

THE ILLINOIS AGRICULTURAL COOPERATIVE ACT: THE
POSSIBILITY OF AND PROCEDURE FOR DENYING THE
VOTING RIGHTS OF STOCKHOLDERS

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The Illinois Agricultural Cooperative Act (ACA) governs agricultural cooperative associations organized in Illinois. The Act incorporates by reference all of the provisions of the Illinois Business Corporation Act of 1983 (BCA) that are not in conflict with the ACA. One provision of the BCA allows a corporation to limit or deny the voting rights of its shareholders if the corporation's articles of incorporation so provide. Whether this particular provision is in conflict with the ACA, and hence whether agricultural cooperative associations organized under the ACA may limit or deny the voting rights of their shareholders, is a debatable question.

The resolution of this question will determine whether an agricultural cooperative organized under the ACA can go forward with a cooperative business action when an insufficient number of affirmative votes in favor of the action would prevent it from occurring despite the absence of opposition to the action. This situation would arise whenever a certain number of cooperative stockholders who do not oppose a proposed action nevertheless neglect to cast votes favoring the action, causing it to fail.

In this note, the author argues that agricultural cooperatives organized under the ACA can indeed limit or deny stockholder voting rights as provided in the BCA, and recommends that the Illinois General Assembly make its intention clear in this regard.

Imagine two Illinois statutes. Statute *A* contains a provision stating that the provisions of Statute *B* will apply to organizations formed under Statute *A* except where those provisions conflict with the express provisions of Statute *A*. Now suppose that Statute *A* contains a clause expressly designating one provision of Statute *B* that *conflicts* with Statute *A*. Does that mean that all other provisions of Statute *B* do not conflict with Statute *A*? What if one of these other Statute *B* provisions on which Statute *A* is silent somehow seems to be contrary to the purpose of Statute *A*, but not necessarily in conflict with an express provision of Statute *A*? Is that Statute *B* provision nevertheless applicable to Statute *A*? Surely the Illinois General Assembly would not draft two pieces of legislation resulting in such a morass of confusion. Unfortunately, such

an Ivesian state of unanswered questions does exist in the Illinois statutory law regarding agricultural cooperatives in Illinois.¹

Illinois agricultural cooperative associations are governed by the Illinois Agricultural Cooperative Act (ACA).² A particular provision of the ACA incorporates by reference the provisions of the Illinois Business Corporation Act of 1983 (BCA) that are consistent with the ACA.³ The BCA allows a corporation formed under the statute to provide in its articles of incorporation for the limitation or denial of voting rights for any class or series of shares.⁴ The question then arises whether the BCA provisions allowing for the limitation or denial of shareholder voting rights apply to agricultural cooperative associations organized under the ACA.

Why is all of this important? Were agricultural cooperatives organized under the ACA permitted to limit or deny voting rights of certain share classes, cooperative business actions could be significantly expedited in situations where it is difficult to gain the necessary shareholder approval despite little or no opposition to the actions.⁵ In Illinois, this situation presents itself most conspicuously in the merger of two agricultural cooperatives, although it could apply to other cooperative action as well. In addition, other states with similar statutes may benefit from the following analysis as well.

The purpose of this note is to expose a glaring ambiguity in the Illinois ACA. At the same time, this note seeks to provide convincing arguments that cooperatives under the ACA can indeed limit or deny stockholder voting rights, which, as mentioned above, could very well expedite cooperative business in Illinois and possibly other states.⁶ In so showing, it is the goal of this note to address the major issues that would inhere in such an action, including procedural issues depending on the

1. This refers to the famous Charles Edward Ives composition entitled "The Unanswered Question," in which a lone trumpet "poses 'the eternal question of existence' against a haunting background of strings, finally to be answered by an eloquent silence." *Charles Edward Ives*, at http://www.charlesives.org/i_life.htm (last visited Jan. 12, 2002). Unfortunately, the Illinois General Assembly has yet to resolve the issue with anything other than silence.

2. 805 ILL. COMP. STAT. 315/1-33 (2000).

3. The provisions of the general corporation laws of this State, relating to corporations for pecuniary profit, and all powers and rights thereunder shall apply to the associations organized hereunder, except where those provisions are in conflict with or inconsistent with the express provisions of this Act; provided, however, that nothing in this Act shall be construed as repealing or modifying the law under which co-operative companies or associations are now organized. *Id.* § 315/31(a).

4. "The articles of incorporation of any corporation incorporated after December 31, 1981, may . . . limit or deny voting rights or may provide special voting rights as to any class or classes or series of shares of such corporation." *Id.* § 5/7.40(b). "A corporation may amend its articles of incorporation . . . to limit or deny voting rights or to provide special voting rights as to any class or classes or series of shares of such corporation." *Id.* § 5/7.40(c). "Subject to the provisions of section 7.40 of this Act . . . , the articles of incorporation may limit or deny the voting rights of or provide special voting rights for the shares of any and all classes or of any series of a class." *Id.* § 5/6.05.

5. See *infra* note 32 and accompanying text.

6. See *supra* text accompanying note 5.

date of incorporation of the cooperative. Although this note takes the ultimate position that agricultural cooperatives organized under the ACA can limit or deny voting rights for certain classes of stock, it is recommended that the Illinois General Assembly make its intention clear in this regard.

I. BACKGROUND

A. *What Is a Cooperative?*

A cooperative can be defined as “a user-owned and controlled business from which benefits are derived and distributed on the basis of use.”⁷ While considered a type of business organization,⁸ a cooperative is nonetheless a separate entity with its own distinct principles and characteristics.⁹ Today there are over 47,000 cooperatives, comprised of over 100 million people, in the United States.¹⁰ While these cooperatives can be found in many sectors of the American economy,¹¹ they are often associated with the agricultural sector.¹²

B. *Cooperative Development History*

The beginnings of agricultural cooperation, and cooperation in general, date back long before the birth of Jesus Christ.¹³ The Babylonian King Hammurabi enacted a code, effective from 2067 to 2025 B.C., under which poor agricultural producers were allowed to manage large estates cooperatively instead of serving the owners of such estates.¹⁴ The idea of cooperation continued to grow.¹⁵ In 1844, a group of twenty-eight British

7. John R. Dunn, *Basic Cooperative Principles and Their Relationship to Selected Practices*, 3 J. AGRIC. COOPERATION 83, 85 (1988).

8. Basil G. Coley, *Economic Factors Associated with the Growth and Development of Agricultural Cooperatives*, 10 SAN JOAQUIN AGRIC. L. REV. 7, 7 (2000).

9. See David Barton, *What Is a Cooperative?*, in COOPERATIVES IN AGRICULTURE 1 (David W. Cobia ed., 1989). Professor Barton maintains that cooperatives can be distinguished from other business organizations on the basis of three principles:

First, the user-owner principle. Persons who own and finance the cooperative are those that use it. Second, the user-control principle. Control of the cooperative is by those who use the cooperative. Third, the user-benefits principle. Benefits of the cooperative are distributed to its users on the basis of their use.

Id. at 1.

10. Nat'l Coop. Bus. Ass'n, *Co-op Primer*, at <http://www.ncba.org/primer.cfm> (last visited Jan. 11, 2002).

11. For a good description of some examples of cooperatives in various American industry sectors, see RURAL BUS.-COOP. SERV., U.S. DEP'T OF AGRIC., COOPERATIVE INFO. REPORT 55, CO-OPS 101: AN INTRODUCTION TO COOPERATIVES 8–10 (1997). A comprehensive discussion of cooperative types can also be found in MARTIN A. ABRAHAMSEN, COOPERATIVE BUSINESS ENTERPRISE 21–34 (1976).

12. See RURAL BUS.-COOP. SERV., *supra* note 11, at 3–4.

13. Coley, *supra* note 8, at 8.

14. *Id.*

15. For a good discussion of the history of worldwide and American cooperative growth, see generally EWELL PAUL ROY, COOPERATIVES: DEVELOPMENT, PRINCIPLES AND MANAGEMENT 41–62

citizens formed a cooperative association, known as the Rochdale Equitable Pioneers' Society, for the primary purpose of selling consumer goods.¹⁶ This association is commonly referred to as the first modern day, true-type cooperative.¹⁷ The cooperative principles the Society developed, known as the Rochdale Principles, were embodied in the philosophy of cooperatives formed thereafter¹⁸ and continue to function as a major class of cooperative principles.¹⁹

In the United States, agricultural cooperation literally began on the *Mayflower* in 1620 with the Mayflower Compact, the principles of which the colonists applied "to clear land, to build homes and communities, to start farming, and to protect themselves."²⁰ Many accounts indicate that the first formal agricultural cooperative associations in the United States were founded around the year 1810—a dairy cooperative in Goshen, Connecticut and a cheese manufacturing cooperative in South Trenton, New York.²¹ The number of agricultural cooperatives reached its zenith in the inter-World War period, when Congress passed a series of legislative acts favorable to cooperatives.²² While the number of agricultural cooperatives and cooperative members has steadily declined over recent years, the U.S. Department of Agriculture reports that in 1999 there were 3466 cooperatives engaged in agricultural product marketing, farm supply, and related agricultural service activities, with a membership of over 3,173,000 and a net business volume of nearly \$100 billion.²³

(1976). For a good description of some of the leading personalities associated with cooperative growth, see generally *id.* at 63–81; GREAT AMERICAN COOPERATORS (Joseph G. Knapp ed., 1967).

16. See ROY, *supra* note 15, at 249–50.

17. Coley, *supra* note 8, at 9.

18. ABRAHAMSEN, *supra* note 11, at 48.

19. See generally David Barton, *Principles*, in COOPERATIVES IN AGRICULTURE, *supra* note 9, at 21 (discussing the major classes of cooperative principles and summarizing the major cooperative tenets of the Society).

20. Gene Ingalsbe & Frank Groves, *Historical Development*, in COOPERATIVES IN AGRICULTURE, *supra* note 9, at 106, 110.

21. See, e.g., Claud L. Scroggs, *Historical Highlights*, in AGRICULTURAL COOPERATION: SELECTED READINGS 7 (Martin A. Abrahamson & Claud L. Scroggs eds., 1957).

22. Ingalsbe & Groves, *supra* note 20, at 114–15. Some of these statutes include the Capper-Volstead Act of 1922 (clarifying antitrust law with respect to agricultural cooperatives), the Cooperative Marketing Act of 1926 (directing the U.S. Department of Agriculture to expand its focus to cooperative issues), and the Agricultural Marketing Act of 1929 (supporting the growth of cooperatives through federal funding). See *id.*

23. CHARLES A. KRAENZLE ET AL., U.S. DEP'T OF AGRIC., SERV. REPORT 59, FARMER COOPERATIVE STATISTICS, 1999 vii (2000). For a definition of these three functional classifications, see *id.* at 1–2. Agricultural and other cooperatives are also commonly classified according to financial structure, geographic area served, and organizational structure. For a detailed discussion of cooperative classifications, see ABRAHAMSEN, *supra* note 11, at 35–37, 39–42. Recent agricultural cooperative statistics may also be found in NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 2001 tbl.10-14 (2001), available at http://www.usda.gov/nass/pubs/agr01/01_ch10.pdf.

