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## FEDERALISM AND THE LAW OF SECURITIES REGULATION: THE LEGACY OF BROWN V. BOARD OF EDUCATION\*

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and  
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The fascination most lawyers find in procedure and process is the result of the opportunity it seems to provide for the evasion of fundamental issues of substance. Thus, even decisions as far-reaching as enunciations of constitutional doctrine by members of the Supreme Court of the United States are often read as attempts by the Court to govern the process by which actions have been taken rather than the substantive results of those actions. Over time however, the significance of such substantive results emerges from the pattern of decisions. And attempts to legitimate those results inevitably involve characterizations both of the judicial process in terms of which they were originally rationalized, and the federal polity on which they were imposed.<sup>1</sup>

### I

It was the substantive consequences of the process defined by the Court in *Blue Chip Stamps v. Manor Drug Stores*<sup>2</sup> that informed Justice Blackmun's dissent:<sup>3</sup>

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\* The first draft of Part IV of this article and of the concluding paragraph was prepared by Professor LaRue; the first draft of the rest of the article was prepared by Professor Deutsch.

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<sup>1</sup> See generally *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>2</sup> 421 U.S. 723, 770 (1975).

<sup>3</sup> Joined by Justices Douglas and Brennan.

Perhaps it is true that more cases that come within the *Birnbaum* doctrine can be properly proved than those that fall outside it. But this is no reason for denying standing to sue to plaintiffs, such as the one in this case, who allegedly are injured by novel forms of manipulation. We should be wary about heeding the seductive call of expediency and about substituting convenience and ease of processing for the more difficult task of separating the genuine claim from the unfounded one.

The *Birnbaum* opinion had confined itself largely to textual analysis, concluding that:

Section 16(b) . . . expressly gave the corporate issuer or its stockholders a right of action against corporate insiders using their position to profit in the sale or exchange of corporate securities. The absence of a similar provision in Section 10(b) strenghtens the conclusion that that section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs, and that Rule X-10B-5 extended protection only to the defrauded purchaser or seller.<sup>5</sup>

The holding about which the majority and dissent in *Blue Chip* disagreed was that “[W]e are of the opinion that *Birnbaum* was rightly decided, and that it bars respondent from maintaining this suit under Rule 10b-5.”<sup>6</sup> The question raised by the dissent’s analysis<sup>7</sup> is the extent to which a judicial holding that standing exists under a given statutory provision can be governed by factors other than textual interpretation. Whatever one’s views on that issue, it is at least clear that what *Blue Chip* means is something that will be puzzled over by the federal Courts of Appeals, who can read the opinion either as mandating a return to the standing requirements delineated in the *Birnbaum* holding, or simply as drawing to a halt the expansion of 10b-5 federal jurisdiction, in the sense that the *Birnbaum* rationale should not further be eroded. Thus, at the time *Blue Chip* was decided, the status of *Birnbaum* in the Circuit which had rendered that decision was that “although some courts have held that a private

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<sup>5</sup> 421 U.S. 723, 761, 770 (1975).

<sup>6</sup> *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (2d Cir. 1952).

<sup>7</sup> 421 U.S. at 731.

<sup>8</sup> See text accompanying note 4 *supra*.

party not a purchaser or seller, seeking *injunctive* relief, may have standing to assert a § 10(b) violation . . . and another has suggested the elimination of the purchaser-seller requirement . . . it is still the rule in this circuit that the requirement be satisfied in a suit for damages."<sup>8</sup>

Self-consciousness concerning this discretion necessarily left to the lower federal and state judiciaries by the processes of law distinguishes, to a significant degree, the work of the Warren and Burger Courts. Justice Rehnquist, the author of *Blue Chip*, gave voice to this self-consciousness when he specially concurred in Justice Douglas' opinion for a unanimous Court in *Lehman Brothers v. Schein*.<sup>9</sup> Although he agreed with the Court's statement that "use of state court certification procedures by federal courts 'does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism',<sup>10</sup> . . . a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based on diversity of citizenship, cases which they see and decide far more often than we do,"<sup>11</sup> and that "in a purely diversity case such as this one, the use of such a [certification] procedure is more a question of considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence."<sup>12</sup>

