareholderoppression.com/images/pdf/Filling_in_the_Gaps-Part_2.pdf [https://perma.cc/8CDU-NZBG].

28. *Texas Is Open for Business*, GREG ABBOTT FOR GOVERNOR (2025), https://www.gregabbott.com/texas-is-open-for-business/ [https://perma.cc/PLZ8-MGKQ] (repost of an article originally published in the Concord Monitor, July 23, 2015); *Start a Business in Texas*, TEX. ECON. DEV. & TOURISM OFF. (2025), https://gov.texas.gov/business/page/start-a-business [https://perma.cc/QG7E-2G3G] ("Texas offers the best business ecosystem in the nation and has frequently been named the best state to start a business. Our leading business climate and favorable regulatory environment provide the groundwork small businesses and entrepreneurs need to succeed."); *Texas Is Open for Business*, ASSOC. REPUBLICANS OF TEXAS (2025), https://artexas.org/texas-is-open-for-business/ [https://perma.cc/47UV-Z7NH].

I hypothesize that the most likely explanation for the Court's moves, given its nature as a political body, is political commitment.

This is a subtle argument about a court of last resort—a court which itself creates law. How can one tell whether the Court is making the law or extending beyond law? The reader must judge on the evidence, including that presented here, but the jurisprudence shows clear examples of each type of case.

In many cases, no political commitment appears. When the law plausibly supports the Court's result and the justices unanimously agree, the legal reasoning alone appears adequate to the Court's decision. The justices' political commitments appear to overlap with the Court's legal reasoning or play no role at all. Such a case shows no separate political commitment.

In re Estate of Poe[29] is such a case. In *Estate of Poe*, the Court held that "a corporation's director cannot owe an *informal* duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder,"[30] even though the corporation had only one shareholder and one director and the director was the shareholder's father.[31] The emphasis is added to the quote because *informal* fiduciary duties differ from a corporate director's formal fiduciary duties of "obedience, loyalty, and due care."[32] The holding in *Estate of Poe* avoids imposing on directors "potentially conflicting duties," the Court said.[33] The potential that corporate fiduciaries may act in other than the corporation's best interests is always a concern.[34] So, while the Court may well have

29. 648 S.W.3d 277 (Tex. 2021).

30. *Id.* at 289 (emphasis added).

31. *Id.* at 280.

32. *Id.* at 287.

33. *Id.* at 286–89.

34. *See, e.g.*, TEX. BUS. ORG. CODE ANN. § 21.418 (West 2025) (addressing director and officer conflicts of interest). *Estate of Poe* reaffirmed the law's policing of director conflicts of interests. After disposing of the informal fiduciary duty claim, the Court reviewed conflict of interest law for corporate directors and asked whether Section 21.418 applied to the transaction at issue in the case. 648 S.W.2d at 289–91. The Court held that no evidence existed to support board or shareholder approval of the transaction because the

intended to shore up legal protections for controlling shareholders, the facts of the case and the law align in such a way that any political commitment is covered by the legal reasoning and holding.

Cardiac Perfusion Services, Inc. v. Hughes[35] is another example. The trial court in that case ordered that a controlling shareholder buy out a minority shareholder's interest.[36] After the trial court decision in *Cardiac Perfusion*, the Supreme Court of Texas decided *Ritchie v. Rupe*,[37] which held that a "buy-order is not available under a common-law claim for shareholder oppression or under the receivership statute [Tex. Bus. Org. Code § 11.404]."[38] The *Cardiac Perfusion* case reached the Court after *Ritchie* was decided, and the Court therefore held the buy-out order unlawful.[39] That was not the whole case: the jury in *Cardiac Perfusion* found facts strongly suggesting that the controlling shareholder had breached duties to the corporation, and the Texas code provides that "a minority shareholder in a closely held corporation may recover equitable relief, in some cases individually . . . , through a derivative action."[40] The Court therefore remanded to allow the plaintiff to "pursue such a claim."[41] But the Court broke no new ground here, post-*Ritchie*, and the results appear to have been justified entirely by established law that the Court cited. No political commitment to controllers appears from behind the legal analysis. Two cases discussed in the margin probably also fall in with *Estate of Poe* and *Cardiac Perfusion*.[42]

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director was interested in the transaction and the shareholder never voted for it. *Id.* at 290–91. It was therefore error to instruct the jury on these theories. *Id.* at 291–92.

35. 436 S.W.3d 790 (Tex. 2014).

36. *Id.* at 792.

37. 443 S.W.3d 856 (Tex. 2014).

38. *Cardiac Perfusion*, 436 S.W.3d at 792.

39. *Id.* at 793.

40. *Id.* at 791–92 (citing TEX. BUS. ORG. CODE § 21.563(c)).

41. *Id.* at 792.

42. The two cases are Transcor Astra Grp. v. Petrobras Am. Inc., 650 S.W.3d 462 (Tex. 2022), and Longview Energy Co. v. Huff Energy Fund LP, 533 S.W.3d 866 (Tex. 2017).

But, in other cases, the Court's legal reasoning is inadequate in some way to support the Court's results; when it is, that reasoning reveals a political commitment. In the cases discussed in Part II, the Court's political commitment appears when the justices protect controlling shareholders even when doing so requires them to ignore or even cast aside other law. In the last twelve years, several of the Court's positions in prominent cases decided in favor of controlling shareholders have a facial legal plausibility but do not survive a hard surface scratch. That the justices seem willing to ignore or set aside (or perhaps not even

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Transcor Astra enforced a settlement between two international corporations relating to a joint venture between them that began in 2006 and quickly fell apart. 650 S.W.3d at 468. A 2012 settlement was supposed to resolve the resulting disputes; in it, Petrobras agreed to pay Astra over $820 million in damages. The settlement agreement contained a broad release that ended in a carve-out: "'[n]otwithstanding anything to the contrary,' the released claims 'shall not include any and all claims . . . arising out of, related to, or connected in any way with the alleged breach, enforcement, or interpretation' of the settlement agreement." *Id.* at 470. Petrobras claimed that this carve-out exempted from the settlement claims that Astra had breached fiduciary duties by paying bribes to obtain the 2006 joint venture agreement and offering bribes to obtain the 2012 release. *Id.* The Court stretched well beyond common sense to claim that the plain meaning of the carve-out language did not apply, as if fraud in the inducement was not an argument related to or connected in any way with the enforcement of the settlement agreement. *Id.* at 470–72. Perhaps sensing this senselessness, the Court backed it up with a purpose argument: "the 'peace' the parties purchased through the settlement agreement" was the point of the whole agreement. *Id.* at 470–71. Texas courts are inclined to emphasize the plain meaning of contractual language. *See* Finley Res., Inc. v. Headington Royalty, Inc., 672 S.W.3d 332, 339 (Tex. 2023) ("Because objective intent controls, our focus is on the contract's language."). However, "[t]hat does not mean . . . that the word[s] must carry every meaning to which [they are] naturally susceptible." *Id.* at 340. The broader context of the 2012 settlement was a plausible limitation on the carve-out's ordinary meaning. *Longview Energy* affirmed the dismissal of breach of fiduciary duty claims against two corporate directors (and their affiliates) for usurping a corporate opportunity. 533 S.W.3d at 869–71. The Court creatively decided a choice of law issue in favor of Texas procedural law and then ruled that no evidence supported the trial court's remedies. *Id.* at 872–78. The Court's melding of Delaware substantive law and Texas procedural law is plausible enough. *See id.* at 873–74, 877–78. The Court seemed to take no note (or perhaps the plaintiffs failed to argue) that director D'Angelo's deflection of Longview from the market—away from where the Huff parties bought up leases—surely dampened the price Huff paid. *See id.* at 870–78 (focusing on properties and profits traceable from the breach rather than on money saved as a result of it).

exam closely) their own law suggests a political commitment. I argue that the Court's decisions in *Ritchie* and in *In re First Reserve Management, L.P.*[43] are examples.

When the justices disagree with each other—as they do in some cases examined closely in this Article—this political commitment manifests itself in concurring and dissenting opinions arguing in similarly beyond-the-law fashion in favor of the shareholder's freedom from legal restriction. The Court's recent decision in *Keyes v. Weller*[44] shows this, as do a few of the opinions reported in Part III.

This Article proceeds as follows. Part I describes the ways in which the Supreme Court of Texas is formally a political body. Under the Constitution of the State of Texas, the "Chief Justice and eight Justices . . . shall be elected . . . by the qualified voters of the state at a general election."[45] The judges are partisans. The political nature of the Court is therefore not surprising, but the extent to which politics influences the Court may be. Part I will convey some of these formal political influences.

In Part II, this Article discusses three cases decided over the last twelve years that show the Court's political commitment to protecting controlling equity owners. The analysis walks carefully through the weeds of the Court's or the justices' reasoning in those cases to point out where and how the Court stretches beyond law. Texas law governs these cases, but the statutes at issue largely track past model codes and therefore reflect business entity law across jurisdictions.[46] The issues and law discussed here will be familiar to any careful student of business entity law.

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43. 671 S.W.3d 653 (Tex. 2023).

44. 692 S.W.3d 274 (Tex. 2024).

45. TEX. CONST. art. V, §§ 2(a)–(c).

46. The statute governing business entity formation and governance in Texas is known as the Texas Business Organizations Code. It was enacted in 2003 but is largely a local version of prior model acts. The prior partnership code, called the "Texas Revised Partnership Act," TEX. REV. P'SHIP ACT art. 6132b-11.01 (1997), was modeled on the Revised Uniform Partnership Act. *E.g.*, *Partnership Act: Enactment History*, UNIF. L. COMM'N (2024), https://www.uniformlaws.org/committees/community-home?CommunityKey=52456941

Part III asks a simple question: Is the Court moving beyond law intentionally? In other words, do the justices mean to push aside law already on the books? I do not believe the Court's reasoning beyond law is intentional in this way, and evidence for this is summarized by examples in Part III. Briefly put, when a choice is presented clearly to the Court between law and the favored political position beyond law, the Court chooses law. At least, most of the Court does. Political positions are more often revealed in dissenting opinions.

Then in Part IV I ask again, after having presented all of the evidence, if political commitment is the best explanation for the justices' movements beyond law. If movement beyond law is not what is intended, why does it happen? Only the justices could begin to answer this question, and their individual answers might not provide clarity. My answer is that the Court itself is politically committed. I suspect that the Court's latent intent is to make its political commitment certain even if its legal commitment is unclear. The Court's political commitment demonstrated in this Article may in fact give more reassurance to the litigants that the Court desires to protect than could a legal commitment.

-7883-47a5-91b6-d2f086d0bb44 [https://perma.cc/9J9D-7FTD] (last visited November 1, 2025). The Texas "Business Corporation Act," TEX. BUS. CORP. ACT art. 1.01.A (1997), was originally modeled on the Model Business Corporation Act. *See* Alan R. Bromberg, Byron F. Egan, Dan L. Nicewander & Robert S. Trotti, *The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law*, 41 TEX. J. BUS. L. 41, 45–47 (2005). Like many limited liability company codes, Texas's predated the Uniform Limited Liability Company Act. Val Ricks, *Three Suggestions for the Texas Limited Liability Company Law*, 44 TEX. J. BUS. L. 29, 31 & n.4 (2011). Limited liability codes therefore show less uniformity. The Business Organizations Code was intended to reorganize the business entity laws into a hub-and-spoke format without substantive change. See the Revisor's Report for the Business Organizations Code, which uses the phrase "[n]o substantive change" over 1,000 times. *Statutory Revision Documents Related to the Business Organization Code*, LEGIS. REFERENCE LIBR. OF TX., https://lrl.texas.gov/legis/revisorsNotes.cfm?code=Business_Organizations [https://perma.cc/3PQC-W55K] (last visited Nov. 2, 2025).

I. THE SUPREME COURT OF TEXAS AS A POLITICAL BODY

The Supreme Court of Texas sits at the apex of the state's civil court system. (The separate Texas Court of Criminal Appeals has "[f]inal appellate jurisdiction in criminal cases."[47]) The Supreme Court of Texas has statewide jurisdiction—until recently, it was the only civil court of appeals with statewide jurisdiction.[48]

The inherently political nature of the Supreme Court of Texas reveals itself formally—at least, besides the requirement of direct, statewide elections—in primarily three ways: management of court membership, discretionary docket control, and the formal jurisdiction and appointment mechanisms of the 15th Court of Appeals.

A. Appointments Before Elections

The Court's political commitments are presumably encouraged in part by the political nature of Supreme Court of Texas offices. As noted, the justices are elected by the "voters of the state at a general election."[49] The dominance of the Republican Party in statewide elections in Texas is stark: no Democrat has been elected to statewide office since 1994.[50] The last Democrats on the Supreme Court of Texas retired at the end of 1998.[51]

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47. COURT STRUCTURE OF TEXAS, *supra* note 22.

48. *See About the Texas Business Court*, *supra* note 20, at 10–11.

49. TEX. CONST. art. V, § 2(c).

50. Texas Democratic Party / Statewide Offices (Oct. 3, 2025), WIKIPEDIA, https://en wikipedia.org/wiki/Texas_Democratic_Party#Statewide_offices [https://perma.cc/DEY4-N6BV]; Pooja Salhotra, *Republicans Reassert Their Dominance in Texas*, TEX. TRIBUNE (Nov. 6, 2024, at 08:00 CT), https://www.texastribune.org/2024/11/06/texas-republicans-elections-2024-trump-cruz/ [https://perma.cc/93YQ-S52G].

51. Justices Raul Gonzalez and Rose Spector each finished terms at the end of 1998 and were replaced by Republicans. Supreme Court of Texas (May 9, 2025), https://en.wikipedia.org/wiki/Supreme_Court_of_Texas. In an earlier era, Democrats were equally or even more dominant and for a far longer period. *See* William J. Chriss, *Chief Justice Jack Pope and the End of the Non-Partisan Court, 1964–1985*, 27 APP. ADVOC. 509, 511–13 (2015) (reporting that no Republican served in statewide office between 1900 and

Even though the Texas Constitution provides that the justices be elected, the more politically effective method of party control is for a justice to retire midterm so that the governor can appoint a successor;[52] the successor will then run in the next election as an incumbent.[53] Using this method, current Governor Greg Abbott appointed Chief Justice Blacklock and Justices Bland, Busby, Hawkins, Huddle, Sullivan, and Young—seven of the nine sitting justices and a supermajority of the Court.[54] Justice Lehrmann was appointed by Rick Perry, a previous Republican governor.[55] Justice Hawkins's recent appointment illustrates the process. Former Justice Boyd announced his retirement in 2025, in the fifth year of a six-year term.[56] This midterm retirement gave Governor Abbott the power to appoint Justice Hawkins as Justice Boyd's successor. Of the nine sitting justices, only Justice Devine was elected to the court in the first instance, defeating another

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1978). For an interesting recitation of the party change in the courts, see Anthony Champagne, *Judicial Reform in Texas: A Look Back After Two Decades*, 43 CT. REV. 68 (2006).

52. TEX. CONST. art. V, § 28(a) ("A vacancy in the office of Chief Justice, Justice, or Judge of the Supreme Court . . . shall be filled by the Governor until the next succeeding General Election for state officers . . . .").

53. *See* Herbert M. Kritzer, *Appointed or Elected: How Justices on Elected State Supreme Courts Are Actually Selected*, 48 LAW & SOC. INQUIRY 371, 372 (2023) ("[A]ll states but one [of those in which state supreme court judges are elected] use appointments to fill midterm supreme court vacancies . . . .").

54. *About the Court: Justices*, TEX. JUD. BRANCH, https://www.txcourts.gov/supreme/about-the-court/ [https://perma.cc/96JZ-HWR8]; Emma Platoff, *Gov. Greg Abbott Selects Former Appeals Court Judge Jane Bland for Texas Supreme Court*, TEX. TRIBUNE (Aug. 26, 2019, at 14:00 CT), https://www.texastribune.org/2019/08/26/greg-abbott-appoints-jane-bland-texas-supreme-court/ [https://perma.cc/U4TR-VGYM]; *Governor Abbott Appoints Hawkins as Justice of the Supreme Court of Texas*, OFF. OF THE TEX. GOVERNOR (Oct. 24, 2025), https://gov.texas.gov/news/post/governor-abbott-appoints-hawkins-as-justice-of-the-supreme-court-of-texas [https://perma.cc/2XRG-MJAG].

55. *About the Court: Justices*, *supra* note 54; *see Debra H. Lehrmann, Justice, Supreme Court of Texas*, NAT'L ASSOC. OF WOMEN JUDGES, https://www.nawj.org/uploads/files/events/webinars/justicedebralehrmannbio.pdf [https://perma.cc/S3Z2-8BXN] (last visited Sep. 26, 2025).

56. *Justice Jeff Boyd to Retire from the Supreme Court of Texas*, TEX. JUD. BRANCH (Apr. 9, 2025), https://www.txcourts.gov/supreme/news/justice-jeff-boyd-to-retire-from-supreme-court-of-texas/ [https://perma.cc/8QVE-W24X].

Republican in the 2012 primary and then running unopposed in the general election.[57]

It is difficult to tell the exact political consequences of gubernatorial appointment to the Court, as opposed to general election. Governor Abbott is also a lawyer[58] and was himself a justice of the Court from 1996 to 2001.[59] He knows quite well what the Court does. (Then-Justice Abbott also resigned before the end of his term, giving the Republican governor Rick Perry the opportunity to appoint Abbott's successor.[60]) One would expect the Governor to appoint in accordance with his and his party's political interests,[61] but discerning what the Governor believes are the overriding political interests with regard to each Supreme Court appointment would be difficult. When the Governor appointed Justice Bland, he emphasized her legal expertise, respect for "the Constitution" (the Governor did not say which

57. *John P. Devine*, WIKIPEDIA (May 2, 2025), https://en.wikipedia.org/wiki/John_P._Devine_(judge) [https://perma.cc/43NA-K6HD].