C. Agricultural Cooperation in Illinois

Agricultural cooperatives in Illinois are also thriving institutions. They too, however, have experienced a decline in number,²⁴ membership,²⁵ and total net cooperative business.²⁶

On June 21, 1923, around the same time that other states were developing legislation regarding agricultural cooperatives, the Illinois General Assembly enacted what is known now as the Agricultural Cooperative Act (ACA), the state legislation governing Illinois agricultural cooperatives.²⁷ The ACA, with its forty-one sections, is a rather minute piece of legislation compared to the Business Corporation Act (BCA), which has scores of sections.²⁸ As such, the ACA contains a provision incorporating the provisions of the BCA as applicable to cooperatives organized under the ACA “except where those provisions are in conflict with or inconsistent with the express provisions of [the ACA].”²⁹ In fact, most states have similar language in their cooperative association laws—language which speaks of the applicability of general corporate law except in instances where that corporate law would somehow be in conflict with or inconsistent with the cooperative statute.³⁰

One BCA provision on which the ACA is silent regards the power of a corporation to limit or deny the voting privileges of its common stockholders.³¹ Such a provision arguably would expedite agricultural cooperative business actions and, indeed, could prevent the failure of a business action that the common stockholders do not necessarily oppose,

24. United States Department of Agriculture statistics reveal that in 1998, there were 196 farmer cooperative associations headquartered in Illinois, compared to 189 in 1999. NAT'L AGRIC. STATISTICS SERV., *supra* note 23, at tbl.10-17. The cooperatives included in these statistics are those engaged in agricultural marketing, farm supply, and other related service activities. *Id.* at tbl.10-16.

25. United States Department of Agriculture statistics reveal that in 1997, cooperative associations in Illinois had a total of 233,229 members, compared to 195,258 members in 1999. *Id.* at tbl.10-17. These membership statistics include only those members entitled to vote for association directors and do not include nonvoting patrons. *Id.* at tbl.10-14 n.4.

26. United States Department of Agriculture statistics reveal that in 1997, net business for such cooperative associations in Illinois was \$6,033,807,000 compared to \$5,316,036,000 in 1999. *Id.* at tbl.10-17.

27. 805 ILL. COMP. STAT. 315/1–/33 (2000). The ACA was passed

[i]n order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; to eliminate speculation and waste; to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; to stabilize the marketing of agricultural products, and to provide for the organization and incorporation of agricultural co-operative associations and societies.

Id. § 315/1.

28. *Id.* §§ 5/1.01–/17.05, 315/1–/33.

29. *Id.* § 315/31(a). For the complete statutory language, see *supra* note 3.

30. JAMES R. BAARDA, U.S. DEP'T OF AGRIC., COOP. INFO. REPORT NO. 30, STATE INCORPORATION STATUTES FOR FARMER COOPERATIVES 14–15, 130–32 tbl.1.04.01, 132–34 tbl.1.04.02 (photo. reprint 1987) (1982). While some of the information in this report may be somewhat outdated, Baarda's analysis nevertheless provides an excellent starting point from which to begin an analysis of the statutory cooperative laws in the fifty states and the District of Columbia.

31. 805 ILL. COMP. STAT. 5/7.40; see also *id.* § 5/6.05. For the pertinent statutory language, see *supra* notes 3–4.

but for which the cooperative has had difficulty securing the necessary votes—what this author deems an “inequitable defeat.”³² Conceivably,³³ this situation could arise in instances requiring a class vote *or* a nonclass vote, but the effect arguably would be heightened when a class vote is required.³⁴ In Illinois, the only current action³⁵ for which the ACA spe-

32. This note will focus on the voting rights with respect to the *common stock* class of shares for two main reasons. First, there are many states that permit their agricultural cooperatives to organize with common and preferred capital stock, and in those states, the common stock is normally the membership stock—the stock giving each member voting power. BAARDA, *supra* note 30, at 109. Other series of preferred stock may not necessarily include all the members of the cooperative. Second, and in that regard, limiting or denying the voting rights of common stockholders affects everyone in the cooperative. It is much harder to argue for the limitation and denial of voting rights in a class of stock in which *everyone* in the organization has a share, as opposed to a series of preferred stock in which not everyone may have a share. Ultimately, this note’s conclusion that the voting rights of common stockholders may be denied also encapsulates noncommon stock classes. In other words, if common stock voting privileges can be denied, this note asserts that the voting privileges of any class of stock can be denied.

33. This note focuses on denying the voting rights of common stockholders and, thus, focuses on agricultural cooperatives organized with capital stock. See 805 ILL. COMP. STAT. 315/3; *supra* note 32. The author did not uncover any evidence that cooperatives organized on a membership basis have encountered difficulties securing the necessary votes of their members in order to effectuate a merger. One could argue, however, that the BCA’s voting rights limitation provisions are also applicable to these membership-based cooperatives. See *supra* note 4 and accompanying text.

Several arguments weigh against this assertion, however. First, the BCA’s voting rights limitation provisions address the voting rights that attach to *shares*. *Id.* Because membership-based cooperatives do not have stock, the BCA provisions are most likely inapplicable to these membership-based cooperatives.

A rebuttal argument could be made that while the BCA voting rights limitation provisions are generally inapplicable to membership-based cooperatives, they are applicable to such cooperatives in the case of *mergers*. Section 31(c) of the ACA provides that in the merger of a membership-based cooperative into a capital stock cooperative, each member of the membership-based cooperative is to be “considered and treated as the holder of one or more *shares* of capital stock.” 805 ILL. COMP. STAT. 315/31(c) (emphasis added). Thus, it is at least plausible that perhaps the voting privileges of members in membership-based cooperatives can be denied with respect to *mergers*.

Denying these members’ right to vote, however, would result in the anomalous situation of leaving no one to approve the merger—save the directors. While a Kentucky court of appeals validated a similar action with respect to a Kentucky agricultural cooperative, the author doubts whether an Illinois court faced with a similar situation would validate such an action. See *Thomason v. Clark County Farm Bureau Tobacco Coop.*, 259 S.W.2d 64 (Ky. 1953); *infra* note 181. Article amendments must be approved by either the membership or some group of shareholders; as such, it appears that at least one class or series of shares (in cooperatives organized on a capital stock basis) or the members (in cooperatives organized on a membership basis) must approve amendments to the articles of incorporation. See 805 ILL. COMP. STAT. 315/9.

Therefore, these factors indicate that the BCA’s voting rights limitation provisions are inapplicable to membership-based cooperatives both generally and with respect to mergers. However, if eliminating the voting privileges of members in order to effectuate a business action would actually further the purpose of the cooperative, membership-based cooperatives should not be prevented from doing so. See *infra* notes 108–11 and accompanying text. While the author found no evidence that membership-based cooperatives have had problems effectuating business actions, the Illinois General Assembly, when deciding whether a cooperative can limit or deny the voting rights of stockholders, should make clear whether the BCA voting rights limitation provisions apply also to membership-based cooperatives.

34. A class vote requirement means that in order for a certain corporate action to be approved, a certain number of the issued and outstanding shares of stock must, by class, approve the action. HENRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS* 498 (1983). The effect is heightened by a class vote requirement simply because each class of shares must approve the corporate action. See *id.* A nonclass vote, on the other hand, does not require each class to approve the action by a certain amount; it only requires that all shareholders in toto approve it. *Id.*

cifically and unequivocally mandates a class vote is the merger of a non-stock cooperative into a capital stock cooperative.³⁶ Yet even some capital stock cooperatives operate on the understanding that a two-thirds class vote is required in order to effectuate a merger.³⁷ Although the analysis of this note with respect to whether common stockholder voting privileges can be limited or denied will be most useful in situations where a class vote is required—as may be the case with the Illinois agricultural cooperative merger process—it might nevertheless be applied to any instance where a contemplated cooperative business action has difficulty drawing, or cannot draw, enough supporting votes despite little opposition.³⁸

35. Section 9 of the ACA governs article amendment voting requirements.

An amendment [to the articles of incorporation] may be adopted by the approval of two-thirds of the directors followed by a favorable vote or the written consent thereto representing a majority of all the members and/or shareholders of the association, or by the written consent of two-thirds of all the members of the association without the approval of the directors.

805 ILL. COMP. STAT. 315/9.

36. *See id.* § 315/31(c). According to this section:

Associations organized on a membership basis may be merged or consolidated with associations organized with capital stock, but the surviving or new association shall be organized with capital stock. In the merger or consolidation procedure, each member of the association organized on a membership basis shall be considered and treated as the holder of one or more shares of capital stock; the members shall vote as a class; the interest of the members shall be converted into shares or other securities or obligations of the surviving or new association, and the procedure shall otherwise conform as nearly as possible to the provisions of the Business Corporation Act of 1983

Id.

37. For instance, an attorney specializing in Illinois agricultural cooperative law has indicated that some Illinois agricultural cooperatives organized with capital stock operate with the understanding that a two-thirds class vote is required for mergers. Telephone Interview with William I. Covey, Partner, Heyl Royster Voelker & Allen (Mar. 30, 2001). This two-thirds class vote requirement appears to stem from section 11.20 of the BCA, which contains a two-thirds class vote requirement for mergers (although the articles of incorporation may supersede this two-thirds vote requirement by providing for a larger or smaller vote requiring no less than a majority). 805 ILL. COMP. STAT. 5/11.20. It appears that those cooperatives requiring a two-thirds class vote might feel compelled by section 31(c) of the ACA to make the merger of *any and all* cooperatives “conform as nearly as possible to the provisions of the [BCA],” and thus to require a two-thirds class vote, even though that section appears to apply only to the merger of a noncapital stock cooperative into a capital stock cooperative. *Id.* § 315/31(c). Therefore, it has been difficult for cooperatives to obtain approval of mergers not because their common stockholders oppose such mergers, but rather because they do not return their proxies or otherwise participate in the vote. *See* Telephone Interview with William I. Covey, *supra*. According to Covey, denying the voting rights that attach to the common stock is one potential solution to the problem, as doing so could significantly decrease the time and expense involved in the merger of agricultural cooperatives and, indeed, could ensure that a merger is not defeated simply because of a lack of involvement in the voting process. *Id.*

Whether a two-thirds class vote is required for all mergers of associations organized under the ACA is unclear and subject to multiple arguments hinging on whether certain BCA provisions are in conflict with the ACA and on the precise meaning of the language in section 31(c) of the ACA, which provides that the merger process “shall conform as nearly as possible” to the BCA. 805 ILL. COMP. STAT. 315/31(c) (emphasis added). Regardless, it appears that a number of cooperatives in Illinois are operating under the assumption that a two-thirds class vote is required in order to effectuate a merger. *See* Telephone Interview with William I. Covey, *supra*. This is precisely why the Illinois General Assembly must clearly state the voting procedure for effectuating agricultural cooperative mergers. In doing so, it should address whether the BCA’s voting rights limitation provisions are applicable to cooperatives organized under the ACA.

38. *See supra* text accompanying note 32.