The issue ordered certified to the Supreme Court of Florida in *Lehman Brothers* was whether Florida law would extend the decision of the Court of Appeals of New York in *Diamond v. Oreamuno*.<sup>13</sup> *Diamond* had held corporate officers and directors accountable to their corporation for gains realized by them as a result of their use of material inside information in transactions in the corporate stock, and the question was whether that holding would be extended to a situation involving investors who sold stock on the basis of inside information provided by a stockbroker, who in turn had received the information from a corporate officer. In *Schein v. Chasen*,<sup>14</sup> a panel of

<sup>8</sup> *Ingenito v. Bermec Corp.*, 376 F. Supp. 1154, 1185 (S.D.N.Y. 1974).

<sup>9</sup> 416 U.S. 386 (1974).

<sup>10</sup> *Id.* at 392.

<sup>11</sup> *Id.* at 393.

<sup>12</sup> *Id.* at 394.

<sup>13</sup> 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969).

<sup>14</sup> 478 F.2d 817 (2d Cir. 1973).

the Second Circuit Court of Appeals reversed the judgment of the district court dismissing plaintiff's stockholder derivative suit. The Supreme Court of Florida agreed with the dissent in the Court of Appeals, and the case was accordingly dismissed.<sup>15</sup>

Given Justice Rehnquist's analysis in *Lehman Brothers* of the significance of the certification procedure, it should be noted that, in *Diamond v. Oreamuno* itself, the New York Court of Appeals, holding that "[a]n examination of the Federal regulatory scheme refutes the contention that it was designed to establish any particular remedy as exclusive,"<sup>16</sup> rejected an argument based upon "our federal-state jurisprudence":

The defendants recognize that the conduct charged against them directly contravened the policy embodied in the Securities Exchange Act but, they maintain, the Federal legislation constitutes a comprehensive and carefully wrought plan for dealing with the abuse of inside information and that allowing a derivative action to be maintained under State law would interfere with the Federal scheme. Moreover, they urge, the existence of dual Federal and State remedies for the same act would create the possibility of double liability.<sup>17</sup>

It should also be noted that the transaction unsuccessfully attacked in the *Birnbaum* litigation was held to create personal liability in *Perlman v. Feldman*.<sup>18</sup> The *Perlman* theory was that the corporate power transferred by the sale of the stock in the circumstances presented constituted a corporate asset, and when the question arose as to the percentage of outstanding stock whose sale would constitute a corporate asset, a panel of the Second Circuit Court of Appeals wrote three opinions which agreed only that a trial should be held by the District Court. In his opinion, Judge Friendly specifically cited to the Florida certification procedure in lamenting the fact that "[h]ere we are forced to decide a question of New York law, of enormous importance to all New York corporations and their stockholders, on which there is hardly enough New York authority for a really informed prediction what the New York Court of Appeals would decide on the facts here presented . . . yet too much for us to have the freedom used to good effect in *Perlman v. Feldman*."<sup>19</sup>

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<sup>15</sup> *Schein v. Chasen*, 519 F.2d 453 (2d Cir. 1973), *vacated and remanded sub nom. Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

<sup>16</sup> 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910, 914 (1969).

<sup>17</sup> *Id.*

<sup>18</sup> 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952, (1955).

<sup>19</sup> *Essex Universal Corp. v. Yates*, 305 F.2d 572, 580 (2d Cir. 1962).