58. *Find a Lawyer: Gregory W. Abbott*, STATE BAR OF TEXAS, https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=148193 [https://perma.cc/7H9K-GXMD] (last visited Nov. 2, 2025).

59. *Supreme Court of Texas*, WIKIPEDIA (Oct. 27, 2025), https://en.wikipedia.org/wiki/Supreme_Court_of_Texas [https://perma.cc/9D4Z-NSYG]; *Texas Governor Greg Abbott*, OFF. OF THE TEX. GOVERNOR, https://gov.texas.gov/governor-abbott [https://perma.cc/39LH-7EDG] (last visited Nov. 2, 2025).

60. *Greg Abbott*, WIKIPEDIA (Nov. 1, 2025), https://en.wikipedia.org/wiki/Greg_Abbott [https://perma.cc/JVT2-HEUB]; *Xavier Rodriguez*, WIKIPEDIA (Jul. 29, 2025) https://en.wikipedia.org/wiki/Xavier_Rodriguez [https://perma.cc/4QY8-ZXT6] (Justice Rodriguez succeeded then-Justice Abbott on the Court in September 2001 in what was the middle of then-Justice Abbott's first elected six-year term.).

61. For what it is worth, Chief Justice Blacklock at some time in the distant past worked for Governor Abbott. Jordan Green, *Texas Supreme Court Justice Tells Longview Crowd that Judges Should Interpret Constitution as Written*, LONGVIEW NEWS-J. (Oct. 23, 2024), https://www.news-journal.com/news/local/texas-supreme-court-justice-tells-longview-crowd-that-judges-should-interpret-constitution-as-written/article_197dd060-90cf-11ef-a88f-334227d0c79e.html (on file with the *Fordham Journal of Corporate & Financial Law*).

constitution), and her commitment to "the rule of law."[62] He said similar things when appointing other justices,[63] but the Governor does not usually defend his choices at length.[64] When he speaks generally about the issue, he says appointments are "one of the most important jobs I have as governor" and that his judges offer "predictability and certainty" because he looks for originalists, textualists.[65] I suppose he says no more than necessary. The justices campaign directly to voters when they are up for re-election[66] but in the general elections typically win by comfortable margins.[67]

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62. *Governor Abbott Announces Intent to Appoint Jane Bland to Texas Supreme Court*, OFF. OF THE TEX. GOVERNOR (Aug. 26, 2019), https://gov.texas.gov/news/post/governor-abbott-announces-intent-to-appoint-jane-bland-to-texas-supreme-court/ [https://perma.cc/BKX5-CB4K].

63. *Governor Abbott Appoints Rebeca Huddle to the Texas Supreme Court,* OFF. OF THE TEX. GOVERNOR (Oct. 15, 2020), https://gov.texas.gov/news/post/governor-abbott-appoints-rebeca-huddle-to-the-texas-supreme-court [https://perma.cc/Z3MF-JU6H]; *Governor Abbott Appoints Blacklock as Chief Justice, Sullivan as Justice of the Supreme Court of Texas*, OFF. OF THE TEX. GOVERNOR (Jan. 6, 2025), https://gov.texas.gov/news/post/governor-abbott-appoints-blacklock-as-chief-justice-sullivan-as-justice-of-the-supreme-court-of-texas [https://perma.cc/4LXB-NQH2]. Governor Abbott was more specific in extolling Justice Hawkins's conservative credentials. The Governor noted that Hawkins served in "President Trump's Department of Justice," challenged "the federal overreach of Obamacare," and defended "Texas' election integrity measures." *Governor Abbott Appoints Hawkins as Justice of the Supreme Court of Texas*, OFF. OF THE TEX. GOVERNOR (Oct. 24, 2025), https://gov.texas.gov/news/post/governor-abbott-appoints-hawkins-as-justice-of-the-supreme-court-of-texas [https://perma.cc/P5X3-PY55]. The Governor's announcement also noted that Hawkins clerked for Justice Alito of the U.S. Supreme Court and Judge Edith Jones of the 5th Circuit. *Id.*

64. *See, e.g.*, *supra* note 63.

65. Eleanor Klibanoff, *Gov. Greg Abbott Touts His influence on Texas Courts to Conservative Law Group*, TEX. TRIBUNE (Apr. 3, 2025, at 16:00 CT), https://www.texastribune.org/2025/04/03/greg-abbott-texas-courts-ut-jim-davis/ [https://perma.cc/D89B-MM2D].

66. *See* Green, *supra* note 61; Eric Dexheimer & Taylor Goldenstein, *Personal Attacks, Explosive Claims Dominate Once Ho-Hum Texas Judicial Races*, HOUSTON CHRON. (Mar. 1, 2024), https://www.houstonchronicle.com/politics/election/2024/article/texas-supreme-court-judge-election-18696447.php [https://perma.cc/MDD3-6GJT].

67. *E.g.*, *Texas Supreme Court Elections, 2024*, BALLOTPEDIA, https://ballotpedia.org/Texas_Supreme_Court_elections,_2024 [https://perma.cc/TRK2-7CRC] (last visited Nov. 2, 2025).

Gubernatorial appointment surely has some effect on the political commitments of the justices themselves, but what this effect is would be difficult to say. It is possible that some justices see the Court as a pathway to other things, including other political office.[68] As noted, Governor Abbott is a former justice. U.S. Senator John Cornyn was once a justice.[69] Federal district court judge Xavier Rodriguez was a justice for just over a year before being appointed to the federal bench.[70] Eva Guzman, who resigned from the Court on June 7, 2021, announced nine days later that she was running for state attorney general.[71] If a justice sees the court as a good career move rather than an ultimate destination, the justice would have an incentive to move with the party that provided, or provides, the path to office.

The uniformity and political control evidenced by how justices come to and leave office strongly suggest that membership on the Court matters a great deal to the party.

B. Docket Control

The Court's ability to perform political functions is bolstered by the Court's control of its own docket. Whether the Court hears a case or not is up to the Court: "Whether to grant review is a matter of judicial discretion."[72] "The Supreme Court *may review* a

68. Swartz et al., *supra* note 16, at 272 (comments of Robert Ragazzo).

69. *Id.*

70. *U.S. District Judge Xavier Rodriguez*, U.S. DIST. CT. FOR THE W.D. OF TEX., https://www.txwd.uscourts.gov/team/xavier-rodriguez/ (under the "Biographical Information" tab) [https://perma.cc/YP4N-WWCT] (last visited Nov. 2, 2025).

71. *See Justice Guzman to Resign, Effective June 11*, TEX. JUD. BRANCH https://www.txcourts.gov/supreme/news/justice-guzman-to-resign-effective-june-11/ (last visited May 30, 2025); Patrick Svitek, *Eva Guzman, Former Texas Supreme Court Justice, Officially Starts Campaign for Attorney General*, TEX. TRIBUNE (June 21, 2021, at 10:00 CT), https://www.texastribune.org/2021/06/21/texas-eva-guzman-attorney-general/ [https://perma.cc/5TTF-TE59].

72. TEX. R. APP. P. 56.1. On this issue generally, see 6 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEX. CIV. PRAC. APP. PRAC. § 22:1 (2d ed., Feb. 2025 Update) ("Unlike the courts of appeals, the Supreme Court exercises discretionary review power.").

court of appeals' final judgment on a petition for review . . . ."[73] (Even in the limited cases in which the law allows direct appeal to the Court, the Court "may . . . decline to exercise jurisdiction."[74]) The Court can request a "brief on the merits" even before deciding whether to grant review.[75] The non-exclusive list of factors the Court "considers" when deciding to grant review includes whether the court of appeals (i) "appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected" or (ii) "decided an important question of state law that should be, but has not been, resolved by the Supreme Court."[76] Thus, the Court can use its discretion to rule on cases that are politically significant and further its political commitments.

The Court's report of its work reveals the breadth of the discretion it exercises.[77] The Court divides all of its work into "regular causes" and "other than regular causes." The Court defines "regular cause" around the Court's discretion:

> "Regular causes" involve cases in which four or more of the Supreme Court justices have decided in conference that a petition for review, petition for writ of mandamus or habeas corpus, or parental notification appeal should be reviewed. Regular causes also include direct appeals the Court has agreed

73. TEX. R. APP. P. 53.1 (emphasis added). The rules likewise give the Court discretion for direct appeals and certified questions of law from federal courts. *See* TEX. R. APP. P. 57.6 ("the Court . . . may"); TEX. R. APP. P. 58 ("The Supreme Court of Texas may answer questions . . . . The Supreme Court may decline to answer the questions certified to it.").

74. TEX. R. APP. P. 57.2; MCDONALD & CARLSON, *supra* note 72, §§ 31:4, 31:7.

75. TEX. R. APP. P. 55.1. The court has indicated that it intends beginning Jan. 1, 2026 to "eliminate the Court's practice of requesting merits briefs before granting a petition for review." SUPREME COURT OF TEXAS, *Preliminary Approval of Amendments to Texas Rules of Appellate Procedure 9, 52, 53, 55, 56, 57, 58, and 64*, Misc. Docket No. 25-9092, at 1, 19 (Oct. 24, 2025), https://www.txcourts.gov/media/1461451/259092.pdf [https://perma.cc/WFW8-AHLE]. The Court intends to retain the right to order them, however. *See id.* at 20, 30.

76. TEX. R. APP. P. 56.1.

77. Thanks to Prof. Mark Steiner for this suggestion.

> to review and questions of law certified to it by a federal appellate court that the Court has agreed to answer.[78]

The Court made "regular cause" of only 129 of 891 petitions for review that the Court handled in 2024.[79] The others were denied, dismissed, or granted some other disposition.[80] Petitions for writ of mandamus did not fare differently; the Court made a regular cause of only 8 of 234.[81]

The rules thus facilitate the Court's power to act politically. Another way they do this is to exempt the Court from hearing oral argument. "If at least six members of the Court so vote, a petition may be granted and an opinion handed down without oral argument."[82] The Court employed this rule 38 times in 2024, only three times to affirm.[83] Of course, this rule is facially justified by the existence of occasional egregious legal error in a lower court opinion, and I have not studied specifically whether the Court has used this power politically. But the capacity is certainly there, and one would expect the Court to use it in its own interests.

The rules also facilitate the Court's power to work with minimal political consequences even when the Court declines to review. Under Texas rules of appellate procedure, the Court's responses to a petition for review can be labeled denied, dismissed "w.o.j.," or refused.[84] These are defined terms. "Refused" means that the Court agrees with "the court of appeals' judgment" and "legal principles"; this label when applied gives the court of appeals' opinion "the same precedential value as an opinion of the Supreme Court."[85] "Dismissed w.o.j." means the

78. TEX. JUD. BRANCH, SUPREME COURT ACTIVITY: FY 2020–2024 1 n.1, https://www.txcourts.gov/media/1460391/sc-activity-2024.pdf [https://perma.cc/4SH2-68MH] (last visited Nov. 2, 2025).

79. *Id.* at 7.

80. *Id.*

81. *Id.* at 3.

82. TEX. R. APP. P. 59.1.

83. TEX. JUD. BRANCH, *supra* note 78, at 3.

84. TEX. R. APP. P. 56.1(b)–(d).

85. TEX. R. APP. P. 56.1(c).

Supreme Court has determined it lacks jurisdiction.[86] The final category, "denied," is a catchall, however. It means the Court "is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects" but has decided "that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction."[87] The justices' views of the importance of the issue thus become the test for review.[88]

C. The Fifteenth Court of Appeals & the Business Court

Of the fifteen Texas intermediate appellate courts, fourteen have "jurisdiction in a specific geographical region" only.[89] In 2024, the 15th Court of Appeals was created to have "statewide jurisdiction" but especially to have exclusive jurisdiction over appeals "from the Business Court and cases brought by or against the State, state entities, and its officers and employees."[90] Though the 15th Court of Appeals sits in Austin, its judges are elected statewide because the jurisdiction of the 15th covers "all counties in [the] state."[91] Appeals from the 15th Court of Appeals go directly to the Supreme Court of Texas.[92]

Critics claimed that "Republicans created the [15th] so businesses and the state could avoid having their cases heard by

86. TEX. R. APP. P. 56.1(b)(2).

87. TEX. R. APP. P. 56.1(b)(1).

88. Other rules address an improvident grant of review (which effectively lets the Court redecide between the three categories), TEX. R. APP. P. 56.1(d); cases that become moot, TEX. R. APP. P. 56.2; and cases that settle, TEX. R. APP. P. 56.3. When a case is moot or settles, the Court likewise has power to grant the petition and do what it wishes with the court of appeals' decision. *See* TEX. R. APP. P. 56.2, 56.3.

89. *Court of Appeals*, TEX. JUD. BRANCH https://www.txcourts.gov/about-texas-courts/courts-of-appeals/ [https://perma.cc/UWW8-DQA4] (last visited Nov. 2, 2025).

90. *Fifteenth Court of Appeals*, TEX. JUD. BRANCH, https://www.txcourts.gov/15thcoa/ [https://perma.cc/54EZ-GUUZ] (last visited Nov. 2, 2025); TEX. GOV'T CODE § 22.220(d).

91. *See* TEX. CONST. art. V, § 6(b); TEX. GOV'T CODE § 22.201(p).

92. COURT STRUCTURE OF TEXAS, *supra* note 22.

judges in urban counties where Democrats dominate local judicial races."[93] That is certainly one effect.

Proponents claimed that the 15th would "improve judicial efficiency, place people with business expertise on the bench and allow issues with implications statewide to be heard by judges elected statewide."[94] This is true in a banal sense but also in a politically important way. The Supreme Court's discretionary docket may become crowded with reversals of politically important cases as urban areas elect more intermediate appellate court judges who are Democrats. The Business Court and the 15th together place the resolution of certain politically important issues—of interest here, important business cases—firmly in the hands of whatever party has control of statewide offices. Currently and for the foreseeable future, that is the Republican Party.

Governor Abbott reportedly took a call from Elon Musk in early 2024, before these courts began work, as Musk was contemplating reincorporating SpaceX in Texas—away from Delaware; Governor Abbott is supposed to have told Musk these courts "would have his back."[95] Governor Abbott appointed the 15th's first judges;[96] the Business Court's judges are not elected but—by statute—appointed by the governor.[97] The creation of the 15th to handle politically important cases in ways consistent with Republican Party commitments leaves the Supreme Court free to exercise its power thoughtfully and more broadly from the top.

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93. Kayla Guo, *Abbott Appoints First Judges to New Appeals Court for Cases Involving State Government, Businesses*, TEX. TRIBUNE (June 11, 2024, at 18:00 CT), https://www.texastribune.org/2024/06/11/texas-appeals-court-15th-abbott-appointees/ [https://perma.cc/37Z7-ER4A]; *see also* Swartz et al., *supra* note 16, at 296 (comments of Robert Ragazzo that the business courts (and by implication the 15th Court of Appeals) "involved in the view of the Democrats, a usurpation of power from Democrat judges in elected position in Democratic counties to Republican judges").

94. Guo, *supra* note 93.

95. *Id.*

96. *Id.*

97. TEX. GOV'T CODE § 25A.009.

In sum, the Supreme Court of Texas is a political body. One should expect political positions to appear in the Court's actions.

II. TEASING OUT POLITICAL POSITIONS

Courts follow the law or at least appear to do so. The Texas Constitution requires the following: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[98] "No . . . *ex post facto* law [or] retroactive law . . . shall be made."[99] "No citizen . . . shall be deprived of life, liberty, property, privileges or immunities . . . except by the due course of the law of the land."[100] To act contrary to these provisions is "excepted out of the general powers of government."[101] Canon 2 of the Texas Code of Judicial Ethics provides, "A judge shall comply with the law. . . ."[102] Obviously, the Court's goal is to govern by law.

But every student of the law knows that the law is open-textured.[103] Each case before a court is unique or not, depending on the facts and the law's focus, and the law's focus is not always determined before a court speaks.

In the cases discussed in this Part II, I will point out how the Supreme Court of Texas confronted fact patterns by applying some law and then reaching out beyond the law either to fail to address other arguments or rule on them *sub silentio*, or sometimes write statements counter to or that even contradict

98. TEX. CONST. art. I, § 13.

99. TEX. CONST. art. I, § 16.

100. TEX. CONST. art. I, § 19.

101. TEX. CONST. art. I, § 29.

102. Tex. Code Jud. Ethics Canon 2.A; *see also id.* Canon 3.B(2) ("A judge should be faithful to the law . . . .").

103. Like most professors, I have favorite texts that address this aspect of law: A.W.B. SIMPSON, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND LEGAL HISTORY (1987); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); THEODOR VIEHWEG, TOPICS AND LAW (W. Cole Durham, Jr., trans. 1993). No text captures reality entirely. In most fact patterns, our mature law as understood by those who know it dictates a result by or almost by its plain meaning and logic alone, but final appellate courts have little need to address such cases.

other law. These implied rulings are not based in law, so why do the justices make them? All of these rulings consistently shore up the legal position of the large equity holder, often the equity holder with control. Consistently writing in favor of controlling or significant equity holders and moving beyond law in their favor strongly suggests the Court's political position.

A. Ritchie v. Rupe

Ritchie v. Rupe[104] is this Article's first instance of the Court's moving beyond law to protect controlling shareholders. In that opinion, the Supreme Court of Texas famously declined to recognize a cause of action for majority shareholder oppression of the minority—either under the state's "oppression" statute or at common law.[105] As in many oppression cases, the majority shareholder block in *Ritchie* controlled the formal mechanisms of power within the corporation involved.[106]

Like many states,[107] Texas has a statute that names "oppression" as a ground for suit against the business entity's "governing persons," such as the corporation's directors.[108] A minority shareholder would have standing to sue under the statute.[109] But under the Texas statute as construed in *Ritchie*, it is

104. 443 S.W.3d 856 (Tex. 2014).

105. *Id.* at 866–71 (construing the statute); *id.* at 877–91 (at common law). For an overview of oppression doctrine and a survey of state law, see ROBERT J. RAGAZZO & DOUGLAS MOLL, CLOSELY HELD CORPORATIONS § 7.01 (2024).