II. ANALYSIS

In order to determine whether the voting rights of common stockholders in agricultural cooperative associations organized under the ACA can be denied, a variety of sources must be analyzed, beginning with the language of the ACA itself. In fact, the Illinois Supreme Court has stated that when determining the intent of the legislature, which is the touchstone of statutory construction, courts should always begin their analysis by looking at the language of the statute in question,³⁹ as the statutory language is the “best indication of the legislature’s intent.”⁴⁰ If the statutory language is clear and unambiguous, then here ends the inquiry.⁴¹

A. *The Statutory Language*

1. *Arguments Against Limiting/Denying Common Stock Voting Rights*

There are several sections of the ACA impliedly indicating that agricultural cooperatives organized thereunder cannot limit or deny the voting rights of common stockholders, or any class of stockholders for that matter. First, in section 2(a), the General Assembly provides a definition of “member,” making mention of the fact that some cooperatives organized under the ACA may choose to organize with capital stock, which includes common stock.⁴² Although this language refers to common stock, it does not indicate that the common stock may be nonvoting.⁴³

Section 8(g), which deals explicitly with cooperative associations organized with capital stock, provides an even greater indication of the voting rights of common stockholders and stockholders in general.⁴⁴ The lengthiest section of the entire ACA, section 8(g) indicates that such cooperatives can have articles of incorporation empowering the directors to take certain action with respect to a producer of agricultural products becoming a nonproducer.⁴⁵ As trustees of the stock of these nonproducers, the directors are instructed to hold in trusteeship, among other things, the “*voting power*, and all other legal and beneficial interests” of that

39. *In re Marriage of Logston*, 469 N.E.2d 167, 171 (Ill. 1984). “[T]he primary rule of statutory construction is to ascertain and effectuate the legislature’s intent. In doing so a court looks first to the statutory language itself.” *Id.*

40. *Kunkel v. Walton*, 689 N.E.2d 1047, 1053 (Ill. 1997); *People v. Butler*, 709 N.E.2d 1272, 1278 (Ill. App. Ct. 1999).

41. “If the language is clear, the court must give it effect and should not look to extrinsic aids for construction.” *Logston*, 469 N.E.2d at 171.

42. “The term ‘member’ shall include actual members of associations without capital stock, and holders of common stock in associations organized with capital stock.” 805 ILL. COMP. STAT. 315/2(a).

43. *See id.*

44. *Id.* § 315/8(g).

45. *Id.*

stock.⁴⁶ Because only producers of agricultural products, in addition to other agricultural cooperatives, can hold common stock or otherwise be members of agricultural cooperatives,⁴⁷ section 8(g) provides at least an indication that common stock has voting power. While section 8(g) says nothing of the extent or nature of that voting power, it nevertheless indicates that stock, including common stock, has voting power.⁴⁸

Section 9 deals with the votes necessary to amend a cooperative's articles of incorporation.⁴⁹ When two-thirds of the cooperative's directors approve an amendment, that amendment is adopted following "a favorable vote or the written consent thereto representing a majority of all the members and/or shareholders of the association."⁵⁰ When two-thirds of a cooperative's directors do not approve an amendment, that amendment can still be adopted following the written consent of two-thirds of all the members of the association.⁵¹ The requirement in the first instance that members and/or shareholders approve the proposed amendment⁵² indicates that perhaps all shareholders have voting power. In the second instance, because it mentions only "members" and not shareholders, and because a "member" is defined as a holder of common stock in a cooperative organized with capital stock,⁵³ there is an even stronger argument that common stock must be voting stock.

Section 10 empowers agricultural cooperatives to provide in their bylaws for, among other things, "[t]he right of members or stockholders to vote by proxy or by mail or both; and the conditions, manner, form, and effects of such votes."⁵⁴ One could construe this language as indicating that all stock is or must be voting stock. The argument is as follows: section 10 permits cooperatives to put in their bylaws a provision allowing for proxy and/or mail votes,⁵⁵ so the absence of such a bylaw means only that proxy and mail voting is disallowed. Stock is still voting—it just cannot be voted through proxies or by mail.

Section 15.2 discusses payment methods in order to effectuate the issuance of stock.⁵⁶ The ACA permits promissory notes, and although the cooperative is ordered to hold the notes as security, "such retention as security shall not affect the right of any stockholder to vote unless

46. *Id.* (emphasis added). "[T]he *voting power*, and all other legal and beneficial interests, other than those given to the certificate holder as hereinabove provided, shall be held by such trustees and exercised and managed by them by vote of a majority of such trustees . . ." *Id.* (emphasis added).

47. *Id.* § 315/7.

48. *Id.* § 315/8(g).

49. *Id.* § 315/9.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See supra* note 42.

54. 805 ILL. COMP. STAT. 315/10(c).

55. *Id.*

56. *Id.* § 315/15.2.

such notes are past due.”⁵⁷ Again, this language could be construed to mean that each stockholder, regardless of class, has a right to vote.

Section 15.5 states that “[n]o member in any association without capital stock, shall be entitled to more than one vote.”⁵⁸ While this section purports to deal only with membership-based cooperatives, an argument could be made that, because a member is defined as either the actual member of a membership-based cooperative *or* the common stockholder of a capital stock cooperative,⁵⁹ section 15.5 *a fortiori* applies to the common stockholders of capital stock cooperatives. If this were so, then the language of section 15.5 seems to indicate that each member (or common stockholder) is entitled to one vote.

Section 16 is similar to section 9 in that it deals with member voting, but it differs regarding the removal of directors and officers.⁶⁰ Proper removal procedure requires a majority vote of the members,⁶¹ and because a member is defined as the common stockholder in an association organized with capital stock,⁶² this indicates that common stock must be voting stock.

2. *Arguments for Limiting/Denying Common Stock Voting Rights*

While there is much language in the ACA indicating that agricultural cooperatives organized thereunder cannot limit voting rights of the common stockholders or any class of stockholders for that matter,⁶³ there is also some strong language indicating otherwise.

a. *Rebutting the Arguments Against Limiting/Denying Common Stock Voting Rights*

The arguments described in the preceding section are subject to rebuttal by equally persuasive arguments. For instance, section 2 makes reference to common stock, and although it does not indicate that common stock voting rights can be limited or denied, it also does not preclude that possibility.⁶⁴

Section 8(g) mentions “voting power” of cooperative members, yet it does not mention anything regarding the extent of that power or the possibility of reducing that power.⁶⁵ In fact, section 8(g) specifically

57. *Id.*

58. *Id.* § 315/15.5.

59. *See supra* note 42.

60. 805 ILL. COMP. STAT. 315/16.

61. “The removal shall be voted upon at the next regular or special meeting, of the association, and by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy.” *Id.*

62. *See supra* note 42.

63. *See supra* Part II.A.1.

64. *See supra* notes 42–43 and accompanying text.

65. *See supra* notes 44–48 and accompanying text.

states that the articles of incorporation shall determine “the number of shares in each class, and the relative rights, interest and preferences each class shall represent,”⁶⁶ which also could be construed as empowering the cooperative to limit or deny voting rights of any class of shares.

Section 9 discusses only the voting requirements necessary for amending the articles of incorporation of a cooperative and does not indicate that all shares must be voting.⁶⁷ In addition, use of the term “members” and not “and/or shareholders” in respect to the two-thirds written consent requirement is not fatal.⁶⁸ One could argue that “and/or shareholders” is not included because it is understood, given its appearance earlier in the same sentence. What is different between the majority- and two-thirds-vote requirements is simply the presence or absence of the necessary director approval.

Section 10 deals only with voting by proxy or by mail and says nothing of the voting power that attaches to shares generally or the limitations thereon.⁶⁹ Section 15.2 indicates merely that the voting rights that attach to stock that is held in security by the cooperative are not affected.⁷⁰ This does not *a fortiori* indicate that all stock must have voting rights attached thereto.

Section 15.5 is applicable only to “associations without capital stock,”⁷¹ as it expressly states.⁷² Further, even if section 15.5 were applicable to all members—the members of an association organized without capital stock and the common stockholders of those associations organized with capital stock—the language of the section states only that no member shall have “more than one vote.”⁷³ This does not preclude the possibility that such stock can have less than one vote (e.g., no votes).

Section 16 details the procedure for removing and replacing directors and officers.⁷⁴ At most, this language indicates that members (common stockholders) have voting power with respect to officer and director removal issues.⁷⁵ It does not preclude the possibility that common stockholder voting rights could be denied with respect to other cooperative business actions.

66. 805 ILL. COMP. STAT. 315/8(g).

67. *See supra* notes 49–53 and accompanying text.

68. 805 ILL. COMP. STAT. 315/9.

69. *See supra* notes 54–55 and accompanying text.

70. *See supra* notes 56–57 and accompanying text.

71. *See supra* notes 58–59 and accompanying text.

72. 805 ILL. COMP. STAT. 315/15.5.

73. *Id.*

74. *See supra* notes 60–62 and accompanying text.

75. 805 ILL. COMP. STAT. 315/16.

b. Novel Arguments for Limiting/Denying Common Stock Voting Rights

In addition to these rebuttals, there is also other statutory language indicating that agricultural cooperatives can limit or deny the voting rights of common stockholders and holders of other classes of stock when doing so would further the purpose of the cooperative. First, section 6 enumerates a series of cooperative powers, including, in section 6(a), the power to engage in a variety of activities associated with agricultural products and to “perform[] business . . . on a cooperative basis.”⁷⁶ In addition, there is broad, sweeping language in section 6(i) giving a cooperative the power “[t]o do each and every thing necessary, suitable or proper” for the accomplishment of the cooperative’s goals; with this also come “any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Act.”⁷⁷ This language indicates that perhaps cooperatives can limit or deny the voting rights of common stockholders when doing so would further the purpose for which the cooperative was organized or accomplish some business action beneficial to the cooperative (e.g., a merger). In addition, section 6(i) gives cooperatives the powers given to corporations organized under the BCA, one of which includes the power to limit or deny stockholder voting rights.⁷⁸ This assumes, of course, that this power is not “inconsistent with the express provisions of [the ACA],”⁷⁹ which is dealt with below.⁸⁰

Section 31 provides perhaps the best argument that limiting voting rights is permissible.⁸¹ As discussed below, however, it is the one provi-

76. Section 6(a) grants cooperatives the power

[t]o engage in any activity in connection with the producing, marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, warehousing, handling or utilizing of agricultural products the manufacturing or marketing of the by-products thereof; or in any activities in connection with the purchasing, hiring or using of supplies, machinery or equipment; or in the financing of any of the above enumerated activities; or in performing business or educational services on a co-operative basis, for those engaged in agricultural activities as bona fide producers of agricultural products, or in any one or more of the activities specified herein.

805 ILL. COMP. STAT. 315/6(a).

77. Section 6(i) grants cooperatives the power

[t]o do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes, or the attainment of any one or more of the subjects herein enumerated, or conducive to or expedient for the interest or benefit of the association, and to contract accordingly; and in addition, to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized, or to the activities in which it is engaged; and any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Act; and to do any such thing anywhere.

Id. § 315/6(i).

78. *See supra* note 4 and accompanying text.

79. *See supra* note 77 and accompanying text.

80. *See infra* notes 83–84 and accompanying text.

81. *See* 805 ILL. COMP. STAT. 315/31.

sion of the ACA that is most subject to dispute on this point.⁸² Similar to section 6(i), section 31(a) expressly provides that “[t]he provisions of the general corporation laws of this State, relating to corporations for pecuniary profit, and all powers and rights thereunder shall apply to the associations organized hereunder, except where those provisions are in conflict with or inconsistent with the express provisions of this Act.”⁸³ Because the ACA does not expressly provide that voting rights cannot be limited or denied, the section of the BCA permitting such action is not in conflict or inconsistent with any *express provision* of the ACA. The rebuttal to this argument is that such a provision is somehow inconsistent with the purpose of an agricultural cooperative, which is discussed below.⁸⁴

Persuasive case law, however, strengthens the argument that the BCA’s voting limitation provisions are not inconsistent with any express provisions of the ACA. In 1999, the Fourth District Appellate Court of Illinois had occasion to hear a case in which one of the issues concerned the applicability of an Illinois statute that was incorporated by reference in another Illinois statute.⁸⁵ That case concerned a provision of the Illinois Health Facilities Planning Act (Planning Act), which adopted the provisions of the Illinois Administrative Procedure Act (Procedure Act) except in the case of a conflict, using language substantially similar to that found in section 31 of the ACA.⁸⁶

The plaintiff, a health care provider, sought the reversal of a decision by the Illinois Health Facilities Planning Board to issue a building permit to a hospital for a new health care facility.⁸⁷ In doing so, the plaintiff invoked a provision of the Procedure Act supposedly entitling it to notice and an opportunity to respond to certain materials.⁸⁸ The court, however, refused to recognize the applicability of that Procedure Act provision to the Planning Act, as allowing this power to the plaintiff would make impossible the exercise of certain investigatory powers granted to the Board under the Planning Act.⁸⁹ This case suggests that Illinois courts, in analyzing “incorporation-by-reference” provisions, will

82. See *infra* notes 83–84 and accompanying text.

83. 805 ILL. COMP. STAT. 315/31(a).