## II

Recent securities regulation decisions by the Burger Court show self-consciousness, not only about the consequences of procedure, but also about the legal consequences of a federal polity. In *Santa Fe Industries, Inc. v. Green*,<sup>20</sup> the Supreme Court decided that minority shareholders, dissatisfied with the terms of a merger consummated in accordance with statutory Delaware law, were restricted to the appraisal remedy provided by the state law in the absence of allegations of misrepresentation or lack of disclosure. Justice Brennan dissented on the basis adopted by the panel of the Second Circuit Court of Appeals: that a Rule 10b-5 claim was stated by allegations that the majority was effecting a merger without any justifiable business purpose and that the proposed price to be paid for the shares in the merger transaction was substantially lower than a price reflecting the appraised value of the physical assets.<sup>21</sup>

Justice Stevens refused to join Part IV of the court's opinion because of the danger that it could be read as extending the holdings in *Blue Chip*, which he noted he believed to be "incorrectly decided", although he was not a member of the Court at the time the decision was rendered, and *Piper v. Chris-Craft Industries, Inc.*<sup>22</sup> from which he had dissented.<sup>23</sup> Justice Blackmun agreed that Part IV was "unnecessary for the decision in the instant case" and noted that he regarded it as "exacerbating the concerns I express in my dissents in *Blue Chip* and in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 215 (1976)."<sup>24</sup>

Part IV of the *Santa Fe* opinion, noted both that "the Court repeatedly has described the 'fundamental purpose' of the [Securities Exchange] as implementing a 'philosophy of full disclosure,'"<sup>25</sup> and that "[i]n addition to posing a 'danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5,' *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975), [the proposed] extension of the federal securities laws would overlap and quite possibly interfere with state corporate law."<sup>26</sup> Its conclusion was that "[t]here may well be

<sup>20</sup> 97 S. Ct. 1292 (1977).

<sup>21</sup> *Id.* at 1304.

<sup>22</sup> 97 S. Ct. 926 (1977).

<sup>23</sup> 97 S. Ct. at 1304 (1977) (joined by Mr. Justice Brennan).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1303.

<sup>26</sup> *Id.*

a need for uniform federal fiduciary standards to govern mergers such as those challenged in this complaint. But those standards should not be supplied by judicial extension of § 10(b). . . ."<sup>27</sup>

The law review article cited in the footnote to this conclusion argued for federal legislation on the following basis:

Delaware is both the sponsor and the victim of a system contributing to the deterioration of corporation standards. This unhappy state of affairs, stemming in great part from the movement toward the least common denominator, Delaware, seems to be developing on both the legislative and judicial fronts. In the management of corporate affairs, state statutory and case law has always been supreme, with federal intrusion limited to the field of securities regulation. Perhaps now is the time to reconsider the federal role.<sup>28</sup>

The argument, however, is far from conclusive. As the issue facing the New York Court of Appeals in *Diamond v. Oreamuno* demonstrates,<sup>29</sup> federal legislation runs the substantial risk of itself becoming the lowest common denominator, or, as *Schein v. Chasen* demonstrates,<sup>30</sup> adding further complications to the possibility inherent in any federal system of divergent results being reached by different authorities faced with the same or similar situations. More generally, it is the overriding significance of a federal system that it represents a political structure that makes it possible for equally important but potentially contradictory human needs, such as individuality and solidarity or diversity and unity, to be given expression. In the United States, the federal system fulfills this function because the personal status on which it rests is perceived by any given individual as a formality based on facts like residence that are easily changed in a mobile society. Thus, although in legal terms the designation of a given state citizenship permits the ascribing judicial authority to determine which law to apply, the very fact that the ascription serves so technical a function assures that the person whose status is at issue is self-consciously aware of the formal nature of the designation.

As in *Blue Chip*, Justice Blackmun dissented<sup>31</sup> from the Court's

<sup>27</sup> *Id.*, at 1304.

<sup>28</sup> Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663, 663 (1974).

<sup>29</sup> See text accompanying note 16 *supra*.

<sup>30</sup> See text accompanying notes 9-12 *supra*.