106. *See Ritchie*, 443 S.W.3d at 806–62; *see* RAGAZZO & MOLL, *supra* note 105, § 7.01(C) (describing common acts of oppression that stem from formal control mechanisms).

107. *See* RAGAZZO & MOLL, *supra* note 105, § 7.01(D)(1)(b) & n.192 ("Forty states have statutes . . . .").

108. TEX. BUS. ORG. CODE ANN. § 11.404(a)(1)(C) (West 2025) ("[A] court . . . may appoint a receiver for the entity's property and business if: (1) in an action by an owner or member of the domestic entity, it is established that . . . the actions of the governing persons of the entity are . . . oppressive . . . . "). For a definition of "governing persons," see *id.* § 1.002(35)(A).

109. *See id.* § 11.404(a)(1)(C).

the corporation who must be oppressed,[110] and only the "governing persons"[111] may commit the oppression. Thus, oppression under the statute merely of minority shareholders as opposed to the corporation is not actionable. Instead, the governing person must "abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation."[112] *Ritchie* thus construed the statute to make harm to the corporation a requirement of shareholder recovery.

The Court also decided whether oppression by those in control of a business entity—not just governing persons but controlling equity owners as well[113]—was actionable at common law. The Court considered such things as foreseeability, likelihood, and magnitude of potential injury; the existence of other protections; and the consequences of imposing a duty.[114] In the end, the Court declined to recognize a common law duty.[115]

The opinion is long and tries to sort through the weeds of prior precedents and the statute itself. Where the Court's legal conclusions in *Ritchie* overlap with plausible readings of the law, the opinion proves no obvious political commitment. The primary reason for discussing *Ritchie* here is that this Article's thesis is

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110. *Ritchie*, 443 S.W.3d at 866–71 (holding oppression occurs only when "a corporation's director or managers . . . abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation").

111. *See id.* at 868 & n.12; TEX. BUS. ORG. CODE ANN. § 1.002(35)(A)(v) (West 2025).

112. *Ritchie*, 443 S.W.3d at 871.

113. *See id.* at 879 ("some directors and majority shareholders" and "those in control"); *id.* at 885 (including "directors of controlling shareholders" as part of the Court's consideration of alternative remedies); *id.* at 887 n.54 (considering the law's scope regarding "majority and minority shareholders" and derivative actions).

114. *Id.* at 878–91.

115. *Id.* at 888–89 ("We conclude that [other] legal duties are sufficient to protect the legitimate interests of a minority shareholder by protecting the well-being of the corporation.").

evidenced in part by the *Ritchie* Court's handling of the Court's own precedent case, *Nicholas v. Patton*.[116]

Patton, decided by the Court in 1955, imposed liability on a founding, controlling shareholder in favor of two minority shareholder plaintiffs for "malicious suppression of dividends."[117] The *Ritchie* Court lurched up against *Patton* at several points. *Patton* was the primary precedent relied on by the *Ritchie* intermediate court of appeals in affirming the *Ritchie* trial court's order that a controlling group of shareholders must buy out the minority shareholder plaintiffs—the order the Supreme Court reversed.[118] *Patton* had to be handled in some way. I was a bit surprised the Court did not simply overrule it. Instead, the Court tried to re-rationalize it, and this is where the Court steps beyond law—the law being *Patton* itself.

In the following, I relate in Section 1 how even on the surface *Ritchie* struggled with *Patton*, in Section 2 what *Patton* said about its own meaning, and in Section 3 how the *Ritchie* court refused to deal with *Patton* in a manner consistent with *Patton*.

1. Supreme Court Discomfort with *Patton*

One first suspects the "beyond law" nature of the Court's handling of *Patton* when the Court tries to tell the reader the meaning of *Patton* not based on what the *Patton* court did or said but on what authority it cited.[119] This is a red flag. The meaning of precedent worth publishing is never exhausted by the prior cases it cites. Courts of last resort make law; they exist to establish precedent to guide lower courts; one would expect their published precedents often to establish law beyond prior precedents, and

116. 279 S.W.2d 848 (Tex. 1955).

117. *Id.* at 854; *see id.* at 849–51.

118. *See Ritchie*, 443 S.W.3d at 876–77.

119. *Id.* at 876 n.31.

Patton clearly did this. The *Ritchie* Court's eyebrow-raising rhetorical move was enough to prompt further inquiry.

The second tip came when the Court tried mightily but in indirect ways to suggest that *Patton* had decided nothing about either (i) a controlling shareholder's duty to anyone or (ii) a director's duty to a shareholder. The *Ritchie* Court was swayed here, perhaps, as it was in *Estate of Poe*,[120] by its recognition that imposing on directors and officers a direct duty to any shareholder would increase the probability of directors' and officers' duties conflicting with duties they owe to the corporation.[121] Whether directors and officers owed a fiduciary duty to shareholders—as opposed to a duty not to oppress them—was an issue the *Ritchie* Court appeared to want to avoid, and avoidance mostly consisted of trying to persuade the reader that *Patton* had not decided the issue already.[122] The Court seemed eager to claim a fiduciary duty had never been recognized: "We have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so."[123] Soon after deciding *Ritchie*, the Court reiterated in *Cardiac Perfusion*, "[T]his Court has never

120. *See supra* notes 29–34 and accompanying text.

121. *See* 443 S.W.3d at 890 & n.62.

122. *See, e.g.*, *id.* at 874–75, 874 n.27 (noting that the plaintiff alleged only an informal duty); *id.* at 876 n.31 (construing Patton v. Nicholas, 279 S.W.2d 848 (Tex. 1955), which examined liability of a controlling shareholder and director, as regarding only the shareholder's duty as a director); *id.* at 883–84 & n.51 ("*Patton* was not a 'shareholder oppression' case") (again construing *Patton* as merely regarding a director's fiduciary duty); *id.* at 891–92 (noting again that plaintiff brought no claim based on formal fiduciary duties); *id.* at 895 n.15, 906–08 (Guzman, J., dissenting) (noting the issue in the case); *id.* at 905–07 (Guzman, J., dissenting) (arguing that *Patton* directly "recognized that the majority shareholder's misconduct did not harm the corporation itself but nonetheless allowed the minority shareholders' claim for breach of fiduciary duty"); *see also* Willis v. Donnelly, 199 S.W.3d 262, 276–77 (Tex. 2006) (declining to decide the issue because the alleged breaches occurred before the defendant became a shareholder).

123. *Ritchie*, 443 S.W.3d at 890. The Court repeated this later in *In re* Estate of Poe, 648 S.W.3d 277, 288–89 (Tex. 2022) (holding that a non-shareholder (a father) who controlled a corporation as sole director did not and could not also owe to the single shareholder (the father's son) even "an informal fiduciary duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder").

recognized a formal fiduciary duty between a majority and minority shareholder in a closely held corporation." [124]

But *Patton*'s meaning was not that straightforward.

2. The Meaning of *Patton* by Reading *Patton*

A full understanding of how the Court reached beyond law to handle the problem of *Patton* requires the reader to delve into *Patton* itself. What did it do? Was the *Ritchie* Court's treatment of it doing law or something else?

Patton imposed liability on a founder, controlling shareholder, and director who dominated the board,[125] a status that hits at the heart of whether controlling shareholders have a duty to the corporation and to other shareholders. Patton was the founder and controller of a machinery supply business. In its earliest days, the business was unincorporated and owned entirely by Patton; Nicholas and Parks were just two employees.[126] However, in 1940, Patton assigned to Nicholas and Parks 10% of the profits, each; Patton increased the share to 20% each in 1943.[127]

In 1944, Patton tried to revoke these assignments, except Nicholas and Parks claimed Patton had made them partners. The three argued about their interests at length and eventually reached an agreement by which they would all continue in the business not as partners but as corporate shareholders, with Patton holding 60% of the stock and Nicholas and Parks each holding 20%.[128] The settlement is curious. On the one hand, it obligated the parties to cause each to be made an employee at a salary of $12,000 per year and specified what offices Patton and Nicholas would hold.[129] It also obligated them to follow bylaws stating that only shareholders could be directors.[130] On the other

124. Cardiac Perfusion Servs., Inc. v. Hughes, 436 S.W.3d 790, 791 n.1 (Tex. 2014).
125. 279 S.W.2d at 852–54.
126. *Id.* at 849.
127. *Id.*
128. *Id.* at 850.
129. *Id.*
130. *Id.*

hand, the settlement contemplated a board of five directors even while there were only three shareholders![131] This structure clearly left Patton in complete control. The bylaws adopted pursuant to the settlement agreement allowed the board to make decisions by simple majority and allowed a majority of shares at a shareholders' meeting to remove a director without cause.[132] If Patton and Nicholas had begun the negotiations as partners, they bargained away all of their control rights.

The settlement thus allowed Patton control, which he immediately began to abuse. Unwisely, he started off by publicly chastising Nicholas and Parks in written letters circulated among the company's employees.[133] These letters and Patton's "other actions, occurring in almost a matter of days after the new arrangement began, were not only quite inappropriate and offensive . . . but also a threat . . . ."[134] Within two months of the corporation's formation, Nicholas and Parks resigned and "entered into a competing business."[135] Patton followed up with declarations to various persons that he intended in effect "to use his power as majority stockholder arbitrarily to the prejudice of" Nicholas and Parks and "see to it that no dividends would be paid;" Patton said he would not buy their stock for "even a small fraction of its value or sell his own at any price."[136] Patton punctuated these pronouncements with name-calling ("crooked") and profanity.[137]

Patton was as good (or bad) as his words. The corporation quickly increased Patton's salary and began to retain cash and expand inventory—with the effect of minimizing profits for the next five years. Whereas profits before the fight had been >$100,000 annually and 10% to 17% of annual sales, after the fight profits decreased to average 2.14% of sales, even while sales increased.[138] The corporation's board initially comprised

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 850–51.
136. *Id.* at 851–52.
137. *Id.*
138. *Id.* at 851.

Nicholas, Parks, Patton, and two other employees; but when the directorial terms of Nicholas and Parks ended, Patton replaced them with other employees and his wife—all more or less "representatives" of Patton (and economically dependent on him).[139] Only in 1951, after Nicholas and Parks sued Patton and the corporation,[140] did the corporation's "profits" increase back near what they were pre-dispute.[141] Of course, no dividend was paid during those five years, notwithstanding a large cash accumulation.[142]

The plaintiffs essentially brought two charges: that Patton "wrongfully suppressed dividends or mismanaged the corporation or both."[143] A jury found Patton liable.[144] But there was no evidence of mismanagement.[145] Various profit-to-sales ratios and growing inventory simply do not show mismanagement "[e]ven if [Patton] caused the books to be 'juggled'" to show low profits.[146] And domination is not mismanagement, said the Court:

> The finding of general domination and control of the board of directors by the petitioner does not of itself connote damage to the corporation or even extreme irregularity in the corporate management. Being the founder of the business, president, owner of a clear majority of the stock and the only substantial stockholder on a board composed largely of employees, he could hardly avoid imposing his personal views on the other members, whatever his intentions.[147]

But "the malicious suppression of dividends is a wrong akin to breach of trust, for which courts will afford a remedy," and on

139. *See id.*
140. *Id.* at 849.
141. *See id.* at 851 (reporting 1951 profits of 8.65% of sales).
142. *Id.* (reporting cash accumulation of $130,000).
143. *Id.* at 853; *see id.* at 849 ("charged with fraud and abuse of his controlling position to the prejudice of the respondents and of the corporation"); *id.* at 852–53 (reasoning that the plaintiffs were not claiming fraud).
144. *Id.* at 849, 852.
145. *Id.* at 853.
146. *Id.*
147. *Id.*

that ground the Court affirmed the finding of Patton's liability.[148] The Court cited Patton's "wrongful state of mind," his stated purpose to acquire the minority stock for less than its value, his manipulation of the books to "pile up profits in the form of property other than cash . . . to excuse withholding dividends," and his "intent to eliminate [the plaintiffs] from every connection with the business."[149] Sounds oppressive!

3. *Patton* in *Ritchie*

When the Supreme Court of Texas later decided *Ritchie*, it confronted—directly or indirectly—this question: Did *Patton* impose liability because Patton was a controlling shareholder or because he was a director? The *Ritchie* Court was on its way to holding that the majority shareholder owed no duty to the minority shareholders, and the Court wanted to say that directors owe no duty to shareholders. *Patton* sort of stood in the way because two shareholders sued Patton—the controlling shareholder and only one of three (or more) directors—for suppressing dividends that would have been paid to the plaintiffs as shareholders. How could these two shareholders have won against Patton unless Patton owed them a duty either as controlling shareholder or as director?

The *Ritchie* Court's attempted resolution of the *Patton* problem was to claim that Patton was liable only because he was a director and officer—and the duty breached was to the corporation. The court said so more than once. Here is one example:

> The cases upon which the Court relied in *Patton* to recognize that the "malicious suppression of dividends" was a wrong in the nature of a breach of fiduciary duty indicate that the Court viewed the wrong as a breach of the formal fiduciary duty owed by corporate officers and directors to the corporation.[150]

148. *Id.* at 854.
149. *Id.* at 853–54.
150. *Ritchie*, 443 S.W.3d at 876 n.31.

Here is another:

> Patton [sic] demonstrates that when a corporate director violates the duty to act solely for the benefit of the corporation and refuses to declare dividends for some other, improper purpose, the director breaches fiduciary duties to the corporation, and the minority shareholders are entitled to relief, either directly to the corporation or through a derivative action.[151]

What should we make of this? The Court wants to claim that Patton was held liable because he was a director, not because he was a controlling shareholder. As a matter of corporate law, this makes little sense. Patton was one of five directors.[152] The board according to its own bylaws acted by simple majority,[153] an approach consistent with the current Texas For-Profit Corporation Law.[154] Patton by himself *as a director* could not have stopped the board from declaring a dividend or not declaring one. Each director gets one vote and is therefore by default equal with every other director. Patton's actions as a director could not by themselves have caused any loss.

Sensing this, the *Ritchie* Court backtracked, perhaps even without realizing it. When it reported the *Patton* plaintiff's claims, it said this: "a corporation's two minority shareholders alleged that Patton—the corporation's majority shareholder, president, and controlling board member— . . . breached his duties to the

151. *Id.* at 884 (footnote omitted).

152. *Patton*, 279 S.W.2d at 850 (reporting that the settlement agreement called for five directors in the corporation's first year); *id.* at 851 (reporting that Nicholas and Parks were replaced by two employees and later by Patton's wife, in addition to the "two serving on the original board with" Patton and the plaintiffs).

153. *Id.* at 850.

154. *See* TEX. BUS. ORG. CODE ANN. § 21.415(a) (West 2025) ("The act of a majority of the directors present at a meeting at which a quorum is present at the time of the act is the act of the board . . . , unless the act of a greater number is required by the certificate of formation or bylaws . . . or by this code."). A quorum is "the majority of the [total] number of directors." *Id.* § 21.413(a).

corporation."[155] Here, the Court seems to want there to be such a thing as a "controlling board member": the *Ritchie* Court calls Patton both "the corporation's majority shareholder" and "controlling board member," as if they were different things. But those are not two things—just one. Patton is "controlling board member" *because* he is the majority shareholder. That is the only reason.

Later, the *Ritchie* Court throws the whole game by admitting as much:

> Patton had used "his control of the board for the malicious purpose of . . . preventing dividends and otherwise lowering the value . . . of the stock of the [minority shareholders] . . . . We equated this finding with a "breach of trust for which the courts will afford a remedy, . . . and the cases on which we relied indicate that we treated that claim as being brought by the shareholders on behalf of the corporation."[156]

The Court is correct that Patton's "control of the board" is the source of Patton's power. But Patton's control of the board arises solely from his holding 60% of the corporation's shares, which gave him the right to elect and remove all the other directors.

Patton was also an officer—president—of the corporation because of this controlling interest. Officers only exist as appointed by the board. Because Patton controlled the board through his share ownership, Patton caused the board to appoint him president. No board member could gainsay this appointment because all of them served at Patton's request and at his whim as controlling shareholder. Likewise, Patton had salary control over all or most of the other board members: as president, he set their compensation, and as a controlling shareholder, he ensured he was president. No person could be employed at the corporation without the board's and the presiding officer's assent, and Patton controlled the board and continued as presiding officer without

155. *Ritchie*, 443 S.W.3d at 883. The *Ritchie* Court also claimed that the plaintiffs in *Patton* brought a fraud claim, but the *Patton* Court itself held that plaintiffs did not bring such a claim. *Patton*, 279 S.W.2d at 852–53.

156. 443 S.W.3d at 884.

risk of termination or threat from anyone because he was the controlling shareholder. Patton's control disappears—and his status as founder is irrelevant—the moment he loses control of the majority of shares. Of course, it is possible to dominate and control others without being the controlling shareholder (some other economic leverage: kidnap their relatives, bury a bomb under their homes and threaten to detonate it, blackmail, etc.), but no facts in *Patton* suggest any source of domination other than Patton's owning 60% of the shares.

The *Ritchie* Court's claim that *Patton* was not based on a controlling shareholder's breach of a duty is more or less a contradiction: While claiming Patton's wrong was merely a breach of his duty as a director, the Court held that acts only a controlling shareholder could do constituted the wrong done by the director.

Though *Patton* is less than a model of clarity, the most straightforward reading of the case points directly to Patton's abuse of the control arising from his majority block of stock. For instance, the *Patton* Court began its opinion by announcing that Patton "who owned approximately 60% . . . is charged with . . . abuse of his controlling position."[157] The jury findings drip with references to the fact that Patton "dominated and controlled" the board.[158] Patton was also the sole individual defendant.[159] Given that he was one of five directors, suing him alone was pointless if the wrong done was done by the board—he could not alone have caused the alleged harm. But if the wrong done could only have been accomplished by the controlling shareholder, then suing Patton alone made perfect sense. Even if the harm done in *Patton* was harm to the corporation, as the Court insists, *Patton* is best read as holding that the majority shareholder owes a duty to the corporation.