84. See *infra* Part II.B.2.

85. *Dimensions Med. Ctr., Ltd. v. Elmhurst Outpatient Surgery Ctr., L.L.C.*, 718 N.E.2d 249 (Ill. App. Ct. 1999).

86. Section 18 the Illinois Health Facilities Planning Act provides:

The Illinois Administrative Procedure Act . . . is hereby expressly adopted and incorporated herein and shall apply to the State Board [Health Facilities Planning Board] and the Agency [Illinois Department of Public Health] as if all of the provisions of such Act were included in this Act; except that in case of a conflict between the Administrative Procedure Act [5 ILCS 100/1-1 et seq.] and this Act the provisions of this Act shall control.

20 ILL. COMP. STAT. 3960/18. This language differs from section 31(a) of the ACA only because section 31(a) uses the terminology, “except where those provisions are in conflict with or inconsistent with the *express* provisions of this Act.” 805 ILL. COMP. STAT. 315/31(a) (emphasis added).

87. *Dimensions*, 718 N.E.2d at 251–52.

88. *Id.* at 258; 5 ILL. COMP. STAT. 100/10-40(c).

89. *Dimensions*, 718 N.E.2d at 259; 20 ILL. COMP. STAT. 3960/18.

consider the incorporated statute inapplicable only if it is in conflict with *express provisions* of the incorporating statute. Again, as the BCA's voting limitation provisions are not in conflict with an *express provision* of the ACA, this indicates that they are applicable to the ACA and that cooperatives under the ACA can deny the voting rights of common stockholders pursuant to the BCA.

The argument for the permissibility of limiting or denying voting rights is further bolstered by another provision of section 31. Immediately following the language incorporating the provisions of the general corporation laws of Illinois is another subsection explaining section 31(a) in greater detail. Passed by the Illinois General Assembly in 1993, section 31(b) explicitly designates one provision of the BCA that is in conflict or inconsistent with the express provisions of the ACA: "[t]he dissenters' rights provisions of the Business Corporation Act of 1983 do not apply with respect to capital stock issued as patronage distributions or to reflect membership in an association organized and operating under [the ACA]."⁹⁰ The argument that naturally flows from this language is that because the General Assembly noted one provision of the BCA that does not apply to agricultural cooperatives organized under the ACA,⁹¹ the other provisions of the BCA do apply.

B. Beyond the Plain Language

Illinois courts have held that "[a] statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses."⁹² A statute decreed ambiguous thereby "warrants consideration of other sources to determine legislative intent"⁹³ or consideration of "further aids of statutory construction."⁹⁴ While the persuasiveness of the arguments just discussed in Part II.A. fluctuates, a close scrutiny of the statutory language reveals the requisite degree of ambiguity required for an analysis beyond the plain language of the statute. Therefore, in order to determine whether the ACA permits the denial of common stock voting rights, one must explore these other sources and construction aids.

I. Expressio Unius Est Exclusio Alterius

One such statutory construction aid applicable to this issue is the principle that the expression of one thing implies the exclusion of the

90. 805 ILL. COMP. STAT. 315/31(b) (footnote omitted). The dissenters' rights provisions of the BCA to which section 31(b) refers are 805 ILL. COMP. STAT. 5/11.65, "Right to Dissent," and 805 ILL. COMP. STAT. 5/11.70, "Procedure to Dissent."

91. See 805 ILL. COMP. STAT. 315/31(b).

92. *Advincula v. United Blood Servs.*, 678 N.E.2d 1009, 1018 (Ill. 1996).

93. *Phoenix Bond & Indem. Co. v. Pappas*, 723 N.E.2d 280, 286 (Ill. App. Ct. 1999).

94. *People v. Tucker*, 657 N.E.2d 1009, 1012 (Ill. 1995).

other.⁹⁵ Illinois courts expressly recognize this principle of *expressio unius est exclusio alterius*,⁹⁶ and its applicability to the common stock voting limitation issue is most evident in section 31 of the ACA.

Analysis suggests that this construction principle is applicable to section 31 of the ACA and that, therefore, common stock voting rights can be denied by agricultural cooperatives. According to this principle, because the Illinois General Assembly in section 31(b) explicitly designated one provision of the BCA as inconsistent with the express provisions of the ACA,⁹⁷ the remaining provisions of the BCA, including those provisions allowing for the denial or limitation of stock voting rights,⁹⁸ are *a fortiori* not inconsistent with the express provisions of the ACA.⁹⁹ If the legislature intended for the BCA's voting rights limitation provisions to be deemed inconsistent with the ACA, it would have indicated such in section 31 as it did with respect to the BCA's dissenters' rights provisions.

An argument could be made, however, that this exclusionary construction principle cannot be applied to section 31 of the ACA. The argument is that there are many other provisions of the BCA that are inconsistent with the ACA, but the legislature has elected not to list all of these provisions in the form of an amendment to section 31 of the ACA.¹⁰⁰ Section 31(b), concerning the inapplicability of the dissenters' rights provisions, was inserted merely for clarity in response to the high degree of ambiguity surrounding the applicability of dissenters' rights to agricultural cooperative members.¹⁰¹ Therefore, the voting rights limitation provisions of the BCA cannot *a fortiori* be read into the ACA merely because of section 31(b); in other words, the statutory construction principle of *expressio unius* is inapplicable to section 31.

The rebuttal to the above line of argument is that these many differences between the BCA and ACA are obvious and that it would be impractical to amend the ACA to denote every minutia of difference between the two pieces of legislation. The legislature purposely selected

95. *People v. Davis*, 695 N.E.2d 1363, 1366 (Ill. App. Ct. 1998).

96. *See id.*

97. *See supra* note 90 and accompanying text.

98. *See supra* note 4 and accompanying text.

99. *See, e.g., Davis*, 695 N.E.2d at 1366.

100. For instance, the voting requirements necessary to amend the articles of incorporation of entities organized under the ACA and the BCA differ respectively. Compare 805 ILL. COMP. STAT. 315/9 (2000), with *id.* §§ 5/10.15, /10.20. There are numerous other examples of ACA and BCA provisions that are incompatible. *E.g., id.* §§ 315/11, 5/7.15 (notice requirements for annual meetings); *id.* §§ 315/12, 5/8.10 (number of directors).

101. "The rights of dissenters at the merger of agricultural cooperatives remains a controversial area." Mary Beth Matthews, *Recent Developments in the Law Regarding Agricultural Cooperatives*, 68 N.D. L. REV. 273, 306 (1992). For a discussion of recent developments in the area of dissenters' rights provisions for agricultural cooperative members, see *id.* at 304-06; Mary Beth Matthews, *Current Developments in the Law Regarding Agricultural Cooperatives*, 1 DRAKE J. AGRIC. L. 173, 179-82 (1996); Kathryn J. Sedo, *Cooperative Mergers and Consolidations: A Consideration of the Legal and Tax Issues*, 63 N.D. L. REV. 377, 397-400 (1987).

one area of difference around which there was a high degree of ambiguity—the applicability of dissenters’ rights provisions to agricultural cooperatives.¹⁰² The other provisions of the BCA that are plainly inconsistent with the ACA are not mentioned by way of an amendment to section 31 of the ACA because their inapplicability to and conflict with the ACA is clear.¹⁰³ Because the applicability of the voting rights limitation provisions of the BCA to the ACA does not fall within this category of obvious differences, the General Assembly would have clearly stated that the provisions are in conflict with the ACA if it had so intended—just as it did with respect to the dissenters’ rights provisions. Therefore, the argument continues, the principle of *expressio unius* is applicable to section 31, and agricultural cooperatives can deny the voting rights of stockholders.

2. *Purpose of the ACA*

Illinois courts emphasize that while *expressio unius* as an interpretation tool is recognized in Illinois, it is a rule of construction and not a rule of law and “should never be applied to defeat the purpose of a statute.”¹⁰⁴ Indeed, when statutory language is unclear, Illinois courts must endeavor to ascertain “the reason and necessity for the law, the evils it was intended to remedy and the objects and purposes to be obtained.”¹⁰⁵

There are arguments for the proposition that the purpose of the ACA and of an agricultural cooperative in general would be defeated were agricultural cooperatives permitted to limit the voting rights of their common stockholders. Most significantly, such a provision would destroy one of the touchstones upon which agricultural cooperatives supposedly operate—the one-man/one-vote principle.¹⁰⁶ In other words, voting must be on a democratic basis, whereby each member of the cooperative is entitled to one vote and only one vote.¹⁰⁷ Denying the voting rights of common stock would obliterate this principle of democratic member control.

Additional persuasive arguments exist, however, which indicate that the purpose of the ACA, and of cooperatives in general, would not be defeated were the voting rights of common stockholders denied in certain instances. The one-man/one-vote principle is no longer a universally recognized principle of cooperative governance, as can be seen through

102. See *supra* note 90 and accompanying text.

103. See *supra* note 100 and accompanying text.

104. *Davis*, 695 N.E.2d at 1366.

105. *Id.* at 1365.

106. Historically, member voting based on the one-man/one-vote principle was a universal principle that epitomized the democratic nature of a cooperative. Jeffrey S. Royer, *Cooperative Principles and Equity Financing: A Critical Discussion*, 7 J. AGRIC. COOPERATION 79, 80 (1992). This one-man/one-vote principle constituted an integral part of cooperative philosophy as espoused by the Rochdale Society. ROY, *supra* note 15, at 251.