<sup>31</sup> Joined by Mr. Justice Brennan.

decision in *Ernst & Ernst v. Hochfelder*<sup>32</sup> on the basis that too much importance was being assigned to technical aspects of the legal process, that:

Once again—see *Blue Chip* . . .—the Court interprets § 10(b) . . . restrictively and narrowly and thereby stultifies recovery for the victim. This time the Court does so by confining . . . the Rule to situations where the defendant has “scienter” . . . . Sheer negligence, the Court says . . . was not contemplated . . . by Congress and the Commission.<sup>33</sup>

[But] surely the question whether negligent conduct violates the Rule should not depend upon the plaintiff’s identity. If negligence is a violation factor when the SEC sues, it must be a violation factor when a private party sues.<sup>34</sup>

The importance of “scienter” in the interaction between government and the individual in our federal system was perhaps most strikingly expressed by the dissent<sup>35</sup> in *Wainwright v. Sykes*.<sup>36</sup> The dissent noted that “over the course of the last decade, the deliberate bypass standard announced in *Fay v. Noia*, 372 U.S. 391, 438-439 (1963), has played a central role in efforts by the federal judiciary to accommodate the constitutional rights of the individual with the States’ interest in the integrity of their judicial procedural regimes,”<sup>37</sup> and also defined the operational significance of that standard: “*Fay* recognized that if one ‘understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on the habeas to deny him all relief. . . .’ 372 U.S. at 439.”<sup>38</sup>

The need for such a standard, given the drives for both individuality and solidarity, is recognized in Freudian terms in the concept of “superego,” which in lay terms is known as “conscience”. What the description of this concept makes clear is that the rules of the game in terms of which individual success is measured are simultaneously perceived as the rules defining the behavior of the group of which the individual regards himself a member:

<sup>32</sup> 425 U.S. 185, 215 (1976).

<sup>33</sup> *Id.* at 215-16.

<sup>34</sup> *Id.* at 217-18.

<sup>35</sup> Mr. Justice Brennan, joined by Mr. Justice Marshall.

<sup>36</sup> 97 S. Ct. 2497 (1977).

<sup>37</sup> *Id.* at 2513.

<sup>38</sup> *Id.* at 2514.



the representative . . . of every moral restriction . . . the vehicle of tradition and of all the time-resisting judgments of value which have propagated themselves . . . from generation to generation."<sup>39</sup>

Mankind never lives entirely in the present. The past, the tradition of the race and of the people, lives on in the ideologies of the superego, and yields only slowly to the influences of the present and to new changes; and so long as it operates through the superego it plays a powerful part in human life, independently of economic conditions.<sup>40</sup>

It is this duality that permits law to be perceived both as a norm whose existence everyone must respect, and as a constraint which the skillful will successfully manipulate to their individual advantage. Because of this disparity between the perception of law as a social and individual phenomenon, furthermore, it seems necessary both that knowing violations of the rules not be permitted, and that the group be permitted to exact penalties only from players who were aware of the existence of the rules.

In the area of corporate law, the fact of this duality in the definition of the legal process has been reflected in 10b-5 litigation since 1965. In that year, a panel of the Second Circuit Court of Appeals, after holding "[t]he proper test . . . [concerning the meaning of 'reliance' in a case of non-disclosure under Rule 10b-5' to be] whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact,"<sup>41</sup> carefully noted that such a test "substitut[ed] the individual plaintiff for the reasonable man,"<sup>42</sup> and denied recovery, seemingly on the basis of plaintiff's status as "an experienced and successful investor."<sup>43</sup> As a result, while it may be true that the Supreme Court's repeated description of "the 'fundamental purpose' of the [Securities Exchange] Act as implementing a 'philosophy of full disclosure,'"<sup>44</sup> postulates an impersonal market in which the identity of any given player is irrelevant, it is equally true that the question of the status of that player in connection with the particular transaction being

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<sup>39</sup> S. FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS, in 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 66-67 (J. Strachey ed. 1964).

<sup>40</sup> *Id.* at 67.

<sup>41</sup> *List v. Fashion Park, Inc.*, 340 F.2d 457, 463 (2d Cir. 1965).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 464.