157. 279 S.W.2d at 849.

158. *Id.* at 852.

159. *See id.* at 849; Patton v. Nicholas, 269 S.W.2d 482, 483 (Tex. Civ. App. 1954), *aff'd in part, rev'd in part*, 279 S.W.2d 848 (Tex. 1955).

In a later part of the opinion, the *Ritchie* Court seemed to confess this, too. Notwithstanding its earlier insistence that *Patton* was all about the duties of directors and officers, the Court said,

> [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. *See, e.g., Patton*, 279 S.W.2d at 849–53. As a rule, . . . claims based on such conduct belong to the corporation . . . .[160]

The passage provides two significant points. The first is that the controlling shareholder owes a duty to the corporation. See it? The passage says so explicitly: "[T]he controlling shareholder []. . . [may] seek to artificially deflate. . . . [C]laims based on such conduct belong to the corporation."[161] If the controlling shareholder does X, the corporation has a claim against the controlling shareholder. The controlling shareholder therefore owes a duty to the corporation not to do this. This backtracks from the Court's prior insistence that *Patton* is all about Patton's directorial duties.

The second point is the *Ritchie* Court's odd assertion that the two minority shareholders' claim in *Patton* was a corporate claim.[162] How could it be?[163] By statute, a dividend is a distribution

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160. *Ritchie*, 443 S.W.3d at 887 (emphasis added). In one remaining bit of dicta, the Court suggested that controlling shareholders who fraudulently manipulate share value might be liable, perhaps to the minority shareholders themselves as victims of the fraud. *Id.* at 888 n.56. Maybe that seemed comforting to someone when *Ritchie* was decided, but the justices' articulations reported in Part II.C of this Article call even this into doubt.

161. *Id.* at 887.

162. *See supra* notes 150, 151, 156, and 160 and accompanying text.

163. I am not alone in disagreeing with the Court's analysis here. *See, e.g.*, Fryar, Part I, *supra* note 27, at 104–16 (Fryar's exceptional analysis reviews the cases the *Patton* court relied on and some of the factors noted here.) ("[W]hat is clear beyond cavil . . . is that the plaintiffs in *Patton* did assert individual claims . . . ."); Stahl, *supra* note 27, at 49–50.

of corporate wealth to someone else.[164] The Texas For-Profit Corporation Law limits the amount of dividends payable precisely in order to protect the corporation from shareholders.[165] In *Patton*, the effect on the corporation of Patton's refusal to declare a dividend was that the corporation became much wealthier! Cash and inventory increased substantially over prior years precisely because no dividends were paid.[166]

This is in fact why the *Patton* Court found the mismanagement claim "to be without support in the evidence":[167]

> Even if [Patton] caused the books to be 'juggled' so as arbitrarily to indicate low profits, or deliberately made excessive 'charge-offs' of one kind or another so as to postpone showing otherwise normal profits, this does not mean that the corporation was damaged, and *we find no evidence otherwise that it was damaged*. On the contrary, *the specific finding as to the reasonableness of [Patton's] salary indicates it was not*, while the above-mentioned evidence of accumulation of . . . surplus during the corporate years is undisputed. . . . And the jury found . . . the extraordinary inventory of 1951 . . . to have been correctly valued.[168]

Why, then, does the *Ritchie* Court imagine that Patton's dividend suppression harmed the corporation? The corporation should thank Patton for keeping its wealth intact. So far as the corporation is concerned, dividend suppression is an excellent

164. TEX. BUS. ORG. CODE ANN. § 21.002(6)(A) (West 2025) ("'Distribution' means a transfer of property, including cash, or issuance of debt, by a corporation to its shareholders in the form of: (i) a dividend on any class or series of its outstanding shares . . . .").

165. *See id.* §§ 21.301 (defining the "distribution limit"); 21.303(b) ("Unless the distribution is made in compliance with Chapter 11, a corporation may not make a distribution: (1) if the corporation would be insolvent after the distribution; or (2) that exceeds the distribution limit.")

166. *See* Patton v. Nicholas, 279 S.W.2d 848, 851 (Tex. 1955) ("the surplus coming up from zero to about $130,000"); *id.* ("[I]nventory of goods for sale . . . appear[s] also to have become much larger. . . . The inventory for every one of the six corporate years was very much larger than that of any noncorporate year.").

167. *Id.* at 853.

168. *Id.* (emphasis added).

strategy. And, even if the *Patton* duty was and is owed only to the corporation, dividend suppression was at most a technical violation of law. No damages occurred. And the Court's majority in *Ritchie* knew the corporation in *Patton* was not harmed: the dissenting opinion of Justice Guzman reminded them several times.[169]

In *Patton*, Patton harmed the minority shareholders' rights as shareholders; that is in fact what he meant to do. Had the corporation been harmed, as *Ritchie* suggested, then the remedy could have gone to the corporation in *Patton*. But the plaintiffs were not required to show harm to the corporation to win.[170] And anyway, ordering a remedy to the corporation in *Patton* would have made no sense on the facts of that case because the corporation already had the money; enforcing a remedy to the corporation, as if the corporation had been harmed, would have meant that no remedy should be given at all.

Nor could *Patton* have ordered that shareholders be paid pro rata, as they would for a corporate injury. This would not have made sense given that Patton employed his control as shareholder to cause the harm.

Instead, the Court ordered a dividend be paid *by the corporation* itself to the minority shareholders[171]—a strange remedy indeed if the harm was to the corporation. While dividend policy is undoubtedly a corporate matter, the action in *Patton* was a direct claim against the controlling shareholder for abuse of his corporate power.

This conclusion is not based on reasoning alone. This is what *Patton* said it was doing. The *Patton* Court said it was ordering a dividend to stop Patton from oppressing the minority shareholders—because of Patton's "control of the board for the malicious purpose of, and with the actual result of, preventing

169. Ritchie v. Rupe, 443 S.W.3d 856, 905, 905 n.51, 906–07 (Guzman, J., dissenting).

170. *See Patton*, 279 S.W.2d at 853–54 (reviewing evidence and finding that the corporation was not harmed but then granting a remedy to the minority shareholders because Patton harmed them).

171. *Id.* at 858–59 (remanding for the trial court to determine "the proper amount of dividends to be now declared and paid by the corporation").

dividends and otherwise lowering the value . . . of the stock of the respondents."[172] Please excuse the long quote, but the Court quite clearly ordered a remedy in favor of minority shareholders, not the corporation, because the wrong was done to the minority shareholders by the "dominant and perverse majority stockholder":

> Wisdom would seem to counsel tailoring the remedy to fit the particular case. . . . [E]quity may, by a combination of lesser remedies, including exercise of its practice of retaining jurisdiction for supervisory purposes and reserving the more severe measures as a final weapon against recalcitrance, accomplish much toward avoiding recurrent mismanagement or *oppression on the part of a dominant and perverse majority stockholder or stockholder group*. . . .
>
> Our view as to proper application of this policy to the instant case entails eliminating the outright liquidation and receivership decreed below and substituting a new decree, which will probably give adequate protection to the respondents and at the same time afford both parties a chance to normalize their relationships. The decree will include a mandatory injunction requiring the corporation and the petitioner as its dominant officer and stockholder to declare and pay at the earliest practical date a reasonable dividend on the stock of the corporation. This means that the amount of such dividend shall be substantial and shall take into consideration, as a strong factor in favor of greater size or amount, the amount of accumulated surplus of the corporation, the fact that *the respondents have been wrongfully deprived of their dividends since the beginning*, the more or less liquid or 'current asset' character of the large inventory of presumably salable merchandise, as well as such other matters as have logical bearing. The respondents are further entitled to have the injunction provide for reasonable dividends to be thereafter declared annually from future profits of the corporation and from accumulated surplus, provided only that

172. *Id.* at 853.

> the payment of such dividends be not clearly inconsistent with good business practice.[173]

If this is a remedy to the corporation, then the Court thinks the minority shareholders and the corporation are one and the same. The *Patton* Court clearly protected the rights of the minority shareholders from harm committed *by* the corporation and its "perverse majority shareholder." The *Ritchie* Court's declarations otherwise are not believable, but they are a pretty good declaration of the Court's present political commitments.

B. In re First Reserve

In re First Reserve Management, L.P.[174] ruled on a mandamus petition brought by two investors who had been sued for an explosion at the TPC petrochemical plant in Port Neches, Texas.[175] The explosion resulted in a multidistrict litigation of "2,000 cases involving more than 7,000 plaintiffs represented by more than 50 law firms."[176]

Plaintiffs claimed that defendant TPC Group LLC operated the plant, but plaintiffs also named as defendants TPC Group LLC's long vertical column of entity equity holders.[177] The Court described the defendant equity owners of TPC Group LLC this way:

- TPC Group LLC was owned by TPC Group Inc.[178]
- TPC Group Inc. was owned by TPC Holdings Inc.[179]
- TPC Holdings Inc. was owned by Sawgrass Holdings LP.[180]

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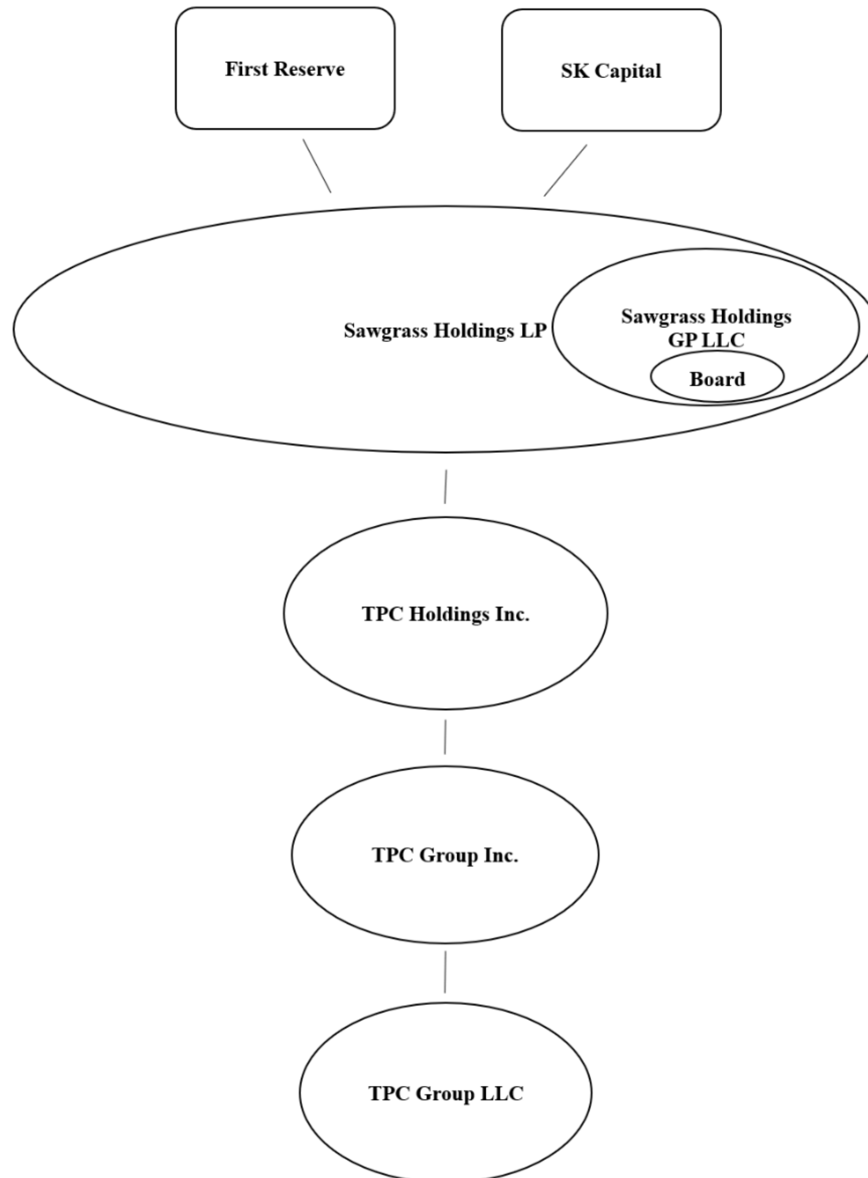
173. *Id.* at 857 (emphasis added).
174. 671 S.W.3d 653 (Tex. 2023).
175. *Id.* at 656, 658–59.
176. *Id.* at 656.
177. *Id.* at 657 & nn.4, 6. "Plaintiffs allege[d] that the LLC is the TPC entity that operate[d] the Port Neches plant." *Id.* at 657 n.4. The discussion in this Article of the entity structure of the defendants is taken entirely from the opinion of the Supreme Court of Texas.
178. *Id.* at 657 n.6.
179. *Id.*
180. *Id.*

• Sawgrass Holdings LP was "owned by two private-investor groups, which Plaintiffs refer[red] to as 'First Reserve' and 'SK Capital.'"[181]

Plaintiffs and the Court also named another entity defendant: Sawgrass Holdings GP LLC, "[t]he general partner of Sawgrass Holdings LP."[182] Sawgrass Holdings GP LLC had "a five-member Board of Managers,"[183] and First Reserve and SK Capital each had the right to appoint two members of this five-member board.[184] Figure 1 gives a visual representation of this ownership structure.

181. *Id.* at 657.
182. *Id.*
183. *Id.*
184. *Id.*

FIGURE 1. Equity Ownership of TPC Group LLC



Note: *Equity ownership is indicated by lines between entity shapes, the higher entity owning the lower. Sawgrass Holdings GP LLC was the general partner of Sawgrass Holdings LP. Though the general partner was probably an equity holder of the LP, it was more importantly the managing partner of the LP. The Board of Managers of Sawgrass Holdings GP LLC was itself the managing body of the LLC. Thus, Board controls GP LLC controls LP.*

The Supreme Court of Texas opinion addressed the possibility that Sawgrass Holdings LP and First Reserve were liable for the explosion.[185] These entities were added into the plaintiffs' first and second amended petitions.[186] Sawgrass Holdings LP is three entity levels up from the operating company, and First Reserve is an equity owner of Sawgrass Holdings LP. On first impression, the distance between actual operations and these investors would suggest that liability is remote or impossible. But the plaintiffs' third amended petition attempted to close the distance in two ways. First, it clumped Sawgrass Holdings LP, First Reserve, and SK Capital together as "Owners" of TPC.[187] Second, it claimed these "Owners" and Sawgrass Holdings GP LLC were liable through (i) veil-piercing and (ii) these entities' own negligence of duties they had assumed.[188] The negligence claim alleged that the board of managers of Sawgrass Holdings GP LLC had assumed control of the Port Neches plant and operated it negligently.[189]

Two days after the third amended petition was filed, First Reserve and Sawgrass Holdings LP moved to dismiss the claims as having alleged no basis in fact.[190] The trial court denied the motion to dismiss.[191] The two then sought mandamus review in the intermediate court of appeals, which was denied.[192] They then petitioned the Supreme Court of Texas for mandamus for an order

185. *Id.*

186. *Id.*

187. *Id.* ("In their third amended petition filed in October 2021, Plaintiffs assert that the investors, through their control of four of the five seats on the GP Board, together with Sawgrass Holdings LP and Sawgrass Holdings GP, are responsible for TPC's failure . . . . Throughout the petition, Plaintiffs refer to the investors and Sawgrass Holdings LP collectively as TPC's "Owners"—never distinguishing among them.").

188. *Id.* at 657; *see also id.* at 662.

189. *Id.* at 657; *id.* at 660 ("Plaintiffs' principal claim is that First Reserve undertook to take charge of TPC's day-to-day operations through its appointees to the GP Board and was negligent in failing to make the plant's operations safe."); *id.* at 662–63.

190. *Id.* at 657–58.

191. *Id.* at 658.

192. *Id.* (reporting informally the decision at First Rsrv. Mgmt. L.P., 665 S.W.3d 44 (Tex. App. 2022)).

that the claims against them be dismissed as having no basis in fact as alleged in the third amended petition.[193]

After the Court's opinion describes this much, the Court makes an ambiguous rhetorical move: the Court lumps First Reserve and Sawgrass Holdings LP together in a single label, "First Reserve": "Because Plaintiffs make the same allegations against Sawgrass Holdings LP as they do against the First Reserve investor group, we will use First Reserve as a short form for [both of them] in the rest of this opinion."[194] This rhetorical move seems, at this point in the opinion, merely a writing convention. It may have been intended as that. The facts and legal issues to this point seem straightforward enough. Grouping the two very different entities together ultimately obscured their stark legal and political differences, however.

Alas, the straightforward factual allegations became more complicated. While the mandamus petitions were brought and appealed, plaintiffs filed or proposed three more amended petitions.[195] Also, TPC Group LLC filed for bankruptcy and settled with the plaintiffs while the mandamus petition was pending.[196] (In fact, the bankruptcy court ruled on the settlement on the same day that the mandamus petition was argued orally before the Supreme Court of Texas.[197]) As part of the settlement, the bankruptcy court ruled that no one above TPC Group LLC could be liable via veil-piercing for the explosion's damages.[198] Thus, by

193. *Id.* at 657–58 (quoting TEX. R. CIV. P. 91a).

194. *Id.* at 658.

195. *Id.* at 658–59.

196. *Id.* at 658. The bankruptcy court approved a global settlement of plaintiff's claims against TPC. *Id.*; *see In re* TPC Group, Inc., No. 22-BK-10493, 2023 WL 2168045 (D. Del. Feb. 22, 2023).

197. *See* 2023 WL 2168045 (D. Del. Feb. 22, 2023); *In re First Rsrv. Mgmt., L.P.,* 671 S.W.3d at 653 (reporting oral argument occurred Feb. 22, 2023).