107. ABRAHAMSEN, *supra* note 11, at 56.

other state cooperation statutes that allow voting systems based on proportionality according to member patronage¹⁰⁸ or land leased.¹⁰⁹ Indeed, agricultural economist John R. Dunn, in affirming the legitimacy of other voting methods, has concluded that voting systems in agricultural cooperatives should strive for, among other imperatives, the “protection of the rights of different size farmers and responsiveness to their needs,” and the “social philosophy of the cooperative’s members.”¹¹⁰ Echoing this conclusion is section 6(i) of the ACA, which empowers agricultural cooperatives to “do each and everything necessary, suitable or proper,” or “conducive to or expedient for the interest or benefit of the association.”¹¹¹

3. *Legislative History*

Another construction tool that Illinois courts often employ when faced with ambiguous statutory language is the ascertainment of legislative history.¹¹² The Illinois Supreme Court has held that “where the language is ambiguous, it is appropriate to examine the legislative history.”¹¹³ Illinois courts have found probative value in, for example, committee hearing recordings¹¹⁴ and floor debate transcripts.¹¹⁵ Unfortunately, in regard to the ACA, the available legislative history sheds virtually no light on whether the BCA’s voting rights limitation provisions are applicable to agricultural cooperative associations organized under the ACA.¹¹⁶ In regard to committee hearings, the Illinois House of Rep-

108. For example, the Alaska Cooperative Corporation Act provides that “[e]ach member has one vote except that bylaws may authorize voting according to actual, estimated, or potential patronage.” ALASKA STAT. § 10.15.130(a) (Michie 2000). The New York Cooperative Corporations Law provides that “[a] corporation incorporated under this chapter may provide . . . for proportionate or unequal voting rights of all its members, based upon the patronage of said members.” N.Y. COOP. CORP. LAW § 46 (McKinney 2000). The Florida Agricultural Cooperative Marketing Associations Act provides that “the bylaws may provide that such members or the holders of common stock in an association with capital stock, may vote upon any or all questions on a patronage basis.” FLA. STAT. ANN. ch. 618.15(5) (West 2000). It should be noted that proportional voting based on patronage is also practiced among Illinois capital stock cooperatives. The authority for this patronage stock appears to derive from section 8(g) of the ACA, which authorizes agricultural cooperatives with more than one class of stock to provide in their articles of incorporation “a description of the different classes, the number of shares in each class, and the relative rights, interest and preferences each class shall represent.” 805 ILL. COMP. STAT. 315/8(g) (2000).

109. For example, the Vermont Cooperative Marketing Act provides that the voting power of members or stockholders may be “in proportion to the land area leased or used by each member for production of the products handled by the association.” VT. STAT. ANN. tit. 11, § 1001(9) (1997).

110. Dunn, *supra* note 7, at 88.

111. 805 ILL. COMP. STAT. 315/6(i); *see also supra* notes 76–78 and accompanying text.

112. *See, e.g.*, *People ex rel. Baker v. Cowlin*, 607 N.E.2d 1251, 1253 (Ill. 1992).

113. *Id.*

114. *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 485 N.E.2d 1076, 1079–80 (Ill. 1985).

115. *Van’s Material Co. v. Dep’t of Revenue*, 545 N.E.2d 695, 699 (Ill. 1989).

116. This legislative history analysis focuses on section 31 of the ACA for obvious reasons. If there were any legislative history discussing the applicability to the ACA of the BCA’s voting rights limitation provisions, it most likely would be found in committee hearing recordings or floor debate

representatives is the only General Assembly chamber to record its committee hearings on tape, and these tapes are only available post-1975. The “incorporation-by-reference” provision of section 31(a)¹¹⁷ was part and parcel to the original ACA, which became effective in 1923.¹¹⁸ Therefore, the only possible pertinent committee hearing information would be that surrounding the nonapplicability of the BCA’s dissenters’ rights provisions laid out in section 31(b),¹¹⁹ which became effective by amendment in 1994.¹²⁰ Because the bill that added section 31(b) was part of an agreed bill list, however, there is no committee hearing tape available.¹²¹

Both the Illinois House of Representatives and the Illinois Senate maintain post-1971 transcripts of floor debates. The only dialogue concerning the 1994 amendment to section 31 is found in the Senate’s third reading of the bill.¹²² Explaining the provision, Senator O’Daniel indicated that “[d]issenters’ rights are not currently addressed in the [ACA], and the cooperatives have been using the [BCA] when they propose major changes.”¹²³ This brief statement indicates nothing regarding whether the BCA’s voting rights limitation/denial provisions are applicable to the ACA.

In addition, the available legislative history of the BCA is equally unenlightening. Floor debate transcripts contain no useful information concerning whether the BCA’s voting rights limitation provisions apply to agricultural cooperatives organized under the ACA.¹²⁴ While there are other sources of legislative history of the BCA, these additional

transcripts of section 31. Section 31(a) is the provision containing the “incorporation-by-reference” language, 805 ILL. COMP. STAT. 315/31(a), and section 31(b) is the provision expressly denying the applicability of the BCA’s dissenters’ rights provisions to the ACA. *Id.* § 315/31(b). A complete scouring of all other sections of the ACA was not undertaken with respect to this note, as that would be, in all likelihood, a fruitless endeavor.

117. *Id.* § 315/31(a); *see supra* text accompanying notes 83–84.

118. 805 ILL. COMP. STAT. 315/1–/33.

119. *Id.* § 315/31(b).

120. Section 31(b) was added as an amendment by P.A. 88-15, effective January 1, 1994. 1993 Ill. Laws 225–26. P.A. 88-15 originated in the Illinois Senate as Senate Bill 169. *Id.* at 225.

121. *See supra* note 120.

122. STATE OF ILLINOIS 88TH GENERAL ASSEMBLY REGULAR SESSION SENATE TRANSCRIPT (Apr. 13, 1993) (statement of Sen. O’Daniel).

123. *Id.*

124. In regard to the legislative history of the BCA, the author focused on the BCA’s voting rights limitation provisions. 805 ILL. COMP. STAT. 5/7.40(b), (c), /6.05. These voting rights limitation provisions first appeared in 1981 as amendments to the Business Corporation Act of 1933. ILL. REV. STAT. ch. 32, ¶¶ 157.28(b), (c), 157.14 (1981). The 1981 amendments were accomplished by P.A. 82-650, effective September 25, 1981. 1981 Ill. Laws 3379, 3377. P.A. 82-650 originated in the Illinois House of Representatives as House Bill 419. *Id.* at 3377. The voting rights limitation provisions were later amended in 1983 as part of the new Business Corporation Act of 1983. The 1983 amendments were accomplished by P.A. 83-1025, effective January 5, 1984. 1983 Ill. Laws 6980, 6971. P.A. 83-1025 originated in the Illinois House of Representatives as House Bill 2281. *Id.* at 6943. In conducting this legislative history analysis, the author focused on the legislative history of both the 1981 and 1983 amendments.

sources do not indicate whether the BCA provisions apply to the ACA.¹²⁵

C. Foreign Jurisdictions

Another appropriate aid in determining whether agricultural cooperatives organized under the ACA can limit or deny the voting rights of common stockholders is an analysis of the agricultural cooperative law of foreign jurisdictions. Cooperative statutory and case law from other states constitutes persuasive authority; if the voting rights of common stockholders of agricultural cooperatives organized under the laws of other states can be denied in certain circumstances, this would be persuasive authority that doing so does not violate any express provisions of the ACA and does not defeat the purpose of a cooperative.¹²⁶ Indeed, all fifty states and the District of Columbia have at least one statute under which farmers can form a cooperative organization, and many of these states have statutes that are peculiar to agricultural cooperative associations as opposed to cooperative associations in general.¹²⁷

An analysis of these cooperative statutes reveals a wide range of language pertaining to the voting power of cooperative association members.¹²⁸ First, there are some statutes containing language that appears to support the proposition that all members are entitled to one vote.¹²⁹ These statutes contain language indicating that members and/or stockholders are entitled to “one vote,” “only one vote,” “one vote only,” or other similar language.¹³⁰

Second, some cooperative statutes indicate that the one-man/one-vote principle need not be applicable to cooperatives, giving the members thereof the option of providing for proportional voting based on pa-

125. *E.g.*, JESSE WHITE, SEC'Y OF STATE, THE BUSINESS CORPORATION ACT OF 1983 (2000) (commentary by Charles Murdock); OFFICIAL COMMENTS OF THE ADVISORY COMMITTEE TO THE SECRETARY OF STATE ON THE ILLINOIS BUSINESS CORPORATION ACT OF 1983 (Feb. 1994).

126. Illinois courts have held that “it is only in the absence of Illinois authority on the point of law in question that the courts of Illinois will look to the law of other jurisdictions as persuasive authority.” *People ex rel. Watson v. Spinka*, 374 N.E.2d 787, 791 (Ill. App. Ct. 1978); *see also Scudder v. Hanover Ins. Co.*, 559 N.E.2d 559, 563 (Ill. App. Ct. 1990). An analysis of the statutory and case law of other jurisdictions, however, is persuasive in determining whether it is even possible to deny the voting rights of common stockholders, regardless of whether an Illinois court faced with this issue would actually explore foreign law.

127. BAARDA, *supra* note 30, at 3–13.

128. *Id.* at 73, 412–16 tbl.11.01.

129. James R. Baarda indicates that the vast majority of cooperative statutes that do define “member” define it to encompass “actual members of associations without capital stock and holders of common stock in associations organized with capital stock.” *Id.* at 63; *see also id.* at 362–64 tbl.10.01. This language mirrors the definition of “member” provided in the Illinois ACA. 805 ILL. COMP. STAT. 315/2.

130. For instance, Delaware agricultural cooperative law provides that “[e]very common stockholder shall be entitled to 1 vote only.” DEL. CODE ANN. tit. 3, § 8534 (1993). Maryland agricultural cooperative law provides that “[a] member of a cooperative organized without capital stock and a holder of stock, whether common or preferred, is entitled to only one vote.” MD. CODE ANN., CORPS. & ASS'NS § 5-521(a) (1999).

tronage of the members¹³¹ or the amount of land leased by the members.¹³² This language, however, does not indicate whether a member's voting rights can be denied; rather, it serves only to illustrate that voting need not be limited to the one-man/one-vote principle.

Third, and perhaps more persuasive, several states indicate in their cooperative statutes that the articles of incorporation of a cooperative may provide that voting shall be on a basis other than one-man/one-vote.¹³³ These statutes are rather open-ended in that they do not provide for a specific voting scheme if the one-man/one-vote principle is not used; rather, they indicate merely that the cooperative's articles of incorporation must set forth the voting rights of its members and/or stockholders if the one-man/one-vote principle is not used.¹³⁴ This statutory language indicates, at least in theory, that the voting privileges of common stockholders can be denied in certain circumstances.

At least one statute, however, provides direct authority for the proposition that the voting power of common stockholders of agricultural cooperatives can be denied. In 1989, the State of Washington combined its cooperative association statutes into a new Cooperative Associations Act,¹³⁵ which expressly provides that "[t]he right of a member to vote may be limited, enlarged, or denied to the extent specified in the articles of incorporation or bylaws" and that the articles of incorporation may "provide for more or less than one vote per member on any matter."¹³⁶ While no case law explains this recently enacted provision, the Washington statute makes clear that its provisions are applicable to agricultural cooperative associations.¹³⁷

Finally, there are many other cooperative statutes containing language that seems to indicate that common stockholders can have less than one vote. These statutes provide that no member or stockholder shall be entitled to more than one vote, or that the bylaws or articles of incorporation may provide that no member or stockholder shall be entitled to more than one vote, or other similar language.¹³⁸ While this lan-

131. See *supra* note 108 and accompanying text.

132. See *supra* note 109 and accompanying text.

133. For example, the New Hampshire Cooperative Marketing and Rural Electrification Associations law provides that the certificate of organization must lay out "the voting privileges of stockholders, if otherwise than one vote to each stockholder." N.H. REV. STAT. ANN. § 301:4 (2000). The Hawaii Agricultural Cooperative Associations statute and Maine Uniform Agricultural Cooperative Association Act provide that "[u]nless the articles otherwise provide, no member shall have more than one vote." HAW. REV. STAT. § 421-10 (1985); ME. REV. STAT. ANN. tit. 13, § 1911 (West 2000).

134. See *supra* note 133.

135. WASH. REV. CODE §§ 23.86.007-.900 (1994).

136. *Id.* § 23.86.115.

137. *Id.* § 23.86.900.