<sup>44</sup> See text accompanying note 25 *supra*.

reviewed has been regarded as a relevant consideration in determining liability under the Securities Exchange Act.<sup>45</sup>

### III

Corporate law, moreover, must deal with the political as well as the economic aspects of business activity. In systemic political terms, the legislature expresses the human need for solidarity by prescribing general rules applicable to all, and the judiciary, the human need for individuality by ascertaining whether the rule should be applied to the particular situation presented. Viewed in these terms, the argument advanced by the dissent<sup>46</sup> in *Piper v. Chris-Craft Industries, Inc.*<sup>47</sup> in favor of permitting damages to be recovered can be summarized as follows: the tender offers regulated by section 14(e) of the Securities Exchange Act are sufficiently like the proxy solicitations regulated by section 14(a) of that same statute so that "the investor who today is just a pawn in a form of industrial warfare,"<sup>48</sup> and who represented the focus of the majority's concern, did not constitute a status exempt from the rule applied by the Supreme Court's decision in *J.I. Case Co. v. Borak*<sup>49</sup> to section 14(a) suits.

As note 21 in the majority opinion puts it:

The dissent emphasizes that *Borak* involved a derivative suit brought on behalf of the corporation, in addition to the shareholder's direct cause of action. Since corporations were not the primary beneficiaries of § 14(a)—the proxy provision involved in *Borak*—the dissent concludes that *Borak* itself fails to meet the "especial class" requirement articulated by our subsequent decision in *Cort v. Ash*. . . . But this is a misreading of *Borak*; there, the Court observed that deceptive proxy solicitations violative of § 14(a) injure the corporation in the following sense:

"The damage suffered results not from the deceit practiced on [the individual shareholder] alone but rather from the

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<sup>45</sup> See, e.g., *Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir. 1977), which stated that "The diligence of the plaintiff in 10b-5 cases is judged subjectively," *Id.* at 1016, and cited as an example "a jury instruction that imposed a duty of due diligence 'solely under the peculiar circumstances of each case, including existence of a fiduciary relationship . . . position in the industry, sophistication and expertise in the financial community and knowledge of related proceedings.'" *Id.* (footnotes omitted).

<sup>46</sup> See note 23 *supra*.

<sup>47</sup> 97 S. Ct. 926 (1977).

<sup>48</sup> See 97 S. Ct. 926, 942 (1977).

<sup>49</sup> 377 U.S. 426 (1964).

deceit practiced on the stockholders as a group." 377 U.S., at 432 (emphasis supplied.)

The *Borak* Court was thus focusing on all stockholders—the owners of the corporation—as the beneficiaries of § 14(a). Stockholders as a class therefore plainly constituted the 'especial class' for which the proxy provisions were enacted. This reading of *Borak* comports with the statement of the question presented in that case:

"We consider only the question of whether § 27 of the Act authorizes a federal cause of action for rescission or damages to a corporate stockholder with respect to a consummated merger. . . ." *Id.* at 428 (emphasis supplied.)<sup>50</sup>

The majority, in other words, views section 14(a) as protecting shareholders "as a class" in the sense that the misinformation about which the proxy provision is concerned represents potential injury to the corporation. Since the corporation cannot itself be injured, however, what is being protected is the process in terms of which corporate decisions are made. Given this goal, the individual shareholder recovers damages, not because injury has been suffered in the amount of the damages, but because he participates in the process.

As the majority views section 14(e), however, the shareholder is seen, not as a participant in a process, but as the holder of a commodity for which competitors are bidding. In that status, the shareholder is assisted by the provisions of section 14(e) in that they endure "full disclosure" of all relevant information concerning the value of those shares of corporate stock. In particular terms, the majority found it "likely . . . that shareholders may be prejudiced because some tender offers may never be made if there is a possibility of massive damage claims for what courts subsequently hold to be an actionable violation of section 14(e)."<sup>51</sup>

It remains true, however, that section 14(e) in fact represents a general rule enunciated by the legislature, and, as the dissent put it: "I do not understand, [e]ven under the Court's interpretation of *Borak* as protecting *all* shareholders . . . [the] holding that only *some* Piper shareholders are protected—*i.e.*, 'ordinary' shareholders as opposed to holders of large blocks."<sup>52</sup> Consequently, it seems important to note that the majority was perfectly aware that, in another situation, the fact of shareholding *per se* might well be sufficient to

<sup>50</sup> 97 S. Ct. 926, 944-45, n.21 (1977).