198. The bankruptcy court "held that Plaintiffs' veil-piercing and alter ego claims belonged to the [bankruptcy] estate [of TPC] and were released under the plan" of settlement. *In re First Rsrv. Mgmt., L.P.*, 671 S.W.3d at 658; *In re* TPC Group, Inc., 2023 WL 2168045, at *7–8. The "belonged to" phrase is the bankruptcy court's. *See* 2023 WL 2168045, at *1, 3–5, 8. The phrase is somewhat confusing because plaintiffs brought—and plaintiffs against corporations and LLCs bring—the veil-piercing allegation—not the subsidiary.

the time the Court ruled, the third petition was technically moot and half the plaintiffs' claims against Sawgrass Holdings LP and First Reserve had disappeared.

Something was left, however. The bankruptcy court ruled that claims of direct liability against the defendants above TPC Group LLC in the equity chain—specifically, the claim that equity owners undertook responsibility for managing safety at TPC facilities and did so negligently—could continue.[199] The Supreme Court of Texas was therefore left only with the negligence claim.

Ruling on the negligence claim alone was complicated by the intertwining of negligence with veil-piercing allegations in the petition before the Supreme Court and in later proposed petitions. The bankruptcy court in fact ruled that the plaintiffs' fifth and proposed sixth amended petitions had to be amended because both complaints contained a settled veil-piercing claim and otherwise intertwined too closely the veil-piercing claim with negligence allegations.[200] So the plaintiffs filed a proposed seventh amended complaint in the bankruptcy court after the oral argument in the Supreme Court of Texas on the mandamus

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The subsidiary has no control over such claims. But the analysis reached a result consistent with Texas law. Veil-piercing imposes an entity liability on an actor other than the entity. Keyes v. Weller, 692 S.W.3d 274, 278 (Tex. 2024). It is "not a substantive cause of action but 'a method to impose personal liability on shareholder and corporate officers who would otherwise be shielded from liability for corporate debts.'" *Id.* (quoting Willis v. Donnelly, 199 S.W.3d 262, 271 (Tex. 2006)). Because the liability imposed in veil-piercing is liability of the entity, settlement of the entity's liability should remove the possibility of veil-piercing for that liability—the entity claim is gone, so there is no entity liability left to impose on non-corporate persons through veil-piercing. Another reason this would be true for TPC Group LLC is that a limited liability company and its members cannot be sued together except in unusual circumstances well outside the normal veil-piercing fact pattern. TEX. BUS. ORG. CODE ANN. § 101.113 (West 2025). Because the member would have to be sued in a second suit (assuming Section 101.113 even allows that), liability would have to be established separately in a first suit against the LLC. In any event, the TPC bankruptcy court disallowed the plaintiffs from continuing with the veil-piercing claim against entity equity owners of TPC. 2023 WL 2168045, at *7; 671 S.W.3d at 658.

199. 2023 WL 2168045, at *8–10; 671 S.W.3d at 658–59.

200. 2023 WL 2168045, at *2.

petition. By the time the Supreme Court decided the mandamus petition, it was working from a complaint that had been superseded by at least four subsequent drafts.

Yet the Court decided to rule notwithstanding these complications.[201] The Court said, "Those developments do not moot whether the allegations in the third amended petition state a cause of action with a basis in law or fact."[202] For what it is worth, the Court claimed that "Plaintiffs and [First Reserve and Sawgrass Holdings LP] not only argue that our ruling on those issues is appropriate, they urge us to rule."[203] Part of this Article's thesis is that plaintiffs attempted a Hail Mary pass in so urging, whether they knew it or not. Weighing the probability of winning (low) with the magnitude of a win (high), perhaps they believed it was justified. The record contains an after-argument brief from Rick Thompson, who argued orally before the Court for the plaintiffs, claiming that mandamus relief would be improper and that the plaintiffs had no "opportunity to conduct full and complete discovery as to the corporate structures and activities of" First Reserve and Sawgrass Holdings LP and other equity owners.[204] But Mr. Thompson, during oral argument, stated that the third and the fifth amended petitions were not significantly different for purposes of the mandamus petition.[205] He also suggested that even the first complaint was filed with sufficient knowledge of the facts,[206] and he said we "need a ruling about what 91a means."[207] So, yes, the plaintiffs did urge the Court to rule.

At any rate, the Supreme Court of Texas ruled whether plaintiffs' petition alleged facts showing that two defendants, one

201. *In re First Rsrv. Mgmt.*, 671 S.W.3d at 663.

202. *Id.*

203. *Id.*

204. Brief of Relators at 2, *In re First Rsrv. Mgmt.*, 671 S.W.3d 653 (No. 22-0227), 2023 WL 2527190, at *2.

205. Oral Argument at 31:40–33:35, *In re First Rsrv. Mgmt.*, 671 S.W.3d 653 (Tex. 2023) (No. 22-0227), https://www.youtube.com/watch?v=7EIv-m2D43o.

206. *Id.* at 32:45–33:35.

207. *See id.* at 34:00–34:08. The Texas Rules of Civil Procedure provide that "a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a.1.

of them three levels above the operating company and another one up a further level from that, were liable for undertaking to manage the plant at Port Neches and then doing so negligently. On the merits, the Court examined whether the complaint alleged that First Reserve and Sawgrass Holdings LP "undertook to render services that [they] know[] or should know are 'necessary for the protection of the other's person or things.'"[208] Undertaking such service implies a duty to perform carefully, but "the duty is only implicated when the . . . undertaking is an affirmative course of action, . . . [not] an omission."[209]

Consistent with the thesis of this Article, one can see why the Court wanted to rule. The ruling gave the Court an opportunity to reiterate various rules of Texas law that affirm the non-liability of equity owners of Texas business entities.

Indirect equity ownership of an operating company is not itself an undertaking,[210] of course. In ruling, the Court was able to repeat several equity-supportive rationales:

> "Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace." As long as companies are distinct legal entities, they are not liable for each other's conduct unless some exception applies to remove this limited liability . . . . Even when one company appoints a loyal employee to the board of a separate legal entity, the appointing company does not become liable for the board's conduct. "[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts."[211]

The Court also opined that activities "consistent with the parent's investor status, such as monitoring the subsidiary's performance,

208. 671 S.W.3d at 660 (internal quotations omitted).

209. *Id.*

210. *See id.*

211. *Id*. at 660-61 (citing SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008); United States v. Bestfoods, 524 U.S. 51, 69 (1998)).

supervision of the subsidiary's finance and capital budget decisions and articulation of general policies and procedures" are not enough.[212] All this is true and relatively uncontroversial.

The Court's actual ruling on the facts, however, was possible only because the Court's analysis buried a critical distinction between the defendants. Please note here again that, throughout the opinion, the Court referred to both First Reserve and Sawgrass Holdings LP as "First Reserve."[213]

Two litigants petitioned for mandamus: Sawgrass Holdings LP and First Reserve. In the Court's telling, Sawgrass Holdings LP is three equity levels up from the operating company, and First Reserve is four levels up.[214] The Court's holding that First Reserve had no operational control appeared warranted. Plaintiffs made no allegation that anyone on the First Reserve level did anything other than what equity holders normally do. Regarding First Reserve, the Court's holdings persuade: "liability cannot be based on First Reserve's ownership interest in TPC, its appointments to the GP Board, or any other action that is consistent with its investor status."[215] Plaintiffs only alleged that First Reserve exercised control through Sawgrass Holdings GP LLC's board, but the only facts showing this were that First Reserve had the "right to appoint two of the five [board] members."[216] When the Court said that "Plaintiffs make no allegation that First Reserve—a group of entities that are distinct from Sawgrass Holdings GP [LLC]—undertook to render services to TPC,"[217] this is actually true with regard to First Reserve itself as regards the conduct of the board of Sawgrass Holdings GP LLC, which plaintiffs alleged took control of the Port Neches plant.

But the Court's holding with regard to Sawgrass Holdings LP is a different matter entirely. The Court ruled in favor of both First Reserve and Sawgrass Holdings LP on exactly the same grounds.

212. *Id.* at 661.

213. *See supra* text accompanying note 194.

214. *See supra* notes 178–184 and accompanying text.

215. 671 S.W.3d at 661.

216. *Id.* at 662.

217. *Id.*

The Court's identical treatment of them is bound up in the Court's calling them both "First Reserve," as if they were identical. Thus, when the Court ruled for First Reserve, it ruled for Sawgrass Holdings LP, too.[218]

However, First Reserve and Sawgrass Holdings LP are very different. First Reserve was, the plaintiffs alleged and the Court reported, an "owner" of Sawgrass Holdings LP, a limited partnership.[219] Sawgrass Holdings GP LLC, on the other hand, was "*[t]he* general partner of Sawgrass Holdings LP."[220]

Thus, First Reserve was, as mere "owner" of an interest in a limited partnership, merely a limited partner.[221] As a general rule, a "limited partner is not liable for the obligations of a limited partnership."[222] There are exceptions under the Texas Limited Partnership Law to this general prohibition, but they are narrow and extremely difficult to prove.[223] Basically, the exceptions require that the limited partner itself "participates in the control of the business,"[224] but the code contains a long list of things that limited partners normally do or might do that look like participation in the business but do not satisfy this standard.[225] Two things that First Reserve could do as a limited partner that would *not* subject it to liability are (i) acting as "a partner of a partnership that is a general partner of the limited partnership" and (ii) serving as "a member or manager of a limited liability

218. *See id.* at 662–63.

219. The only entity in Texas law authorized to use the abbreviation LP is a limited partnership. *See* TEX. BUS. ORG. CODE ANN. §§ 5.052–.059 (West 2025).

220. *Supra* note 182 (emphasis added).

221. Limited partners are frequently described as "unitholders" in limited partnership agreements, meaning something like units of limited partnership interest.

222. TEX. BUS. ORG. CODE ANN. § 153.102 (West 2025).

223. *See id.* §§ 153.102–.106.

224. *Id.* § 153.102(a)(2).

225. *Id.* § 153.103 (including acting as an agent or employee of the limited partnership or of the LP's general partner; acting as an officer, director, or stockholder of a corporate general partner; "acting as . . . a partner of a partnership that is a general partner of the limited partnership;" "acting as . . . a member or manager" of an LLC "that is a general partner of a limited partnership;" and many other, lesser-involved, management-related activities).

company that is a general partner of the limited partnership."[226] If First Reserve could do these things and yet avoid liability, it is doubtful that any input into Sawgrass Holdings LP would subject it to liability short of taking over the limited partnership entirely.

And this takeover would have to be public. Even if First Reserve did act as a general partner, it would become "liable only to a person who transacts business with the limited partnership reasonably believing, based on the limited partner's [First Reserve's!] conduct, that the limited partner is a general partner."[227] So even if First Reserve participated in Sawgrass Holdings LP's management as if it were a general partner, none of that activity would have subjected it to liability to the 7,000 plaintiffs damaged by the Port Neches explosion, none of whom had any idea First Reserve existed. After all, even plaintiffs failed to add First Reserve to the suit until "[o]ver a year into the litigation."[228]

For these sorts of reasons, Texas law does not normally allow veil-piercing against limited partners as such.[229] Veil-piercing is not necessary because the statute sets forth a way in which limited partners can be liable;[230] the Texas Limited Partnership Law thus supersedes the common law and equity much the way Sections 21.223–.225 of the Texas For-Profit Corporations Law supersede law and equity.[231] It is possible that the equitable remedy of veil-piercing could cut through all of the statutes. After all, Section 21.223, the corporate provision, applies to an "affiliate" of corporations—"a person who controls" a corporation[232]—because equity cannot allow the manipulation of corporate entity status for the commission of fraud by those who control the corporation but

226. *Id.* § 153.103(1)(D)–(E).

227. *Id.* § 153.102(b).

228. *In re* First Rsrv. Mgmt., 671 S.W.3d 653, 657 (Tex. 2023).

229. Asshauer v. Wells Fargo Foothill, 263 S.W.3d 468, 474 (Tex. App. 2008), *petition for review denied* (Apr. 17, 2009); Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 499 (Tex. App. 2002), *reh'g of petition for review denied* (Nov. 21, 2002) ("The theory of alter ego, or piercing the corporate veil, is inapplicable to partnership.").

230. *See Pinebrook Props.*, 77 S.W.3d at 499.

231. *See* Val Ricks, *The Twisted Veil of Texas LLCs*, 46 TEX. J. BUS. L. 67, 71 (2014).

232. TEX. BUS. ORG. CODE ANN. § 1.001(1) (West 2025).

intentionally take no formal status.[233] The limited partnership code never shuts out equity categorically.[234]

At any rate, for the plaintiffs to succeed against First Reserve, they would have to allege something that would succeed against a quite remote equity holder, and the plaintiffs did not allege enough facts. While the petition alleged that TPC's "Owners" and Sawgrass Holdings GP LLC "undertook direct operational control" and "assumed the duty of risk mitigation," the plaintiffs' petition alleged more specifically that "TPC was controlled by the Board of Sawgrass Holdings GP [LLC]"[235]—the general partner of the limited partnership Sawgrass Holdings LP. The Court claimed,

> But as we have explained and Plaintiffs now concede, First Reserve's right to appoint two of the five members of the GP Board does not subject it to liability for TPC's conduct. Because Plaintiffs make no allegation that First Reserve—a group of entities that are distinct from Sawgrass Holdings GP [LLC]—undertook to render services to TPC, their negligent-undertaking claim has no basis in law.[236]

And this was actually true of First Reserve itself. Even if Sawgrass Holdings GP LLC undertook to control TPC, First Reserve did not. The Court inexplicably did not mention a single statute governing the liability of limited partners for anything. The Court called First Reserve an "investor,"[237] a term that gives no legal status under the Texas Business Organizations Code. But the Court's result is consistent with the law. So, though the Court's analytical omissions are plain, and these omissions make the reader wonder if something is going on, they do not show the Court moving

233. *See id.* § 21.223; Val Ricks, *Fraud Is Now Legal in Texas*, 8 TEX. A&M L. REV. 1, 32–33 (2020).

234. Nor does it mean to do so; the provision I have been addressing, TEX. BUS. ORG. CODE ANN. § 153.102(b) (West 2025), adopts the principle of equitable estoppel.

235. *In re* First Rsrv. Mgmt., L.P., 671 S.W.3d 653, 662 (Tex. 2023).

236. *Id.* at 662.

237. The Court used the term "investor" or "investors" 16 times but "partner" only once to identify Sawgrass Holdings LP's general partner. The Court did not cite to the Texas Business Organizations Code's partnership provisions a single time.

beyond the law—at least with regard to First Reserve itself, the limited partner.

However, in the language exonerating First Reserve the limited partner, the Court meant the label "First Reserve" also to apply to Sawgrass Holdings LP. While what the Court said in this section of the opinion makes sense as to First Reserve the limited partner of Sawgrass Holdings LP, its meaning as to Sawgrass Holdings LP itself is completely different.

Why? Because Sawgrass Holdings LP as a limited partnership is managed completely and only by its general partner, Sawgrass Holdings GP LLC—the very entity plaintiffs claimed had seized control of the Port Neches facilities. Under the Texas Business Organizations Code, the governing authority of a limited partnership "includes . . . the general partner[] of a . . . limited partnership."[238] And "[g]overning authority means a person or group of persons who are entitled to manage and direct the affairs of the entity under this code."[239] Sawgrass Holdings GP LLC was *the* governing authority of Sawgrass Holdings LP.

As the general partner of Sawgrass Holdings LP, Sawgrass Holdings GP LLC therefore was *the* agent of the limited partnership. "[A] general partner of a limited partnership has the rights and powers . . . of a partner in a partnership without limited partners."[240] In a general partnership, "[e]ach [general] partner is an agent of the partnership for the purpose of its business."[241] Because the partner is an agent, the "partnership is liable for loss or injury to a person . . . as a result of a wrongful act or omission or other actionable conduct of a partner acting: (1) in the ordinary course of business of the partnership; or (2) with the authority of the partnership."[242] What was the general partner doing if not carrying out the business of the limited partnership? It was the LP's only governing authority and played the primary role in determining what that business was.

238. TEX. BUS. ORG. CODE ANN. § 1.002(35)(A)(ii) (West 2025).

239. *Id.* § 1.002(35)(A).

240. *Id.* § 153.152(a); *see also id.* § 152.003.

241. *Id.* § 152.301; *see also id.* § 152.302.

242. *Id.* § 152.303(a).

An assumption that Sawgrass Holdings GP LLC was acting outside the scope of its authority is unwarranted and almost certainly incorrect. It is exceedingly rare that general partners of limited partnerships act on their own and not for the limited partnership. General partners of limited partnerships exist primarily to serve as governing authority and agent of the limited partnership. The scope of their activities is limited primarily because they have a duty of loyalty to the limited partnership. As general partner of Sawgrass Holdings LP, Sawgrass Holdings GP LLC by law owed to Sawgrass Holdings LP "a duty of loyalty[,] a duty of care," and a duty to act for Sawgrass Holdings LP "in a manner [it] reasonably believe[d] to be in the best interests of the partnership."[243] The duty of loyalty includes "refraining from dealing with the partnership on behalf of a person who has an interest adverse to the partnership" or "competing or dealing with the partnership in a manner adverse to the partnership."[244] Taking any benefit from a business in which Sawgrass Holdings LP was interested in any way, contrary to the interests of Sawgrass Holdings LP, would have breached Sawgrass Holdings GP LLC's duty of loyalty to Sawgrass Holdings LP.[245] The risk of competing with the LP in violation of these duties is great enough that general partners typically refrain from any business other than that of the limited partnership. So, we should not presume, and the Court should not presume, that the general partner was breaching these duties. Rather, we should presume that the general partner acted for the limited partnership. The Court cites no allegation that Sawgrass Holdings GP LLC was not acting as the limited partnership's governing authority and agent or was breaching its duties to the limited partnership.