138. For example, the Idaho Cooperative Marketing Act provides that "[n]o member or stockholder shall be entitled to more than one (1) vote." IDAHO CODE § 22-2614 (Michie 2001). The Kentucky Agricultural Cooperative Association's statute provides that "[a]n association, in its bylaws, may provide that no member shall have more than one (1) vote." KY. REV. STAT. ANN. § 272.201 (Michie 1989).

guage fails to conclusively indicate whether the voting privileges of stockholders may be denied, illustrative case law interpreting such language indicates that the voting power of common stockholders can be denied.¹³⁹

In 1953 the Court of Appeals of Kentucky decided a case involving an agricultural cooperative in which the voting rights of all 5300 of its holders of common stock (the only voting stock) were denied by the board of directors in order to effectuate the sale of the cooperative's principle asset.¹⁴⁰ Despite the seeming lack of any opposition by the cooperative's common stockholders, the cooperative, because of a lack of attendance at the meeting at which the vote of sale was to be taken, was unable to garner the necessary affirmative votes of a majority of the common stockholders to approve the sale.¹⁴¹ Acting on a provision included on each certificate of common stock, and in the bylaws and articles of incorporation, providing that the board of directors could deny the privileges attached to common stock if a member failed to cooperate,¹⁴² the board of directors deemed all 5300 common stockholders as uncooperative and revoked their voting rights, thus enabling the cooperative to effectuate the sale of its asset.¹⁴³ The Court of Appeals found that the denial of the voting rights of the common stockholders in that instance was neither contrary to any Kentucky statutory provisions nor unconstitutional in any way.¹⁴⁴

This case provides express support for the argument that agricultural cooperatives *can* limit or deny the voting rights of their common stockholders,¹⁴⁵ and a number of aspects of this case should be highlighted. First, the court noted that the Kentucky statutory provisions governing agricultural cooperatives did not guarantee each common stockholder a vote; they provided only that "no stockholder may have more than one vote."¹⁴⁶ Second, the court emphasized that nothing in the record indicated that any common stockholder objected to the revoca-

139. See *Thomason v. Clark County Farm Bureau Tobacco Coop.*, 259 S.W.2d 64, 66 (Ky. 1953).

140. *Id.* at 65.

141. *Id.* at 66.

142. The common stock certificate provided that "[i]f the Board of Directors shall find, subsequent to a hearing, that . . . the holder [of common stock] has failed to cooperate with the Association, he shall have no privileges on account of such stock or vote or voice in the management and affairs of the association." *Id.* at 65-66.

143. *Id.* at 66.

144. *Id.*

145. *Id.*

146. *Id.* (summarizing section 272.190(4) of the Kentucky Revised Statutes Annotated). While section 272.190 was repealed in 1966, the voting rights language of that section is nearly identical to the voting rights language of current section 272.201(5), which provides that "[a]n association, in its bylaws, may provide that no member shall have more than one (1) vote." KY. REV. STAT. ANN. § 272.201(5) (Michie 1989). Although the statutory provisions upon which the Kentucky Court of Appeals relied in *Thomason* have been repealed, that holding is nevertheless still good law, as those provisions upon which the court relied are nearly identical to the provisions contained in the current Agricultural Cooperative Associations statute. *Id.* §§ 272.1001-350.

tion of his voting rights.¹⁴⁷ Third, the “noncooperative” language included on each certificate of common stock¹⁴⁸ was a permissible limitation under Kentucky statute.¹⁴⁹ Fourth, a statutory provision expressly provided that “when the stock of a cooperative is divided into preferred and common, the articles [of incorporation] may provide what privileges are granted to each class.”¹⁵⁰ Finally, in expounding upon its decision, the court emphasized that effectuating a cooperative business action for which there was an insufficient number of affirmative votes despite seemingly no opposition was a “sound reason,” in light of “the purpose and object of cooperative marketing associations,” for denying the voting rights of the common stockholders.¹⁵¹

III. RESOLUTION

A. *Well, Can They Be Denied?*

Given the combination of the ACA’s language and purpose,¹⁵² as well as the highly persuasive statutory and case law from other states,¹⁵³ the question posed directly above must inevitably be answered in the affirmative. The BCA’s voting rights limitation provisions¹⁵⁴ apply to the ACA; that is, agricultural cooperatives organized under the ACA can provide in their articles of incorporation for the limitation or denial of the voting rights of their common stockholders and, indeed, any class of stockholders.

147. *Thomason*, 259 S.W.2d at 66. It should be noted that this case originated as a declaratory judgment brought by the purchasers of the cooperative’s assets in order to determine whether the cooperative had conveyed good title. *Id.* at 65. In other words, there is nothing in the record of this case indicating that any common stockholder objected to the voting privilege revocation.

148. *See supra* note 142 and accompanying text.

149. *Thomason*, 259 S.W.2d at 66. The court quoted section 272.150(i) of the Kentucky Revised Statutes Annotated, which provided that the bylaws of a cooperative may indicate

“[t]he number and qualification of members of the association; the conditions precedent to membership; the conditions under which members may withdraw or transfer their stock; the conditions under which membership shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership; [and] the manner and effect of expulsion.”

Id. Again, while that section was repealed in 1966, current section 272.151(2)(h)(i) of the Kentucky Agricultural Cooperative Associations statute contains similar language. KY. REV. STAT. ANN. § 272.151(2)(h)(i).

150. *Thomason*, 259 S.W.2d at 66 (summarizing section 272.130 of the Kentucky Revised Statutes Annotated). Again, while that section was repealed in 1966, current section 272.131 of the Kentucky Agricultural Cooperative Associations statute contains substantially similar language. KY. REV. STAT. ANN. § 272.131(1)(g).

151. *Thomason*, 259 S.W.2d at 66.

152. *See supra* Parts II.A, II.B.1, II.B.2.

153. *See supra* Part II.C.

154. 805 ILL. COMP. STAT. 5/7.40 (2000).

1. *Statutory Language*

Focusing solely on the plain language of the ACA, the language of several key sections and the conclusions to be drawn therefrom far outweigh any statutory-based arguments that denying stock voting power is inadmissible under the statute. First, as indicated previously, section 15.5¹⁵⁵ provides that “[n]o member in any association organized without capital stock[] shall be entitled to more than one vote.”¹⁵⁶ That section, as the plain language clearly suggests, is applicable only to “associations without capital stock,” and therefore would not apply to the many agricultural cooperatives in Illinois and elsewhere that are organized with capital stock.¹⁵⁷ Further, even if this section were construed to apply to the members of an association organized with capital stock (i.e., to the common stockholders), section 15.5 merely places an upper limit of one on the number of votes to which each member is entitled; it does not provide a minimum number of votes to which each member is entitled.¹⁵⁸ Further, as *Thomason v. Clark County Farm Bureau Tobacco Cooperative, Inc.* indicated, such language does “not guarantee a vote to every stockholder.”¹⁵⁹

In addition, the actual power and ability of the agricultural cooperative to limit stockholder voting rights cannot be realistically challenged, as several sections of the ACA provide all the authority that would be needed for such limitation. For instance, section 8(g) provides that the articles of incorporation are to lay out “the relative rights, interest and preferences” of the shares in each class.¹⁶⁰ Further, section 6 bestows upon cooperatives the power “[t]o do *each and everything* necessary, suitable or proper” for the attainment of the cooperative’s purposes and “[t]o do *each and everything . . . conducive to or expedient for the interest or benefit of the association.*”¹⁶¹ Together, these two sections indicate that cooperatives can deny voting rights when doing so would further a cooperative purpose or action to which there appears to be little or no opposition (in other words, to which there is insufficient opposition to defeat the action) but that nevertheless cannot be attained because of an insufficient number of affirmative votes—the “inequitable defeat.”¹⁶² Because denying voting rights is one ideal solution to such a problem, denying cooperatives the power to do so would be directly counter to what these sections purport to allow.

155. See *supra* text accompanying notes 58–59, 71–73.

156. 805 ILL. COMP. STAT. 315/15.5.

157. *Id.*

158. *Id.*

159. 259 S.W.2d 64, 66 (Ky. 1953).

160. 805 ILL. COMP. STAT. 315/8(g); see *supra* text accompanying note 66.

161. *Id.* § 315/6(i) (emphasis added); see *supra* text accompanying notes 76–77.

162. See 805 ILL. COMP. STAT. 315/8(g), /6(i).

Perhaps the strongest buttressing elements for the contention that common stock voting privileges can be denied are section 31¹⁶³ and the *expressio unius* principle applicable thereto.¹⁶⁴ First, as section 31(a) indicates, the BCA applies except where its provisions “are in conflict with or inconsistent with the express provisions” of the ACA.¹⁶⁵ The ACA contains no provision prohibiting the limitation of member or stockholder voting rights.¹⁶⁶ Further, the applicability of the principle of *expressio unius* under the circumstances appears undeniable.¹⁶⁷ Because the legislature specifically mentioned in section 31(b) of the ACA one provision of the BCA that is inapplicable to the ACA,¹⁶⁸ this strongly suggests that the legislature would have made mention of the BCA’s voting rights limitation provisions if it felt that they too were inapplicable to agricultural cooperatives organized under the ACA.¹⁶⁹ This conclusion is further buttressed by the fact that the BCA was amended in 1981 and 1983, in response to a dramatic revision of the Illinois Constitution in 1970, to provide for the possibility of denying the voting rights of any class of stock.¹⁷⁰ Such a highly visible change in the business corporation laws of this state suggests that if the legislature had felt that the new provision should not be applicable to the ACA, it would have certainly made its intention clear in the form of an amendment to section 31, as it did with regard to the dissenters’ rights provisions of the BCA.¹⁷¹

2. *Statutory Purpose and Foreign Statutes*

Despite policy arguments to the contrary, the denial of common stockholder voting power would not defeat the purpose of either the ACA or the cooperative structure of an agricultural cooperative association. The one-man/one-vote principle is no longer the *sine qua non* of the cooperative voting structure. While many state cooperation statutes indicate that no stockholder or member shall have more than one vote,¹⁷² or that each member or stockholder is entitled to one vote,¹⁷³ there are many other state cooperation statutes that allow different voting systems such as proportional voting based on patronage,¹⁷⁴ land ownership,¹⁷⁵ or some other basis delineated in the cooperative’s bylaws or articles of in-

163. See *supra* text accompanying notes 83–89.

164. See *supra* text accompanying notes 90–91, 95–103.

165. 805 ILL. COMP. STAT. 315/31(a).

166. See *supra* text accompanying notes 155–59.

167. See *supra* text accompanying notes 95–103.

168. 805 ILL. COMP. STAT. 315/31(b); see *supra* note 90 and accompanying text.