<sup>51</sup> *Id.* at 948 (footnote omitted).

<sup>52</sup> 97 S. Ct. 926, 955, 962 n.18.

confer standing, and even explicitly raised the possibility that shareholders suing under section 14(e) might not be subject to the purchaser-seller requirement enunciated in *Blue Chip*.<sup>53</sup>

Indeed, given the crucial relevance of the meaning of *Borak* to the question of the legitimacy of judicial interpretation of legislation in *Piper v. Chris-Craft Industries, Inc.*, it is significant that, in justifying his holding, the author of *Blue Chip* noted both that "[t]his Court had no occasion to deal with the subject [of an implied right of action under Rule 10b-5] . . . until . . . [there existed an] overwhelming consensus of the district courts and courts of appeals that such a cause of action did exist,"<sup>54</sup> and that the "growth [of that private right of action] may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it, see *J.I. Case Co. v. Borak*, but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5"<sup>55</sup> before summarizing the basis for his conclusion that:

We quite agree that if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability. But as we have pointed out, we are not dealing here with any private right created by the express language of § 10(b) or by Rule 10b-5. No language in either of those provisions speaks at all to the contours of a private cause of action for their violation. However flexibly we may construe the language of both provisions, nothing in such construction militates against the *Birnbaum* rule. We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question. Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b-5, we believe that practical factors to which we have adverted, and to which other courts have referred, are entitled to a good deal of weight.<sup>56</sup>

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<sup>53</sup> 97 S. Ct. 926, 948 and n.25.

<sup>54</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

<sup>55</sup> *Id.* at 737.

<sup>56</sup> *Id.* at 748-49.

## IV

What we hope our analysis of *Piper* has demonstrated is that the Supreme Court possesses a valuable political asset in that its opinions can be so written as to permit the inference that their holdings might not be applied to future situations. The political processes in which the Court is involved, however, derive not only from the separation of branches at the national level, but also from the impact of the Court's opinions on the power of state governments. Professor Herbert Wechsler, the legal scholar who argued that the application of neutral principles to the opinion in *Brown v. Board of Education*<sup>57</sup> demonstrated that the Supreme Court was, in fact, engaged in making a substantive value choice,<sup>58</sup> also branded the Supreme Court decision in *Naim v. Naim*<sup>59</sup> as "wholly without basis in the law."<sup>60</sup> It is our contention that an analysis of the issues presented by the factual situation before the Supreme Court in *Naim v. Naim* demonstrates that Professor Wechsler's characterization of that decision ignores the extent to which intersections among the legal and political aspects of Supreme Court opinions are required by the necessary impacts of those opinions. We believe that this case is worth discussing at length because it functions as a paradigm of the legal problems of federalism.

The case of *Naim v. Naim* began in the trial court, known in Virginia as the Circuit Court, of Portsmouth, Virginia. Mrs. Ruby Elaine Naim filed suit against her husband, Mr. Ham Say Naim, to dissolve their marriage. The trial court granted an annulment, and Ham Say appealed to the Virginia Supreme Court of Appeals. Ruby Elaine did not file a brief in the case, but the Attorney General of Virginia appeared as an *amicus curiae*.

The Virginia Supreme Court of Appeals, stating that the sole issue before it was the constitutionality of the statute prohibiting miscegenation, viewed the annulment as having been based on the grounds that the marriage was unlawful.<sup>61</sup> In its opinion, written in the inter-

<sup>57</sup> 347 U.S. 483 (1954).

<sup>58</sup> "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all; its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in some way on any groups or races that may be involved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) [hereinafter cited as Wechsler].

<sup>59</sup> 350 U.S. 985 (1956).

<sup>60</sup> Wechsler, *supra* note 58, at 34.