So, when the Court reasons through the plaintiff's petition not for First Reserve but for Sawgrass Holdings GP LLC, its conclusions are not plausible. For instance, when the Court says, "[p]laintiffs make no allegation that [Sawgrass Holdings LP]—a

243. *Id.* § 152.204.
244. *Id.* § 152.205.
245. *See id.* §§ 152.204(b)–(c), 152.205.

group of entities that are distinct from Sawgrass Holdings GP [LLC]—undertook to render services to TPC,"[246] this simply is not true. Sawgrass Holdings GP LLC is in fact the governing authority, manager, and agent of Sawgrass Holdings LP. The two entities could hardly be more related. Moreover, if Sawgrass Holdings GP LLC as governing authority, managing partner, and agent of Sawgrass Holdings LP undertook to render services to TPC, then Sawgrass Holdings LP is bound by that act—as an entity bound by its governing authority and as principal bound by its agent.

The Court continued—and again, I am replacing "First Reserve" with Sawgrass Holdings LP because the Court meant "First Reserve" to include that limited partnership: "And in any event, [Sawgrass Holdings LP] had no authority itself over TPC's budget and expenses. That authority was vested solely in the GP Board, not in [Sawgrass Holdings LP]."[247] This cannot be true. The GP is the agent and governing authority of the LP, so if the GP had it, then the LP had it.

The Court does not help its argument at all by citing the "GP Board" rather than the GP LLC itself. The board of the limited liability company is itself the governing authority of the limited liability company that is the general partner.[248] The governing managers of a limited liability company are commonly called a board because the Texas Limited Liability Company Law dictates (unless modified by contract) that they function almost exactly as would a corporation's board of directors.[249] The Court does not indicate anything other than the default imposed by law happened here: the GP Board acts for the LLC acts for the LP.

Here's the Court's next sentence: "Plaintiffs allege that 'Owners and Sawgrass Holdings GP [LLC] . . den[ied] funds to adequately supply the plant with spare parts . . . or perform necessary maintenance needed to keep the plant safe', but they have not pleaded a single instance in which [Sawgrass Holdings LP] *itself* decided whether to provide or withhold resources to

246. *In re* First Rsrv. Mgmt., L.P., 671 S.W.3d 653, 662 (Tex. 2023).

247. 671 S.W.3d at 662.

248. TEX. BUS. ORG. CODE ANN. § 1.002(35)(A)(iii)–(iv) (West 2025).

249. *See id.* §§ 101.352–.359.

TPC."[250] But the LP is an entity and can act only through its agent.[251] Sawgrass Holdings GP LLC *is* Sawgrass Holdings LP's agent. It is Sawgrass Holdings LP's *only* agent that anyone in the opinion mentions. Sawgrass Holdings GP LLC is also Sawgrass Holdings LP's governing authority. Alleging that Sawgrass Holdings GP LLC—with its status and duties as LP's only manager—undertook to run the plant would to any business lawyer imply that it took such a role acting for the LP. Again, generally the general partner of a limited partnership has no other purpose.

Several lines later, the Court again confuddled the distinction between First Reserve the limited partner, on one hand, and Sawgrass Holdings LP the limited partnership and direct principal of Sawgrass Holdings GP LLC, on the other. At first, I leave the Court's language as is, but please recall that when the Court says "First Reserve," it means to include Sawgrass Holdings LP: "But Plaintiffs pleaded that First Reserve 'and Sawgrass Holdings GP [LLC]' did these things. Plaintiffs do not state factually *how* First Reserve itself took and exercised such control other than through its ownership interest and the GP Board, which, again, Plaintiffs concede is not enough for a negligent undertaking."[252] Now consider how this reads if we make clear that First Reserve includes Sawgrass Holdings LP: "But Plaintiffs pleaded that [Sawgrass Holdings LP] 'and Sawgrass Holdings GP [LLC]' did these things. Plaintiffs do not state factually *how* [Sawgrass Holdings LP] itself took and exercised such control other than through its ownership interest in the GP Board, which, again, Plaintiffs concede is not enough for a negligent undertaking."[253] In this second version, what the Court says makes no sense at all, whether the plaintiffs conceded it or not. If Sawgrass Holdings GP LLC did something as governing authority, manager, and agent of

250. *In re First Rsrv. Mgmt.*, 671 S.W.3d at 662–63. Note the Court used the English "pleaded" rather than the Scottish "pled."

251. *See* Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 402 (Tex. 1934); Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995) ("Corporations, by their very nature, cannot function without human agents.").

252. 671 S.W.3d at 663.

253. *Id.*

Sawgrass Holdings LP, then indeed Sawgrass Holdings LP is by law deemed to do it. And Sawgrass Holdings LP does not have an "ownership interest" in the GP Board; instead, the GP Board is the governing authority and manager of the LLC which is Sawgrass Holdings LP's general partner—its only governing authority, manager, and agent. The GP Board is the only way Sawgrass Holdings LP interacts with the world. All the evidence of the GP Board's management of the Port Neches plant is evidence that Sawgrass Holdings LP managed the Port Neches plant, because the GP Board's purpose for existing and the extent of its authority as the governing authority of the general partner of Sawgrass Holdings LP is to act for Sawgrass Holdings LP, its principal.

Perhaps the Court became caught up in its own unjustified combining of First Reserve and Sawgrass Holdings LP into one label, "First Reserve." But the plaintiffs' insistence that Sawgrass Holdings GP LLC did these things *is* to bind Sawgrass Holdings LP to them.

If lawyers take the Court's holding at face value, it establishes a presumption that a limited partnership's only known general partner's governing authority serves only the interest of that general partner, notwithstanding the statutes dictating and the typical practice indicating the general partner's duty of loyalty to the limited partnership, its status as agent of the limited partnership, and a complete absence of any evidence that the general partner exists for any purpose other than to serve the interests of and bind the limited partnership.

Establishing such a counterintuitive, code-refuting proposition is the cost of the Supreme Court of Texas's holding in *First Reserve*. This extension of what the Court perceives as protected entity status out beyond any law that could justify it reveals the Court's political preference.

C. Keyes v. Weller

In the recent *Keyes v. Weller*,[254] the Court held that Texas Business Organizations Code Section 21.223—the state's unique

254. 692 S.W.3d 274 (Tex. 2024).

veil-piercing statute (which also applies to limited liability companies)—"has no effect on the independent common-law principle that corporate agents who direct or engage in tortious conduct are personally liable for that conduct."[255] Stated another way, the statute does not "shield a corporate agent who commits tortious conduct from directly liability 'merely because the officer or agent also possesses an ownership interest in the corporation.'"[256] This was a good result: a contrary holding would require socializing the cost of business fraud on customers and suppliers, a terrible idea[257] contrary to the statute.[258]

But five of nine justices specially concurred in the Court's opinion to highlight, in Justice Busby's words, that "[t]he Court quite properly did not address under what circumstances Section 21.223 would limit the direct liability of a shareholder for tortious acts *not* committed as a corporate officer or agent."[259] Justice Bland, joined by Justices Blacklock, Huddle, and Young, was even more strident: "Section 21.223 remains a shield against a suit seeking to impose liability based on shareholder conduct for matters relating to a corporate contractual obligation unless the shareholder directly benefits from the transaction."[260] Beware, then: Trust nothing a shareholder says relating to the corporation unless you are sure they are also speaking as corporate agent. Five justices—a majority of the Court—have put everyone on notice that shareholders might commit torts with impunity when acting solely as shareholders; the rules that apply to everyone else do not apply to shareholders acting as such in relation to a corporate

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255. *Id.* at 282.

256. *Id.* (quoting Kingston v. Helm, 82 S.W.3d 755, 765 (Tex. App. 2002), *petition for review denied* (Mar. 6, 2003)).

257. *See* Ricks, *supra* note 233, at 53–62.

258. *Keyes*, 692 S.W.3d at 280–82; Ricks, *supra* note 233, at 21–53.

259. 692 S.W.3d at 283 (Busby, J., concurring, joined by Blacklock, Huddle, and Young); *id.* at 285 (Bland, J., concurring, joined by Blacklock, Huddle, and Young).

260. *Id.* at 285 (Bland, J., concurring).

liability.[261] Such shareholders no longer need to follow the "rules of the game."[262]

Even though the majority appear to agree with this reservation of the issue,[263] this reservation is at odds with the Court's opinion. The majority recognized explicitly that the statute originally protected only against attempts to impose liability based on "veil-piercing theories that, at common law, were methods to impose shareholder liability for corporate contractual obligations despite shareholders' general protection."[264] "In 1993, the Act was amended to incorporate additional veil-piercing theories . . . ."[265] And in 1997, the Texas Legislature expanded (i) the scope of protected matters from corporate contractual to anything relating to a corporate contract and (ii) the reach of the

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261. Justice Busby suggested a limit to the socialization of shareholder tort costs. Emphasizing that the statute "applies only if the plaintiff seeks to hold the shareholder defendant liable for a 'contractual obligation of the corporation or any matter relating to or arising from the obligation,'" the Justice claimed that "the statute limits a defendant's liability relating to a corporate contractual obligation but not the defendant's liability for his own misconduct." 692 S.W.3d at 284 (Busby, J., concurring). But fraud committed by a shareholder to induce a corporate obligation is a "matter relating to . . . the obligation," TEX. BUS. ORG. CODE ANN. § 21.223(a)(2) (West 2025), for just one example. And obtaining information or assurance from a controlling or even major shareholder seems like a natural thing for an investor, lender, or potential officer to do; Delaware amended its corporate code in 2024 to allow a shareholder just such influence. *See* DEL. CODE ANN. tit. 8, § 122(18) (2025) (providing that a corporation may make contracts with a shareholder/s "in its or their capacity as such" that require shareholder consent to corporate activities). The legislature drafting Section 21.223 probably could not have chosen a phrase more broad than "relating to." I believe the legislature had no intent to free any tortfeasor from liability. *See* Ricks, *supra* note 233, at 21–53 (arguing the point from every angle I could imagine). But the Court seems particularly committed to withholding legal protection from those who do business with shareholders.

262. *See* Ricks, *supra* note 233, at 53–55; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 27, 133 (40th anniversary ed. 2002) ("[T]he role of government . . . is to do something that the market cannot do for itself, namely, to . . . enforce the rules of the game.").

263. 692 S.W.3d at 283 (emphasizing that the defendants claimed the statute's protection only on the ground that they were acting "in their capacities as authorized agents").

264. *Id.* at 281–82.

265. *Id.* at 282.

statute to cover "affiliates" of the corporation and shareholder.[266] But no new theory of liability has ever been added. The only theories of liability the statute protects against are those the Court in *Keyes* named "veil-piercing theories."[267] In the Court's own words, the statute is limited:

> The statutory history and language confirm that the statute's focus has always been, and continues to be, on the liability of shareholders relating to corporate contractual obligations . . . . Further, the statute applies to shareholder liability for those obligations "on the basis that the holder . . . is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory."[268]

These are the theories the Court named "veil-piercing theories."

Thus, the issue that the concurrences say is reserved is, according to the Court's opinion, merely the liability of a non-agent shareholder under a veil-piercing theory—any veil-piercing theory. As the Court recognized, veil-piercing is not even a cause of action, just a "'method to impose personal liability on shareholders and corporate officers who would otherwise be shielded from liability for corporate debts.'"[269] If what the Court says of these theories is true, then the undecided issue is whether the statute protects shareholders against veil-piercing. I can assure the concurring justices that it does! That was and is the statute's purpose and the import of its plain language. By suggesting that something *beyond* that is yet to be decided, the concurring opinions suggest that the language of the statute might do something beyond what the majority says the statute does.

Going beyond even this, however, Justice Bland and her colleagues reached such a position at some cost to legal coherence. Technically, the disjunct arises from Justice Bland's

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266. *Id.*

267. *See id.* at 281–82.

268. *Id.* at 282.

269. *Id.* at 278 (quoting Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter, 607 F.3d 1029, 1035 (5th Cir. 2010)).

attempt to explain both why shareholders cannot be liable—a topic the majority did not address—while agents can be.

First, the Justice tried to explain why shareholders are not liable. She needed to explain this because agents can be liable for their own misrepresentations as agents, the Court held, but not, Justice Bland asserted, for their fraud as shareholders—yet, shareholders and agents are often the same individuals. Justice Bland's explanation mattered in *Keyes* itself because the defendants in the case were both LLC members and agents of the LLC.[270] The concurring justices wanted them to be liable as agents but preserve their non-liability as LLC members. Why would fraud committed solely as a shareholder/member be treated differently than fraud or other tortious conduct committed also as an agent? Justice Bland appears to believe it is a matter of which hat the tortfeasor was wearing. The shareholder's corporate identity is "distinct from that of the officer," she says:

> When a defendant holds roles both as a shareholder and an officer of the corporation, as defendants in this case do, the statute shields the shareholder, who has a corporate identity distinct from that of the officer. The Court's opinion appropriately distinguishes the role of the shareholder from that of a corporate officer and concludes that [the statute], standing alone, does not shield conduct unrelated to the shareholder role. [271]

Unquestionably, shareholders have a separate legal identity from that of the corporation, but officers and employees are also legally distinct from the corporation, no? *That* separateness between principals and agents mattered in the case because the statute also appeared to cover agents. The statute by its terms protects not only a shareholder of the corporation but "any affiliate . . . of the corporation," and *affiliate* is defined by the code to include "a person who . . . is controlled by . . . another person."[272] Under standard agency law, including agency law

270. *Id.* at 275.

271. *Id.* at 286–87 (Bland, J., concurring).

272. TEX. BUS. ORG. CODE ANN. § 1.002(1) (West 2025).

dictated by the Supreme Court of Texas, an officer binds the corporation only as an agent. "Corporations can act only through agents of some character."[273] An agent is, by the Court's own definition, "subject to the principal's control."[274] Because the corporation is the officer's principal, then the agent should be an affiliate under the statute's definition. In other words, the statute appears to cover both shareholders/members and agents. For Justice Bland to distinguish agents from shareholders/members, then, she had to explain why agents are not affiliates—not "controlled by" the corporation. Here is her explanation: "When acting in their corporate capacity, officers and employees *are* the corporation."[275] So, affiliates are those controlled by the corporation, the corporation's agents (including its officers) are subject to the corporation's control, and yet the agents are not affiliates. This is a just contradiction.

It is also dangerous. What should the practicing bar make of Justice Bland's assertion that "officers and employees *are* the corporation"? In prior cases, the Court has been more careful to say that "a corporate officer's acts on the corporation's behalf are deemed corporate acts."[276] Moreover, the *deeming* language appears in cases in which an officer is accused of tortiously

273. Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 402 (Tex. 1934); *see* Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995) ("Corporations, by their very nature, cannot function without human agents.").

274. Finley Res., Inc. v. Headington Royalty, Inc., 672 S.W.3d 332, 343 (Tex. 2023) (Devine, J., for the Court); Jody James Farms, JV v. Altman Group, Inc., 547 S.W.3d 624, 635 & n.35 (Tex. 2018) ("To establish an agency relationship, a [party] must show that it was subject to the principal['s] . . . control and authorized to act as its agent.").

275. *Keyes*, 692 S.W.3d. at 286 n.15 (emphasis in original).

276. ACS Invs., Inc. v. McLaughlin, 943 S.W.2d 426, 432 (Tex. 1997); Powell Indus. v. Allen, 985 S.W.2d 455, 457 (Tex. 1998) ("deemed corporate acts"); *Holloway*, 898 S.W.2d at (Tex. 1995) ("deemed the corporation's acts").

interfering with the corporation's own contract.[277] In those cases, an agent acting for the corporation is not liable for the tort.[278]

In the case of fraud or other tort, however, the corporation is liable vicariously for the tort that is within the scope of employment.[279] Whether an act is within the scope of employment depends directly on whether the corporation controls the agent's actions.[280] So, in a case like *Keyes*, the LLC may well be liable for the tort because the agents were subject to the LLC's control, but those same agents are not affiliates because they are not subject to the LLC's control? Instead, they are the LLC?

If the whole Court were to say such a thing, plaintiff's lawyers would have a free-for-all. If an agent acting in corporate capacity *is* the corporation, then an agent signing a contract with actual authority from the corporation—clearly and surely acting in corporate "capacity," whatever that means—should be bound by every corporate contract. After all, "the officers and employees *are* the corporation."[281] Moreover, a corporation would not be *vicariously* liable for the tortious conduct of its agent; it would be

277. *See Powell Indus.*, 985 S.W.2d at 457; *ACS Invs.*, 943 S.W.2d at 432; *Holloway*, 898 S.W.2d at 795.

278. *See Powell Indus.*, 985 S.W.2d at 457 ("The plaintiff must prove that the agent acted willfully and intentionally to serve the agent's personal interests at the corporation's expense . . . . A corporate officer's mixed motives—to benefit both himself and the corporation—are insufficient to establish liability."); *ACS Invs.*, 943 S.W.2d at 432; *Holloway*, 898 S.W.2d at 795.

279. *See* Los Compadres Pescadores, LLC v. Valdez, 622 S.W.3d 771, 779 (Tex. 2021); Painter v. Amerimex Drilling I, Ltd., 561 S.W.3d 125, 130–39 (Tex. 2018); Baptist Mem. Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998); Bank of Tex., N.A. v. Glenny, 405 S.W.3d 310, 316–17 (Tex. App. 2013) (reversing summary judgment for an employer because a fact issue existed as to whether an employee made tortious misrepresentations within the scope of employment); Hedley Feedlot, Inc. v. Weatherly Tr., 855 S.W.2d 826, 837 (Tex. App. 1993), *writ denied* (Feb. 2, 1994); Campbell v. Hamilton, 632 S.W.2d 633, 634–35 (Tex. App. 1982), *writ ref'd n.r.e.* (May 26, 1982); Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96, 98–99 (Tex. 1994) ("An insurance company is generally liable for any misconduct by an agent that is within the actual or apparent scope of the agent's authority.").

280. *See Los Compadres*, 622 S.W.3d at 779 ("Under this theory, an entity is vicariously liable for its employee's or agent's actions within the scope of employment or agency because the entity necessarily has the right to control an employee's or agent's work.").