169. See *supra* text accompanying notes 95–103.

170. See *infra* note 193.

171. See *supra* note 90 and accompanying text.

172. See *supra* text accompanying note 138.

173. See *supra* text accompanying note 130.

174. See *supra* note 108 and accompanying text; *supra* text accompanying note 131.

175. See *supra* note 109 and accompanying text; *supra* text accompanying note 132.

corporation.¹⁷⁶ Of course, at least one state—Washington—expressly provides that a member (common stockholder) may have his voting privileges denied.¹⁷⁷ This mass deviation from the one-man/one-vote principle evident among the nation’s cooperative statutes emphatically and undeniably reveals that the purpose of an agricultural cooperative is not defeated by a voting system based on something other than the one-man/one-vote principle, even if the voting system allows for the denial of member voting rights. What is important is not the type of voting system, but whether that system fosters the protection and advancement of cooperative members’ needs.¹⁷⁸

These preceding arguments endeavor to prove that the purpose of a cooperative would not be defeated by voting power denial. Indeed, allowing this procedure to remedy the “inequitable defeat” would actually achieve the purpose of a cooperative.¹⁷⁹ Because the denial of common stock voting rights would expedite the merger process and any other association action on which a class vote may be required and for which there is support but for which the necessary votes for approval are difficult to secure, such an initiative does not run contrary to the object and purpose of the ACA, but rather serves to fulfill the purpose of an agricultural cooperative and, thus, the statute in general.¹⁸⁰

3. *Foreign Case Law*

Complementing the above line of arguments is the holding in *Thomason v. Clark County Farm Bureau Tobacco Cooperative, Inc.*, a case which, while decided in the 1950s in a jurisdiction outside Illinois, nevertheless highlights an instance where common stock voting rights *can* and *should* be denied in order to further a cooperative purpose.¹⁸¹ First, illus-

176. See *supra* text accompanying note 133.

177. WASH. REV. CODE § 23.86.115 (1994); see *supra* text accompanying notes 135–37.

178. See *supra* notes 110–11 and accompanying text.

179. See *supra* Part II.B.2 and accompanying notes.

180. See *supra* Part II.B.2 and accompanying notes.

181. 259 S.W.2d 64 (Ky. 1953). In highlighting the persuasive value of *Thomason*, this note questions whether Illinois courts would validate the procedure used in that case to approve the sale of an asset—the action for which the cooperative could not gain the necessary affirmative votes. After revoking the voting rights of the cooperative’s common stockholders, the board of directors opted to go ahead with the sale. *Id.* at 65. Because the preferred stockholders in that cooperative did not have voting rights, denying the common stockholder voting rights meant that no stockholder was left with voting rights; the board of directors was the only “entity” that could “approve” the sale.

In regard to cooperatives organized under the ACA, it appears that at least one class or series of shares must retain the right to vote, given that section 9 of the ACA requires member and/or shareholder approval for amendments to the articles of incorporation. 805 ILL. COMP. STAT. 315/9 (2000). To be sure, this is not likely to be an issue, given that at least one class of preferred stock is likely to have voting rights, and given that the author has found no evidence indicating that cooperatives have had difficulty securing the necessary votes of preferred stock classes. See *supra* note 33. Conceivably, however, there could be a situation akin to that in *Thomason*, whereby the denial of voting privileges would leave no share classes or series with voting rights. Although this is an open question, the author argues that, if denying the voting privileges of all stockholders is necessary to effectuate or significantly expedite a cooperative business action, then the cooperative should not be restricted from doing

trating the proposition that common stockholders *can* have their voting rights denied, the court construed the Kentucky statutory language, which is nearly identical to section 15.5 of the ACA, to mean that common stockholders are not guaranteed voting privileges.¹⁸²

Second, *Thomason* reiterated the statutory mandate given to a Kentucky agricultural cooperative to lay out in its articles of incorporation the privileges granted to each class if the stock is divided into preferred and common.¹⁸³ Immediately after this recognition, the Kentucky court upheld the right of the cooperative to limit common stock voting rights.¹⁸⁴ As discussed previously,¹⁸⁵ the ACA contains a virtually identical provision that instructs cooperatives to designate in their articles of incorporation “the number of shares in each class, and the relative rights, interest and preferences each class shall represent.”¹⁸⁶ Admittedly, the parallels between the Kentucky agricultural cooperative at issue in *Thomason* and cooperatives organized under the Illinois ACA are not necessarily comprehensive.¹⁸⁷ Nevertheless, the case provides immense support for the proposition that a cooperative *can*, and indeed *should*, deny common stockholder voting rights when doing so would further the “purpose and object” of the cooperative by, for example, avoiding needless expenditures of time and money and preventing an “inequitable defeat” from miring the cooperative in stagnant inaction.¹⁸⁸

so. The Illinois General Assembly, in deciding whether agricultural cooperatives can limit or deny the voting rights of their stockholders, should also resolve the question of whether at least one class or series of shares must retain the right to vote on a particular issue.

182. See *supra* text accompanying notes 155–59.

183. See *supra* text accompanying note 150.

184. “There is no question of the validity of denying all voting rights to the preferred stockholders, and we see no reason why conditional voting rights may not be granted to the common stockholders.” *Thomason*, 259 S.W.2d at 66.

185. See *supra* text accompanying note 160.

186. 805 ILL. COMP. STAT. 315(8)(g).

187. For instance, the *Thomason* court noted that the Clark County Farm Bureau Tobacco Cooperative contained a statement in its bylaws, articles of incorporation, and common stock certificates that common stockholders’ voting rights could be revoked on grounds of noncooperation. *Thomason*, 259 S.W.2d at 65–66. A closer analysis of the case, however, reveals that the authority for this statement was derived from a Kentucky statutory provision empowering the cooperative to provide in its bylaws for the conditions under which membership would cease. See *supra* note 149 and accompanying text. The ACA contains a substantially similar provision in 805 ILL. COMP. STAT. 315/10(i). While this note does not argue that such a provision should be inserted into a cooperative’s bylaws, articles of incorporation, or stock certificates, it may behoove cooperatives to do so, as this was clearly one factor in the *Thomason* court’s decision to uphold the revocation of common stockholder voting rights. See *supra* note 142 and accompanying text. Applying the *Thomason* reasoning, the insertion of such a clause would be allowable under the ACA. See *Thomason*, 259 S.W.2d at 65–66. It is conceivable that cooperatives could use statutory language similar to that at issue in *Thomason* as authority to limit or deny voting rights even absent a cooperative statute—such as the ACA—incorporating a corporate law provision expressly allowing the denial of voting rights. See *id.* at 66. For the purposes of this note, however, a statutory provision like section 10(i) of the ACA serves as one of many buttressing pieces of evidence for the assertion that the denial of voting rights is possible. 805 ILL. COMP. STAT. 315/10(i). The assertion is not being made here that a statutory provision like section 10(i) is sufficient in and of itself to grant cooperatives the power to deny voting rights, although the author does not discount that possibility.

188. *Thomason*, 259 S.W.2d at 66.

B. Procedure for Denying Voting Rights

With the central question—whether an agricultural cooperative organized under the ACA can limit or deny the voting rights of its common stockholders—answered in the affirmative, perhaps a brief discussion is in order with respect to how such an initiative would be accomplished. Unfortunately, with this discussion comes another haunting refrain of the “unanswered question,” as there is some ambiguity as to how the voting rights limitation provisions should be adopted. First, the express authority for limiting the voting rights of certain stockholders emanates from section 7.40 of the BCA.¹⁸⁹ Any corporation formed after December 31, 1981, may provide in its *initial* articles of incorporation for a limitation or denial of voting rights,¹⁹⁰ and any corporation, regardless of the date of incorporation, may *amend* its articles of incorporation to provide for a limitation or denial of voting rights.¹⁹¹ Much confusion has arisen concerning the type of vote needed to amend the articles of incorporation to limit the voting rights of stockholders, (i.e., an unanimous vote or a standard two-thirds article amendment vote), which may depend upon the date of incorporation.¹⁹² The author, however, is of the opinion that the date of incorporation is significant only with respect to the right to vote in elections for directors and does not apply to agricultural cooperatives seeking to deny voting rights in order to effectuate nondirector election business such as a merger.¹⁹³ In other words, an agricultural cooperative

189. 805 ILL. COMP. STAT. 5/7.40(b), (c).

190. The articles of incorporation of any corporation incorporated after December 31, 1981, may limit or eliminate cumulative voting rights in all or specified circumstances, or may limit or deny voting rights or may provide special voting rights as to any class or classes or series of shares of such corporation.

Id. § 5/7.40(b). Prior to 1981, the BCA did not allow for any limitations on voting rights. WHITE, *supra* note 125, at 10. Therefore, it was not possible for any corporation formed before December 31, 1981, to provide for voting limitations in its *original* articles of incorporation. *See id.* As indicated *infra* note 191, however, any corporation, regardless of its date of incorporation, may *amend* its articles of incorporation to provide for voting limitations.

191. “A corporation may amend its articles of incorporation to limit or eliminate cumulative voting rights in all or specified circumstances, or to limit or deny voting rights or to provide special voting rights as to any class or classes or series of shares of such corporation.” 805 ILL. COMP. STAT. 5/7.40(c).

192. *See* CHARLES W. MURDOCK, ILLINOIS PRACTICE—BUSINESS ORGANIZATIONS § 9.19, at 534 (1996).

193. The 1870 Constitution of the State of Illinois provided that “*in all elections for Directors or managers of incorporated companies[,] every stockholder shall have the right to vote . . . [and] to cumulate said shares.*” *See* Roanoke Agency, Inc. v. Edgar, 461 N.E.2d 1365, 1366–67 (Ill. 1984) (quoting ILL. CONST. of 1870, art. XI, § 3) (emphasis added). A massive revision of the 1870 Illinois Constitution occurred in 1969 and 1970, resulting in the ratification of a new Illinois Constitution on December 15, 1970, effective July 1, 1971. GEORGE H. RYAN, SEC’Y OF STATE, ILLINOIS HANDBOOK OF GOVERNMENT 102–03 (1997). The 1970 Illinois Constitution provides merely that “[c]orporate charters shall be granted, amended, dissolved, or extended only pursuant to general laws.” ILL. CONST., art. XIII, § 6. No longer is there a constitutional guarantee of voting and cumulative voting for directors of corporations, although the Transition Schedule of the Illinois Constitution does provide that “[s]hareholders of all corporations heretofore organized under any law of this State which requires cumulative voting of shares for corporate directors shall retain their right to vote cumulatively for such directors.” ILL. CONST., Transition Sched., § 8.

seeking to amend its articles of incorporation to limit or deny the voting rights of its common stockholders, so long as it is not limiting or denying the right to vote for directors or managers, need not become concerned with the date of incorporation or whether an unanimous vote is required; it need only follow the normal procedures for amending articles of incorporation.¹⁹⁴

Second, article amendments under the BCA are passed by an affirmative vote of two-thirds of all shares entitled to vote, except where a class vote is required, in which case the measure is adopted upon an affirmative vote of two-thirds of each class entitled to vote, as well as an

In response to the new constitutional provision, the Illinois General Assembly promulgated in 1981 one of these "general laws" by providing that corporations formed after December 31, 1981, could limit or eliminate cumulative voting rights or eliminate voting rights altogether, and that corporations formed before January 1, 1982, could amend their articles of incorporation to eliminate cumulative voting rights or eliminate voting rights altogether. ILL. REV. STAT. ch. 32, §§ 157.28(b), (c), 157.14 (1981) (amended by P.A. 82-650). Indeed, the Illinois Supreme Court accepted the validity of these provisions by noting that, even despite the Transition Schedule, cumulative voting for directors in corporations formed prior to the effective date of the 1970 Illinois constitution could be eliminated by an unanimous vote of the shareholders entitled to vote for such directors. *Roanoke Agency*, 461 N.E.2d at 1372. The *Roanoke Agency* court, however, interpreted the BCA as it existed after its 1981 amendments, *see id.*, and not as it existed after the 1983 Business Corporation Act and its amendments to section 7.40, which amendments provided that the articles of incorporation could be amended, pursuant to the normal procedures, to eliminate cumulative voting or voting in general, regardless of the date of incorporation. *Id.* at 1371-72. No unanimous vote was required for pre-July 1, 1971 cases. *See id.* Thus, vast confusion has arisen over whether *Roanoke Agency* still requires an unanimous vote for pre-July 1, 1971, corporations, or whether the General Assembly's 1983 amendment to section 7.40 of the BCA, which does not require unanimity for pre-July 1, 1971, corporations, *see id.*, is the applicable law.