<sup>61</sup> *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955).

val between the first and second *Brown* decisions, the Virginia court held that the anti-miscegenation statute was constitutional. Ham Say Naim appealed the case to the United States Supreme Court. The Supreme Court stated two grounds in sending the case back to the Virginia court because of inadequacy of the record.<sup>62</sup> First, the record did not show the relationship of the parties to Virginia at the time of the marriage and at the time of their first returning to Virginia. The second ground was the failure of the parties to bring to the Court "all questions relevant to the disposition of the case." For these two reasons, the Court concluded the case did not present the issue of the validity of the anti-miscegenation statute in "clean cut and concrete form." The Supreme Court, therefore, vacated the judgment and remanded.

The Virginia court at this point dug in its heels.<sup>63</sup> To be blunt about it, there was a refusal to comply with the Supreme Court's mandate. In its opinion, the Virginia court stated that the constitutionality of the statute was squarely presented and that the record contained sufficient facts to decide the case. Second, the Virginia court said that it had no procedure for remanding the case to Portsmouth for additional fact finding. Accompanying its second order, the United States Supreme Court issued a very brief per curiam opinion. The full opinion reads:

Appeal from the Supreme Court of Appeals of Virginia. The motion to recall the mandate and to set the case down for oral argument upon the merits, or, in the alternative, to recall and amend the mandate is denied. The decision of the Supreme Court of Appeals of Virginia of January 18, 1956, 197 Va. 734, 90 S.E. 2d 849, in response to our order of November 14, 1955, 350 U.S. 891, leaves the case devoid of a properly presented federal question.<sup>64</sup>

It is this second opinion that Wechsler judged to be outrageous. Wechsler said:

I take no pride in knowing that in 1956 the Supreme Court dismissed an appeal in a case in which Virginia nullified a marriage on this ground [miscegenation], a case in which the statute had been squarely challenged by the defendant, and

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<sup>62</sup> 350 U.S. 891 (1955).

<sup>63</sup> 197 Va. 734, 90 S.E.2d 849 (1956).

<sup>64</sup> 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955), *on remand*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956).

the court after remanding once, dismissed per curiam on procedural grounds that I make bold to say are wholly without basis in the law.<sup>65</sup>

The first thing that should be noted is that Wechsler agreed with the Virginia Court that the issue was squarely presented. He apparently disagreed with the Supreme Court's statement that the parties had failed to bring before the Court all questions relevant to the disposition of the case. Nor has Professor Wechsler been alone in his judgment that the issue of the anti-miscegenation statute was properly before the Court. All of the law review commentators have agreed. The first commentary upon the case was in the Virginia Law Review.<sup>66</sup> The student comment was about the first Virginia opinion,<sup>67</sup> and consists of genteel criticisms. The student editors wonder if there might be any authority for the proposition that interracial marriages cause physical or mental harm. They point out that the Virginia Supreme Court does not cite any scientific authority but merely relies upon subjective assertions. The case note criticizes the Virginia Supreme Court for this subjective approach to constitutional adjudication and argues that there should be some scientific authority, even if it be minority authority, in support of the legislative action. In the absence of scientific authority, the editors state that possible alternative grounds for upholding the statute would be to inquire whether there was reasonable basis for determining that the safety, morals or welfare of the community would be endangered by interracial marriages. The comment does not go on to discuss what the answer would be if one asked these questions, which admittedly the Virginia Supreme Court of Appeals did not.

Discussing the issue of evasion of the Supreme Court's mandate, the North Carolina Law Review noted that the Supreme Court could have followed *Martin v. Hunters Lessee*<sup>68</sup> and bypassed the Virginia Supreme Court of Appeals altogether, returning the case directly to the Circuit Court for the City of Portsmouth, or it could have recalled the case and decided it on the merits. The comment concludes:

Since it chose to do neither, the court evidently did not wish to decide the question involved at this time and refrained from doing so by apparently exercising its discretion as to what constitutes an adequate record.<sup>69</sup>

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<sup>65</sup> Wechsler, *supra* note 58, at 46-47.