281. *Keyes*, 692 S.W.3d at 286 n.15 (Bland, J., concurring).

directly liable because "the officers and employees *are* the corporation."[282]

Under normal agency law, an agent's act can only bind the corporation if the corporation authorizes it (through actual or apparent authority).[283] The agent cannot authorize itself to act.[284] Justice Bland's statement erases that logic. If the agents are the corporation, can they authorize themselves to act? Is "capacity" supposed to include just agency status or also power to bind? If capacity is just status, then once an agent becomes an agent, it should be able to authorize itself. Relatedly, can a corporate agent ever act disloyally if acts in their capacity as agent are acts of the corporation? Justice Bland states something that agency law assumes is impossible—that principal and agent are identical, so these questions should surprise no one.

The proposition that the agents are the corporation displaces not just agency law but corporate law. If anyone within the corporate structure can make a bid for being the corporation, it is the board of directors, not the agents. The board is, by default, the governing authority of the corporation.[285] According to the code, *governing authority* "does not include an officer who is acting in the capacity of an officer."[286] The board of directors is the part of the corporation that acts as principal: "the board of directors of a corporation . . . shall exercise or authorize the exercise of the powers of the corporation; and . . . direct the management of the business and affairs of the corporation."[287] Subchapter I of Chapter 21 of the Texas For-Profit Corporation Law—nineteen

282. *Id.*

283. Gaines v. Kelly, 235 S.W.3d 179, 182 (Tex. 2007) ("An agent's authority to act on behalf of a principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority).").

284. *Gaines*, 235 S.W.3d at 183–84 ("Declarations of the alleged agent, without more, are incompetent to establish either the existence of the alleged agency or the scope of the alleged agent's authority."); First Valley Bank of Los Fresnos v. Martin, 144 S.W.3d 466, 471 (Tex. 2004) ("First, apparent authority must be based on the acts of the principal.").

285. TEX. BUS. ORG. CODE ANN. § 1.002(35)(A)(i) (West 2025).

286. *Id.* § 1.002(35)(B).

287. *Id.* § 21.401.

sections in all—is dedicated to the board and its operation.[288] And of the entire Texas For-Profit Corporation law, only one section, 21.417, addresses officers and agents and makes clear that they are subject to the board's appointment and control.[289] They are not the corporation in any sense.

The Justice's statement is even more problematic when applied to a limited liability company that is member-managed.[290] When the LLC is member-managed, the managing members themselves are—*as members*—its governing authority, equivalent to a corporation's board.[291] But they are also as governing persons of a limited liability company "an agent of the company for purposes of carrying out the company's business."[292] The two roles could not be harder to distinguish. Does the Justice mean for us to distinguish a limited liability company member of a member-managed LLC *when acting as a member* from that circumstance when the same member is *acting as manager*? This is a legal can of worms—or perhaps a can of hats. The Court in *Keyes* did not say whether the LLC at issue was member-managed, but I was certainly left wondering.

Law is, nearly always, words. Speaking as an agency law and business entity law teacher, I wonder what I am supposed to do with the words that agents acting in their capacity are the corporation. If words can mean whatever the Court says, even in contradiction to everything else the Court says, then there is no law at all. I am glad that Justice Bland's opinion only won four total votes! As a lawyer, I would argue that her words have no effect at all outside of her own opinion.

What is worse, the gyrations in Justice Bland's opinion were unnecessary if the majority read the statute correctly to limit the statute's effect to only liability sought through "veil-piercing theories."[293] What the LLC members in *Keyes* were accused of was

288. *Id.* ch. 21, subch. I.

289. *Id.* § 21.417; *see id.* §§ 3.103, 3.104 (subjecting each officer to removal "for or without cause by the governing authority," the board).

290. *See id.* § 101.251.

291. *Id.* §§ 1.002(35), 101.251.

292. *Id.* § 101.254(a).

293. *See* 692 S.W.3d at 281–82.

intentional misrepresentation,[294] a tort (and a cause of action), not the extension of corporate liability under a veil-piercing theory. Nothing in the statute says anyone is protected against direct liability for their own tort. As the majority recognized, every theory of liability listed in the statute is a veil-piercing theory.[295] The statute's scope is limited by its own words. Even a corporate agent acting in the agent's capacity and thus under the corporation's control and thus an affiliate under the statute's definition is still not protected by the statute—under the statute's plain terms—because the statute only inhibits the effect of veil-piercing theories. It says nothing about limiting direct tort liability for misrepresentation.

So, when the issue the concurring justices say was reserved for future decisions comes up for actual decision, the statute will/should still only protect the shareholder from liability "on the basis of" a veil-piercing theory. Stretching the statute into giving shareholders a free pass from tort liability for intentional misrepresentation will not only be the worst form of socialism,[296] it will now, after *Keyes*, necessitate some of the logical gyrations that appear in Justice Bland's concurrence.

In *Keyes*, the desire to speak on behalf of shareholders came at considerable cost, in this case a cost to coherence. I suppose the justices desired political coherence, but even an elected judiciary—perhaps particularly an elected one—should speak and follow law. Contradicting law is one way not to follow it.

IV. IS THIS INTENTIONAL?

The intent of a body of nine people is something of a fiction, just as the intent of a legislature is a fiction.[297] Moreover, the churn

294. *Id.* at 275.

295. *Supra* notes 263–269 and accompanying text.

296. *See* Ricks, *supra* note 233, at 59–62.

297. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("A legislature certainly has no intention whatever in connection with words which some two

of decisions on different but related issues through rotating authors who do not fully agree with each other leads inexorably to inconsistency.[298] Collective will is hard to tease.

Nevertheless, two recent decisions suggest that the Court's will is not intentionally to work beyond the law.

A. Skeels v. Suder

The issue in *Skeels v. Suder*[299] seemed tailor-made for the court wanting to shore up controlling-equity-holder power: "whether a corporate resolution authorized a law firm [a professional corporation] to redeem a departing shareholder's shares on terms unilaterally set by the firm's founders."[300]

The "founders" mentioned in the issue statement—Friedman, Suder, and Cooke—were lackadaisical at best regarding business entity law. The Court reported that "the predecessor of Friedman, Suder & Cooke, P.C. (FSC) incorporated as a law firm professional corporation" in 1992.[301] It did not issue stock until 2014.[302] Even though it had issued no shares, the Court reports that in 1999 "the firm had four shareholders."[303] In 2007, FSC hired Skeels, and "he became a shareholder" by 2011.[304] How a corporation that has never issued shares can have any shareholder is a complete mystery that the Court asserts but does not bother to address. The Court reports that Cooke claimed FSC "'deemed' its shareholders

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or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."); *see also* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992) ("Legislative intent is an internally inconsistent, self-contradictory expression. Therefore, it has no meaning. To claim otherwise is to entertain a myth . . . .").

298. *See, e.g.*, Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895 (2006) (discussing Arrow's Theorem's application to judicial decisionmaking and other ways in which collective courts can act irrationally).

299. 671 S.W.3d 664 (Tex. 2023).

300. *Id.* at 665.

301. *Id.* at 666.

302. *Id.* at 665–67.

303. *Id.* at 666.

304. *Id.*

to have . . . shares,"[305] but the Texas Business Organizations Code actually addresses what makes a shareholder,[306] and "deeming"—essentially agreeing to pretend—is not a legal move under the code. Did the Court by calling these people shareholders mean to give "deeming" some legal status? That indeed would be proof of this Article's thesis.

The IRS forced FSC to shape up in 2014, when it audited FSC and told the FSC office manager that it wanted to see FSC "acting like a real corporation."[307] So FSC "formally issued . . . backdated certificates of 1,000 shares of common stock to each of its shareholders."[308] The Court does not mention what consideration—required under the code[309]—was paid for the shares, but none of the parties challenged that shares were issued, apparently.[310] Before the IRS showed up again, Cooke prepared a resolution signed by all of FSC's new shareholders.[311] The resolution said that the corporation wanted to memorialize in writing the "policy and practice" of the corporation, and the "right" of the founders, that the founders "have been entitled, and shall continue to be entitled, *to take affirmative action on behalf of the Firm*."[312] Cooke explained that the resolution meant to preserve the right of the founders to be in absolute control of the firm, to have "ultimate power and control."[313]

Later, Skeels and another shareholder became dissatisfied with the firm and were terminated.[314] When "shareholders" had left FSC before 2014, they had each negotiated, released, or settled

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305. *Id.*
306. *E.g.*, TEX. BUS. ORG. CODE ANN. §§ 21.157–.162 (West 2025).
307. 671 S.W.3d at 667.
308. *Id.*
309. *See* TEX. BUS. ORG. CODE ANN. § 21.157 (West 2025).
310. Both parties argued about whether the shares could be redeemed, a position that requires that the shares had been issued.
311. 671 S.W.3d at 667.
312. *Id.*
313. *Id.*
314. *Id.* at 667–68.

with FSC regarding claims they might have as shareholders.[315] Essentially, they had given up their (imaginary) shares. The other shareholder fired with Skeels did this.[316] Skeels refused, even though FSC offered him $75,000.[317] Skeels also asked as a shareholder to inspect the books.[318] At this point, FSC declared that it would rely on the resolution to "redeem" Skeels's shares in exchange for nothing.[319] Litigation then started, ending up at the Court.[320]

By a vote of 7–1, the Court rejected FSC's claim that the resolution authorized the founders to declare redemption for nothing.[321] Essentially, the Court's decision rests on three points. First, Skeels's shares were common shares which by default are not redeemable and therefore were personal property defined by the corporation's governing documents, none of which mentioned redemption.[322] Second, though the resolution authorized the founders to act for FSC, it did not authorize them to act for the shareholders, and Skeels never agreed to a redemption of his shares.[323] Third, FSC never asserted that it had used the resolution to amend any governing document to give it a right to redeem.[324] Regarding this third point, FSC perhaps wanted to avoid telling its current shareholders that their shares were worthless, because that would be the result of a declaration that the founders, by virtue of the resolution, could take the shares back in exchange for nothing, simply by declaring it so. The resolution itself did not do this, and to claim that it did would be

315. *Id.* at 667.
316. *Id.* at 668.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 668–69.
321. *Id.* at 665, 674.
322. *Id.* at 670–71, 673.
323. *Id.* at 671–74.
324. *Id.* at 671, 673.

to claim that it allowed the founders to take shareholders' property or essentially declare it a nullity.[325]

Chief Justice Hecht, unlike the majority, took the bait. In a dissent, Justice Hecht reasoned that for Skeels to agree that the founders could amend the corporation's governing documents to create terms of redemption but not "unilaterally set the term for redeeming Skeels' shares" makes no sense.[326] Justice Hecht would have construed a grant of authority to the founders to "take affirmative action on behalf of the firm" to include changing the terms of stock after issuance.[327] I am certain every founder would appreciate such power, especially if they could get it so informally.[328] That the Court itself respected the law of share issuance enough to deny the founders and controlling equity holders such power suggests that they will not step beyond law intentionally.

B. Pike v. Texas EMC Management, LLC

Pike v. Texas EMC Management LLC[329] presented another opportunity to choose between business controller and not. The Court chose not, so the Court's opinion is actually of secondary importance to this Article except to tee up Justice Bland's dissent. But the dissent makes sense only against the Court's opinion, so here is a summary.

Put as briefly as possible, limited partnership Texas EMC Products; its general partner Texas EMC Management, LLC; and

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325. This was essentially the argument of academics who argued as amici. *See id.* at 669 n.18.

326. *Id.* at 674 (Hecht, C.J., dissenting).

327. *Id.* at 674–75.

328. *See, e.g.*, Labovitz v. Dolan, 545 N.E.2d 304 (Ill. App. 1989) (holding that a promoter and controller of a limited partnership could be liable to the limited partners for a scheme in which the controller withheld profits from and made no distributions to limited partners, depressing the value of their interests, and then tried to buy them out for less than full value); Nicholas v. Patton, 279 S.W.2d 848 (Tex. 1955) (a case factually similar to *Labovitz* but in the corporate setting, discussed at length *supra* Part II.A).

329. 610 S.W.3d 763 (Tex. 2020).

limited partner EMC Cement BV sued the general partner's manager, Pike;[330] two limited partners, Wilson and Walker; "VHSC," which bought the limited partnership's assets at a foreclosure sale; and Few Ready Mix, a concrete business in Jasper, Texas.[331] After trial, a jury found limited partners Wilson and Walker liable to EMC Cement BV for $7 million damages "for breach of the partnership agreement."[332] The trial court entered judgment, Walker appealed, and the Court granted review.[333]

Walker challenged limited partner EMC Cement BV's standing as a limited partner to recover the $7 million.[334] The challenge was based on the notion that the $7 million was measured by diminution of the value of EMC Cement BV's limited partnership interest.[335] The trial court instructed the jury that the measure of damages should be "'[t]he difference, if any, in the value of EMC Cement's interest in the [Partnership] before and after the failure to comply' with the agreement."[336] Walker objected that this "claim for damages belonged to the Partnership and there was no evidence of a separate loss to EMC Cement BV."[337]

The Court handled Walker's argument in two ways: (i) as a challenge to EMC Cement BV's constitutional ability to bring the claim, which would deprive the Court of jurisdiction;[338] and (ii) as a challenge to EMC Cement BV's capacity as a partner "to sue individually for injury to the partnership."[339] The Court made rulings related to both. It held, first, that Walker as a limited partner had "constitutional standing to sue for an alleged loss in

330. The Court did not say whether the general partner was a manager-managed LLC and Pike was the manager or whether Pike was simply a hired employee manager. Pike's presence as a defendant is more plausible if he was more than an employee.

331. *Pike*, 610 S.W.3d at 770–72.

332. *Id.* at 773.

333. *Id.* The intermediate court of appeals affirmed this award. *Id.*

334. *Id.*

335. *Id.* at 775.

336. *Id.* Walker objected to this, but the trial court overruled the objection. *Id.*

337. *Id.*

338. *Id.* at 773–75.

339. *Id.* at 775.

the value of its interest in the organization"[340] because "the authority of a partner to recover for an alleged injury to the value of its interest in the partnership is not a matter of constitutional standing that implicates subject-matter jurisdiction."[341] No matter who owned the right to recover for the lost value of the partnership under relevant statutes,[342] the Court thought a limited partner had an injury "concrete" enough to "meet the constitutional justiciability requirement."[343] Doing otherwise would render the courts unable to issue judgment on the merits.[344] This is a legitimate policy concern. The Court opted not to reduce the Court's power unnecessarily. And, for what it is worth, Walker asked for a "take-nothing judgment," not dismissal.[345]

With regard to EMC Cement BV's capacity, the Court declined to decide whether EMC Cement BV had any capacity.[346] But the Court did frame the issue, probably in order to shore up its standing analysis: "We hold that the question whether a claim brought by a partner actually belongs to the partnership is likewise a matter of capacity because it is a challenge to the partner's legal authority to bring the suit."[347]

The Court then explained how a partner might have capacity to bring a claim that a partnership might also bring. First, the Court stated specifically that "Chapters 152 and 153 of the Business Organizations Code include sections addressing a partner's authority to sue."[348] In fact, Section 152.210 quite clearly states that a "partner is liable to the partnership and the other partners for .

340. *Id.* at 778.

341. *Id.* at 775.

342. *See id.* at 776 ("But is the . . . prohibition—as now articulated in our statutes—a matter of constitutional standing that affects a court's subject matter jurisdiction?").

343. *Id.* at 777 (quoting Ensley v. Cody Resources, Inc., 171 F.3d 315, 319–20 (5th Cir. 1999)).

344. *See id.*

345. *Id.* at 774.

346. *Id.* at 778–79 ("We need not decide whether EMC Cement BV lacked capacity to recover, however, because we conclude there is insufficient evidentiary support for EMC Cement BV's damages even if it had capacity.").

347. *Id.* at 779.

348. *Id.*

. . a violation of a duty to the partnership or the other partners . . . that causes harm to the partnership or the other partners."[349] And Section 152.211 allows a partner to sue another partner "for violation of the partnership agreement."[350] The Court also recognized that the Texas Limited Partnership Law allows limited partners to sue derivatively but noted that EMC Cement BV did not sue in a derivative capacity.[351] EMC Cement BV sued in a personal capacity, and the dispute on appeal was whether the harm done was personal or to the partnership.[352]

The Court also discussed as controlling precedent an earlier case, *In re Fisher*,[353] that allowed a limited partner to sue "two other[]" limited partners for injuries the limited partner "suffered directly."[354] All of this law—the statutes and *Fisher*—indicate that a limited partner sometimes has capacity to sue for injuries suffered directly as a result of another limited partner's breach of the partnership agreement "that causes harm to the partnership or the other partners."[355] So the Court cited *Fisher* in support that a limited partner has the capacity and can claim damages for "'injuries he suffered directly.'"[356]

Why—with its jurisdiction- and standing-related holdings—is *Pike* relevant here? Mostly because the Court had an opportunity to build up the business entity edifice and protect controlling or at least substantial equity owners from suit—but it did not do so. The consequence is that equity owners of limited partnerships—like Walker and Wilson—remain subject to suit from other equity

349. TEX. BUS. ORG. CODE ANN. § 152.210 (West 2025) (quoted at 610 S.W.3d at 779–80).

350. *Id.* § 152.211.

351. 610 S.W.3d at 780 (noting TEX. BUS. ORG. CODE ANN. §§ 153.401–.413 (West 2020)).

352. *Id.* ("[T]he parties dispute whether the damages EMC Cement BV recovered were personal or for harm to the Partnership . . . .").

353. 433 S.W.3d 523 (Tex. 2014).

354. *See Pike*, 610 S.W.3d at 780 (citing *id.* at 527).

355. *See id.* at 779–80 (quoting TEX. BUS. ORG. CODE ANN. § 152.210 (West 2020)).