While the 1981 amendment permitting the elimination of cumulative voting and of voting in general was the first sign from the Illinois General Assembly that such elimination was possible, *see id.* at 1366-72, it does not appear that the 1870 Constitution had ever prevented the elimination of voting rights for other, nonelection business. The 1870 Constitution provided only that each stockholder had a right to vote and a right to vote cumulatively in the *election of directors and managers*, *id.* at 1366-67; the Transition Schedule mandates only that shareholders of corporations formed prior to July 1, 1971, retain their right to vote cumulatively *for directors*. *Id.* at 1369. In other words, unless the "inequitable defeat" concerns the denial of rights to vote for directors or managers of the agricultural cooperative, the cooperative need not worry about whether an unanimous vote is required depending on the date of incorporation of the cooperative. *See id.* at 1366-67, 1369.

194. For a discussion of the continued applicability of *Roanoke Agency* in light of section 7.40 of the 1983 BCA, see WHITE, *supra* note 125, at 10-11. *See also* OFFICIAL COMMENTS OF THE ADVISORY COMMITTEE TO THE SECRETARY OF STATE ON THE ILLINOIS BUSINESS CORPORATION ACT OF 1983, *supra* note 125, at 25 (assuming that "the legislature has power to permit corporations whenever organized to change voting rights by a vote, less than unanimous, uniform as to all corporations, and is not restricted by any residual constitutional right of any shareholder in a pre-1971 corporation arising from the language of the 1970 Constitution"); MURDOCK, *supra* note 192, § 9.19, at 535 (opining that because the 1983 BCA is a "comprehensive recodification of Illinois corporate law" and not just a mere amendment to the 1933 BCA, the 1983 BCA "could be deemed a legislative act executing section 8 of the Transition Schedule"). Compare Wesley G. Nissen, Note, *The Constitutionality of the 1983 Illinois Business Corporation Act's Voting Provisions*, 1985 U. ILL. L. REV. 647, 674-76 (arguing for the applicability of section 7.40 of the 1983 BCA over *Roanoke Agency* and section 8 of the Transition Schedule), with James M. Van Vliet, Jr., *The New Illinois Business Corporation Act Needs More Work*, 61 CHI.-KENT. L. REV. 1, 24 (1985) (arguing that "until a different interpretation is indicated to be appropriate by the Illinois courts, it seems prudent to view section 7.40(c) as if the *Roanoke* decision applies").

affirmative vote of two-thirds of the rest of the shares entitled to vote.¹⁹⁵ Limiting the voting rights of a certain class of stock would require a class vote under the BCA.¹⁹⁶ Under the provisions of the BCA, then, in order for an agricultural cooperative to deny the voting rights of the common stockholders, two-thirds of the common stockholders would have to approve the action in the form of an amendment to the articles of incorporation, and two-thirds of all other stockholders (i.e., preferred stockholders) entitled to vote would have to approve the action.¹⁹⁷ Following this procedure, it would seem pointless to seek to deny the voting rights of common stockholders, given that some agricultural cooperatives in Illinois operate under the assumption that a merger requires a two-thirds class vote.¹⁹⁸ If cooperatives are having trouble gaining the requisite two-thirds vote from the common stockholders for a merger, why would it be any easier to gain the requisite two-thirds vote from the common stockholders to deny their voting rights?¹⁹⁹

The procedure that cooperatives are more likely to follow is that provided by the ACA for amending articles of incorporation, which requires only a majority, all-shareholder vote (assuming two-thirds of the directors approve)²⁰⁰ as opposed to the BCA's two-thirds class vote.²⁰¹

195. 805 ILL. COMP. STAT. 5/10.20(c). Under this section, [t]he proposed amendment shall be adopted upon receiving the affirmative vote of at least two-thirds of the votes of the shares entitled to vote on such amendment, unless any class or series of shares is entitled to vote as a class in respect thereof, in which event the proposed amendment shall be adopted upon receiving the affirmative votes of at least two-thirds of the votes of the shares of each class or series of shares entitled to vote as a class in respect thereof and of the total votes of the shares entitled to vote on such amendment.

Id. One should note that the articles of incorporation may supersede the two-thirds vote requirement by providing for a larger or smaller vote not less than a majority vote. *Id.* § 5/10.20(d). It is unclear whether cooperatives could take advantage of this “supersede” provision, as the ACA does not give express authority to cooperatives to alter the voting requirements for amending articles of incorporation; therefore, the “supersede” provision may be inapplicable to cooperatives because it may be inconsistent with the ACA. Assuming, however, that cooperatives could use the “supersede” provision, then limiting the voting rights of common stockholders would require a majority (as opposed to a two-thirds) class vote on the part of the common stockholders and a majority (as opposed to a two-thirds) nonclass vote on the part of the remainder of the preferred stockholders. *Id.*

196. *Id.* § 5/10.25 (“The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment if the articles of incorporation so provide or if the amendment would . . . [l]imit or deny the voting rights of the shares of such class.”).

197. *See id.* § 5/10.20(c).

198. *See id.*

199. The only plausible answer to this question is that perhaps two-thirds of the common stockholders could approve an amendment now that would deny their voting rights if and when the cooperative contemplates a merger sometime in the future. In other words, the cooperative could be proactive, gaining the two-thirds vote necessary to deny voting rights now while it is not under a time crunch. Then, when the cooperative contemplates a merger sometime in the future, the voting rights would be denied, and it would not be necessary to scurry for the requisite two-thirds vote from the common stockholders. Their voting rights would have been denied upon the occurrence of some event (such as, for example, a formal statement by the board of directors that the cooperative's stockholders should approve a planned merger). The problem with this approach is that common stockholders may be reluctant—and understandably so—to give up their rights now for a potential merger in the future without knowing any of the details.

200. 805 ILL. COMP. STAT. § 315/9 (“An amendment may be adopted by the approval of two-thirds of the directors followed by a favorable vote or the written consent thereto representing a majority of all

Applying section 31 of the ACA, the BCA's two-thirds class vote requirement for amending articles of incorporation to limit the voting rights of stockholders is inconsistent with the ACA's majority nonclass vote requirement for amending articles of incorporation.²⁰² Therefore, the BCA is in conflict with an express provision of the ACA, and the ACA article amendment procedure applies.²⁰³ Under this procedure, then, amending the articles of incorporation of an agricultural cooperative to limit the voting rights of the common stockholders would require only an affirmative vote of all the voting stock combined.²⁰⁴

As if the applicability of these two procedures were not confusing enough, one should recognize the possibility of a hybrid procedure. Because a majority, all-shareholder vote could conceivably pass despite near-unanimous opposition from the common stockholders, a class vote requirement would seem to be more fair. After all, because a cooperative is member-based, and because the members of a cooperative are the common stockholders,²⁰⁵ it would seem more equitable and "cooperative" to require their approval as a class before denying their voting rights. In this vein, then, perhaps an Illinois court would recognize the applicability of the BCA's class vote requirement for agricultural cooperatives as being part and parcel to the BCA's voting rights limitation provisions, yet recognize the ACA's majority vote requirement as being in conflict with the BCA's two-thirds vote requirement. In other words, limiting the voting rights of common stockholders would require a majority class vote for the common stockholders and a majority nonclass vote for all of the remaining preferred stockholders.²⁰⁶ The author posits that this hybrid procedure would be the most equitable and "cooperative."

C. Resolution

Whether or not all mergers of agricultural cooperatives organized under the ACA require a two-thirds class vote, some agricultural cooperatives operate under the assumption that they do, and it has been difficult in the past to obtain the necessary affirmative votes of two-thirds of the common stockholders.²⁰⁷ Denying their voting rights in order to ef-

the members and/or shareholders of the association, or by the written consent of two-thirds of all the members of the association without the approval of the directors.").

201. *Id.* § 5/10.20(c).

202. *Id.* § 315/31.

203. *Id.* § 315/31(a); *see supra* note 3.

204. 805 ILL. COMP. STAT. 315/9.

205. *Id.* § 315/2(a).

206. Note that this is the same result that would be reached if cooperatives were to take advantage of the BCA's "supersede" provision by lowering the vote requirement from two-thirds to a simple majority. *See id.* § 5/10.20(c)-(d); *supra* note 195.

207. Telephone Interview with William I. Covey, *supra* note 37; *see also supra* text accompanying note 37.

fectuate the merger and prevent an “inequitable defeat” would be one ideal solution to the problem.

The Illinois General Assembly should make its intention clear with respect to the vote requirements for mergers of agricultural cooperatives organized under the ACA, whether noncapital stock or capital stock. The law should either explicitly provide the number of votes needed for all types of mergers, or explicitly state that the BCA’s voting rights limitation procedure is applicable to agricultural cooperatives organized under the ACA and detail what that procedure involves.

Preferably, the Illinois General Assembly should address both issues. For instance, even if the General Assembly indicates that mergers of capital stock cooperatives require only a majority all-shareholder vote (and not a two-thirds class vote), it should still insert a provision stating that the BCA’s voting rights limitation provisions are applicable to agricultural cooperatives organized under the ACA, accompanied by an explanation of the procedure called for by such provisions.²⁰⁸ While a merger is the only known action “requiring” a two-thirds class vote,²⁰⁹ it is conceivable that other cooperative business may be doomed by an “inequitable defeat,” or at least stalled while the cooperative spends much time and money attempting to secure the necessary votes. With the power to deny voting rights, perhaps the cooperatives could take a proactive stance now by amending their articles of incorporation to provide for the denial of voting rights if and when they encounter difficulty securing the necessary affirmative votes for a contemplated cooperative business action despite seemingly little opposition.²¹⁰

Further, a proclamation by the General Assembly that the BCA’s voting rights limitation provisions are applicable to the ACA would be persuasive evidence for cooperatives organized under the cooperative statutes of other states.²¹¹ Other state cooperative statutes have provisions incorporating the business corporation laws of that state, some of which may allow voting rights to be limited or denied.²¹² If the General Assembly confirms that the BCA’s voting rights limitation provisions are applicable to the ACA because they are not inconsistent with the ACA, such a confirmation would be highly persuasive authority to cooperatives in other states whose cooperative statutes incorporate the general corpo-

208. In doing so, the Illinois General Assembly also should make clear whether the BCA’s voting rights limitation provisions are applicable to cooperatives organized on a membership basis (noncapital stock cooperatives)—generally and with respect to merger actions. *See supra* note 33. While the author uncovered no information indicating that membership-based cooperatives are having difficulties effectuating mergers or other cooperative business, it is conceivable that these cooperatives could benefit from using the BCA’s voting rights limitation provisions. As such, the Illinois General Assembly should address this issue as well.

209. 805 ILL. COMP. STAT. 5/11.20; *see supra* notes 35–37 and accompanying text.

210. *See supra* note 199.

211. *See supra* note 127 and accompanying text.

212. BAARDA, *supra* note 30, at 14, 130–32 tbl.1.04.01.

ration laws of those states—cooperatives who may be faced with the prospect of an “inequitable defeat” situation.

IV. CONCLUSION

It is now time for the Illinois General Assembly to step up to the symphony that is the Agricultural Cooperative Act. With one wave of the baton, the Illinois General Assembly can resolve the “unanswered question” surrounding the merger process and whether cooperatives can deny the voting rights of their common stockholders in order to effectuate cooperative business.