356. *Id.* at 780 (quoting *Fisher*, 433 S.W.3d at 527). That did not end the Court's discussion. There was also an issue whether Walker had raised the matter sufficiently at the trial court, and the Court ruled that he had, so the Court could have applied the law here had the facts warranted it. *Id.* at 780–81. Because the Court in a later part of the opinion held that the $7 million award was not supported by sufficient evidence, the Court declined to say specifically that EMC Cement BV had directly suffered injuries. *Id.* at 781.

owners—like EMC Cement BV.[357] The situation may seem somewhat academic because the Court with jurisdiction retains power to rule against the plaintiff on the merits, but obtaining a ruling on the merits will be the more expensive route to a win for the equity owner defendant, and that was perhaps Justice Bland's concern.

Justice Bland in dissent would have held that (i) "EMC [Cement BV's] claim is based merely on its percentage of a reduction in the value of the partnership," and (ii) the "reduction in the value of the partnership is a partnership injury, [and] a limited partner like EMC Cement has no standing to recover directly for it in a judgment."[358]

These rulings allowed Justice Bland to say a lot of entity-affirming things, like this:

> The foundational trait of a business organization is its independent-entity status, distinct from the stakeholders who comprise it. The perennial business organization—a corporation—enjoys powers that allow it to exist independently. It can own property, acquire debt, and sue in its own name. As long as all abide by the structures and formalities essential to its independence, corporate shareholders are not personally liable for the corporation's debts or tort beyond their capital investment.[359]

That is glowing. It may or may not be relevant to limited partnerships, so she addressed those, too. The first sentence in

357. In 2019, the Texas Legislature created an exceptional procedure for what would otherwise be derivative proceedings for "closely held limited partnership" litigation. TEX. BUS. ORG. CODE ANN. § 153.413 (West 2025); *Pike*, 610 S.W.3d at 800 n.42 (Bland, J., dissenting). Section 153.413's exception might well have applied to the limited partnership at issue in *Pike*. The exception allows a court to elect, "if justice requires," to treat the suit "as a direct action brought by the limited partner for the limited partner's own benefit" and require recovery to be paid directly to the limited partner. TEX. BUS. ORG. CODE ANN. § 153.413(c) (West 2025). This statute was passed too late to apply to the *Pike* facts, however, which occurred in 2010–11. *See* 610 SW.3d at 769–72; *id.* at 802 & n.58 (Bland, J., dissenting).

358. 610 S.W.3d at 800 (Bland, J., dissenting).

359. *Id.* at 796–97.

her dissent is this: "The partnership is an entity unto itself, not an extension of individual partners asserting their individual interests."[360] Against this background, her comparison of partnerships with corporations seems weightier: "Partnerships—and their limited liability variant—similarly exist as independent entities. Partnership assets are the property of the partnership; individual partners have no legal interest in those assets."[361]

But these statements about limited partnerships are less true—they are at least incomplete and probably give a false picture of a partnership as an entity. Unlike a corporation, a partnership is in some ways an entity and in some ways an aggregate—the group of partners themselves. So, for instance, partnership is an entity for separating partnership property from partner property.[362] But partnership property can be held in the names of individual partners, and sometimes factfinding is required to determine whether property used by the partnership is property of the partnership or property of a partner (factfinding which is never needed if the partners stay friends).[363] Sometimes the partnership owns only the *use* of property otherwise owned by a partner,[364] in which case partners do indeed have a legal interest in the asset.

A partnership can sue and be sued in its own name,[365] but a judgment against the partnership binds the general partners who have been served with process, and judgment against the partners

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360. *Id.* at 795. I am not sure what "unto itself" adds.

361. *Id.* at 797.

362. *See* TEX. BUS. ORG. CODE ANN. §§ 152.101, 154.002 (West 2025).

363. *See id.* § 152.202(a)–(b) ("Property is presumed to be partnership property if acquired with partnership property, regardless of whether the property is acquired" "in the name of the partnership."); *id.* § 152.202(c) ("Property acquired in the name of one or more partners is presumed to be the partner's property," but may not be.).

364. *E.g.*, *id.* § 152.102(c) ("Property acquired in the name of one or more partners is presumed to be the partner's property, regardless of whether the property is used for partnership purposes . . . ."). The partnership agreement can easily require that a partner contribute the use of property for the duration of the partnership's existence in exchange for a partnership interest, while the partner retains all other rights in the property. *See id.* § 152.002(a).

365. *Id.* § 152.305.

may also be entered even though they are not named parties.[366] "[A]ll [general] partners are jointly and severally liable for all obligations of the partnership."[367] So, once such a judgment is entered against any partner based on a claim "against the partnership," the partnership's "creditor may proceed against the property of [that partner] to satisfy" that judgment if the claim remains unpaid.[368] All of these overlapping, extending aspects of partner and partnership property and liability are true even though, as Justice Bland cites, "[a] partnership is an entity distinct from its partners."[369] The code as a whole limits that blanket statement.

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366. *Id.* § 152.306(a).

367. *Id.* § 152.304(a).

368. *Id.* § 152.306(b).

369. *Id.* § 152.056 (quoted at Pike v. Tex. EMC Mgmt., LLC, 610 S.W.3d 763, 795 (Tex. 2020) (Bland, J., dissenting)). As a professor who teaches business entities law, I am not quibbling when I also criticize Justice Bland for claiming that "[l]imited partnerships did not exist" in 1988. *See* 610 S.W.3d at 796 (claiming that limited partnerships did not exist when Pledger v. Schoelkopf, 762 S.W.2d 145 (Tex. 1988), was decided); *see also id.* at 795 n.7 & 798 n.27 (referring to a case involving a limited liability partnership). Based on her inclusion of a code provision that applies only to limited liability partnerships, in a footnote intending to address "[p]artnerships—and their limited liability variant," 610 S.W.3d at 797 & n.17 (quoting TEX. BUS. ORG. CODE ANN. § 152.801(a) (West 2020)), I believe Justice Bland confused limited partnerships (which were involved in *Pike*) with limited liability partnerships (which were not). Limited partnerships are, as Justice Bland notes on the same page, "a creature of statute." A limited partnership is "a partnership that is governed as a limited partnership under Title 4 and has one or more general partners and one or more limited partners." TEX. BUS. ORG. CODE ANN. § 1.002(50) (West 2025). A limited liability partnership, on the other hand, "means a partnership governed as a limited liability partnership under Title 4." *Id.* § 1.002(48). A general partnership (not a creature of statute) can become—also and at the same time remain a general partnership—a limited liability partnership by registering as such, and it remains a limited liability partnership only during the period of its active registration. *Id.* §§ 152.801–.806. Because a general partnership can become a limited liability partnership without having limited partners, a limited liability partnership may be—at the same time it is a limited liability partnership—a general partnership. *See id.* § 1.002(34). A limited partnership may also become a limited liability partnership, *id.* § 152.805, and when it does, clarity counsels that it be called a limited liability limited partnership. *See id.* §§ 1.002(47) & (50), 5.055, 153.351–.353. When a limited partnership becomes a limited liability partnership, it is

When Justice Bland addresses the statutes that apply directly to partners' suing other partners, she says this: "But section 152.211(a) confers authority only on the partnership to sue for breaches "of a duty to the partnership causing harm to the partnership.'"[370] While it is true that Section 152.211(a) does not address a partner's right to sue—subsection (b) does, so subsection (a) is beside the point. Justice Bland also addresses subsection (b):

> In contrast, subsection (b) confines an individual partner's ability to sue to enforce "a right" under the partnership agreement and to "enforce the rights and otherwise protect the interests of the partner," not the partnership. Subsection (b) thus permits a partner to redress its personal rights. It does not permit an individual partner to pursue, on the partner's own behalf, a direct recovery for harm to the partnership."[371]

But the conclusions do not follow from the premises, here. Justice Bland quoted the subsection correctly, but the whole subsection actually suggests a partner can sue to protect the partnership's rights, or at least leaves the matter open. Subsection (b)(1) says, without limitation, "A partner may maintain an action against . . . another partner for legal or equitable relief . . . to . . . enforce a right under the partnership agreement."[372] There is no limit here to the partner's personal rights. Subsections (b)(2) and (3), on the other hand, expressly limit the partner to enforcing the partner's own rights—in contrast to subsection (b)(1), which directly

both a limited liability limited partnership and a limited partnership. *Id.* § 153.351. Limited partnerships and limited liability partnerships are easy to confuse, but they are not the same at all. Law is words, and I do not want to correct my students with statutes only to have them quote the Court back to me. For the record, limited liability partnerships did not exist in 1988; they were allowed only beginning in 1991, first in Texas. Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 COLO. L. REV. 1065, 1065 (1995). Limited partnerships, on the other hand, are in the United States about two centuries old. *See The Limited Partnership*, 45 YALE L.J. 89, 895–96 & n.6 (1936) (discussing the New York statute of 1822 that allowed the creation of limited partnerships but noting that a similar entity had "always" been possible in Florida and Louisiana and that in 1936 all states but two enabled the entity).

370. 610 S.W.3d at 798.

371. *Id.*

372. TEX. BUS. ORG. CODE ANN. § 152.211(b)(1) (West 2025).

addresses breach of the partnership agreement itself and lacks such a limit.[373] The absence in (1) of a limitation that is present and clearly intended in (2) and (3) suggests that the partner in EMC Cement BV's position can indeed sue its Walkers and Wilsons for harm to the partnership.

Justice Bland is arguing aggressively here. She dissented alone, and lone dissents often reveal particularly important commitments.[374] The full language of the statute does not as neatly serve her ultimate purposes, though. An advocate can pick and choose which parts of the law to emphasize, but a court of last resort should not. Near the end of her lengthy dissent, she again affirms these purposes:

> To grant limited partners standing to sue individually for claims against other partners or a third party for an injury to the partnership causes instability in business organizations and costly litigation for claims that should be dismissed immediately, absent compliance with the Legislature's derivative standing rules.
>
> Because EMC Cement [BV] claimed an injury based on lost value of the partnership, we should dismiss its claim for lack of standing. As a limited partner, it lacked standing to recover the partnership's lost profits. . . . This Court . . . disregard[s] a partnership's status as an independent entity in concluding that derivative standing requirements may be waived—and a partnership's recovery taken—in a limited partner's enforceable judgment, in contravention of the limited partnership's governing documents [which named a general partner].[375]

This makes clear what Justice Bland wanted. By pushing aside the counter arguments but inserting equity holder protection—the political goal—she appears to have chosen the political option this Article asserts.

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373. *Id.* § 152.211(b).

374. *See, e.g.*, Grant Christensen & Anne Mullins, *The Lone Dissent*, WASH. & LEE L. REV. (forthcoming 2026), https://ssrn.com/abstract=5213323 [https://perma.cc/N6XH-ZCLF].

375. 610 S.W.3d at 807–08.

Another reason I believe Justice Bland took the political option is that she failed to mention the one statute in the partnership code that directly addressed her analysis: "The powers and duties of a limited partner shall not be governed by a provision of Chapter 152 that would be inconsistent with the nature and role of a limited partner as contemplated by this chapter."[376] This is more or less what Justice Bland is arguing—the nature of a limited partner's role—and using the derivative proceeding provisions of Chapter 153 to imply the limited partner could not sue. But perhaps she did not want to argue "nature and role," as that might make relevant the exceptional Section 153.413, which allows limited partners to recover directly for a derivative claim brought against the person harming a "closely held limited partnership."[377] This section was not applicable to the facts of *Pike* because the plaintiff sued directly, but the statute is certainly relevant to a limited partner's "nature and role." Under that section, EMC Cement BV might have recovered the $7 million itself because, well, EMC Cement BV was actually injured.[378] The possibility of Section 153.413's helping to define the limited partner's nature and role in a closely held limited partnership suggests the Court itself took the right approach.

The Court thus had an opportunity to shut down one more way in which equity owners could sue each other. The other justices could have joined the entity-affirming, equity-affirming opinion of Justice Bland. They did not. This persuades me that the moves beyond law the Court makes in the cases discussed in Part III do not evidence an intent to move beyond law. The cases may be politically grounded, but the Court believes it is acting consistently with law. These examples in Part IV suggest that, when the Court believes law constrains it, it follows the law.

376. TEX. BUS. ORG. CODE ANN. § 153.003(b) (West 2025).

377. *Id.* § 153.413.

378. *See supra* notes 340–343 and accompanying text.

V. WHAT IS LEFT?

The Supreme Court of Texas has revealed a political commitment to protecting controlling equity owners—*e.g.*, shareholders, LLC members, limited partners—from liability related to their equity ownership.

Commitment is purposive. As noted, to some extent attributing purpose to a collective body is fiction.[379] Nevertheless, the law does this regularly. Something like this is meant by "legislative intent," an idea both the United States Supreme Court[380] and the Supreme Court of Texas invoke.[381] The Supreme Court of Texas begins with legislative text and tries to give meaning to every word in its context, harmonizing each provision, considering the context and framework of the statute, to meld a cohesive reflection of intent, presuming both inclusions and omissions were intended.[382] I have tried to do something like this with the cases analyzed in this Article. One must take the Court's product—the text—as it stands and try to make sense of it in its context. Where the Court or the justices stretch out beyond law, a charitable reading of their opinions requires that we assume they intend to serve the common good. Both legal and political ends can serve the common good. Given that the law the Court cites is incomplete, ignored, or occasionally misstated, something besides law is at work.

Political goals are the next best alternative explanation, for several reasons. First, the political goal—protection of equity investment—seems to be shared by all the justices. I believe that the cases discussed in Section III and the Court's decision to grant review in the cases discussed in Section IV show this. Much of the rhetoric employed by the justices when describing the protected

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379. *See supra* note 297.

380. *E.g.*, West Virginia v. Env'tl Prot. Agency, 597 U.S. 697, 723 (2022) (describing the major questions doctrine as grounded in "separation of powers principles and a practical understanding of legislative intent").

381. Pub. Util. Comm'n v. Luminant Energy Co., 691 S.W.3d 448, 460–64 (Tex. 2024).

382. *See id.* at 460–61 (paraphrased but faithful to the Court's intent).

status of equity holders displays fervor beyond the needs of dispassionate, even-handed law. Even when the justices perceive that the law divides them, as in *Keyes* and the cases in Section IV, the fallback is this same political goal.

Second, the Court's political nature offers evidence. A great deal of political science supports the idea that judges bring political commitments to the office and that these commitments have an effect in certain decisions even while judges try to avoid solely political grounds for their actions.[383] In some social science circles, judges are assumed as rational economic actors to act politically; the question is mostly whether judges take account of others' political preferences, too, or only their own.[384] One would expect justices of the Supreme Court of Texas, who are elected statewide and retain office only by satisfying voter preferences, to have political positions that will appear in judicial opinions.

As Part I shows, the Supreme Court of Texas is a court of law and also a political body. A political explanation for what happens at the Court—for what happens that is not caused by law—is therefore consistent with the justices' appointments by the governor and resignations that allow the governor control, the justices' other career goals as far we know them, the single-party nature of statewide office in Texas, the political desire to reign in intermediate appellate courts controlled locally by the other party, and the Texas Republican Party's general political commitments. Because the Court is both a legal and political body, when legal reasons fail to explain what the Court does, political reasons should be the second explanation.

Third, the justices are highly trained, extremely intelligent, and politically savvy people. They are also career lawyers.

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383. *See, e.g.*, Bruce A. Green & Leslie C. Levin, *Public Confidence, Judges, and Politics On and Off the Bench*, 87 L. & CONTEMP. PROB. 183 (2024); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1471–82 (2003) (reviewing the literature extent at the time); Dmitry Bam, *Judicial Partisanship in a Partisan Era: A Reply to Professor Robertson*, 70 FLA. L. REV. 148 (2019); Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016).

384. *E.g.*, Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247 (2003).

Explaining their joint resolutions of the contentious business law issues encountered in the cases would be difficult on any other rationale than law or politics. When law fails to explain, politics is available as a uniting force, and I know of no other uniting force in this case, especially one that could explain the justices' consistent fallback rhetoric. I have been watching the Court's business jurisprudence for decades. Politics seems the most plausible explanation for the Court's recent decisions.

As I mentioned in the introduction, I believe it is possible that the existence of this political fallback position reassures businesses—potential litigants—as much or more than a strictly legal position would. If this is true, it comes with a downside. Of particular interest to me as a law teacher are the trade-offs entailed by moving beyond law. The move makes the result dependent on the Court's personnel rather than independent of them. The rule of law is always better than the rule of any particular people, even those in the party we prefer. At some point, those in power will move on and others will take their places. If the laws can be ignored, then the rules in effect at any given time will depend more on the people applying them than the rules themselves. As Thomas More said in *A Man for All Seasons*, "I'd give the Devil benefit of law, for my own safety's sake;"[385] but for safety's sake, I (your author) would rather even angels abide by the law. And anyway, we are neither devils nor angels, but free people in a free country, and this freedom depends on law, as Thomas Paine implied: "[I]n free countries the law *ought* to be King; and there ought to be no other."[386]

Because I believe the Court intends to follow the law, I suggest finally that the Court's reliance on the bar's business entity expertise is probably unwarranted. Rather than fall back on a political position after the Court addresses the parties' legal arguments, the Court could first engage in or commission independent legal research into Texas business entity law. As a federal judicial law clerk, I routinely researched beyond the

385. ROBERT BOLT, A MAN FOR ALL SEASONS 66 (1960).

386. THOMAS PAINE, COMMON SENSE 74 (1776) (Edward Larkin ed., 2004).

parties' briefs, often at my employer's request; the Court's briefing attorney staff could be likewise engaged. The Texas Code of Judicial Ethics explicitly exempts from the rule against judicial *ex parte* communications the justices' "obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge."[387] The judge must give notice to the parties and afford them "reasonable opportunity to respond."[388] The Court's occasionally using this procedure would perhaps spark the bar to greater learning; I propose that this effect would occur whether the expert adds or not; knowing the justices are willing to employ this procedure should encourage the bar to present and follow the law more thoroughly and accurately.

387. Tex. Code Jud. Ethics Canon 3(B)(8)(c).

388. *Id.*