<sup>66</sup> 41 VA. L. REV. 861.

<sup>67</sup> See note 61 *supra*.

<sup>68</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>69</sup> 34 N.C.L. REV. 492, 495 (1956).

The North Carolina editors apparently thought that there were no limitations upon the Supreme Court's discretion and that the Court had *carte blanche* to call a record adequate or not as it might be pleased to do so.

The Notre Dame Law Review agreed that the basic question was refusal of the state court to follow a mandate but the editors were far more critical of the performance of the Supreme Court.

The cases wherein the Supreme Court's mandate has not been followed present no apparent trend of legal thought. The Supreme Court has repeatedly refused to call the state courts into line, contrary to the spirit of the *Martin* case. It has preferred to recognize as controlling the legal niceties which the state courts have offered by way of explanation for their refusal to follow the Court's mandates on remand. The significance of the principle case lies in this seeming reluctance of the Supreme Court to deviate from this legalism.<sup>70</sup>

The editors of the Harvard Law Review in their annual review of the Supreme Court viewed the issue in the same way, but were more non-committal. After a general assertion that racial discrimination was not a major part of the docket in the 1955 term but that what was interesting was avoidance of the racial issues, and after a straight-forward description of the procedural events, the one paragraph analysis of *Naim v. Naim* wound up by saying "[b]y the expedient of refusing to obey the Supreme Court's order to return the case to the trial court for clarification of the facts, the Virginia court had, at least temporarily, saved the state's miscegenation statute from constitutional scrutiny."<sup>71</sup>

The annual survey of Virginia law in the Virginia Law Review did not criticize either the Virginia Supreme Court or the United States Supreme Court. The domestic relations section of the survey said that the case had "attracted much publicity but did not actually change existing law" and spoke of the Virginia Supreme Court's first decision as "well documented."<sup>72</sup> Dean Ribble's constitutional law section was more thorough in discussing the procedural matters.<sup>73</sup> He pointed out that the Supreme Court had denied certiorari in an Alabama felony conviction under the Alabama anti-miscegenation statute and that the Virginia opinion had discussed this case, he made

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<sup>70</sup> 31 NOTRE DAME L. REV. 714, 716-17 (1956).

<sup>71</sup> *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 104 (1956).

<sup>72</sup> *Annual Survey of Virginia Law*, 42 VA. L. REV. 989, 1007 (1956).

<sup>73</sup> *Id.* at 1158-59.



some comments about the inconclusiveness of the denial of certiorari, and he discussed the remand procedures in this particular case. He made no evaluation of either court's performance.

The first problem that must be considered in analyzing the *Naim v. Naim* dismissal is the relationship between the Supreme Court's first and second opinions. The Supreme Court's opinion on the first round of the case reads in full as follows:

Appeal from the Supreme Court of Virginia. *Per Curiam*:  
The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered "in clean-cut and concrete form, unclouded" by such problems. *Rescue Army v. Municipal Court*, 331 U.S. 549, 584. The judgment is vacated and the case remanded to the Supreme Court of Appeals in order that the case may be returned to the Circuit Court of the City of Portsmouth for action not inconsistent with this opinion.<sup>74</sup>

The second opinion stated that the Virginia court's action on remand "leaves the case devoid of a properly presented federal question."<sup>75</sup> There are two ways of construing the logical relationship between the first Supreme Court opinion and the second one. One possibility is that the case originally had a properly presented federal question, albeit with a defective record, but that the Virginia court's interim action on the remand did something that now "leaves" the case devoid of a properly presented federal question. Another possibility is that the case never did have a properly presented federal question and that the Virginia court's interim action on the remand did not do anything and thus "leaves" the case devoid of a properly presented federal question. To be precise, this possibility assumes that the Supreme Court at first doubted whether a federal question was properly presented, and so remanded to see if the record could be improved. In light of the defiance, the Court re-examined its doubts and determined with certainty that the case did not contain a properly presented federal question.

We believe the second possibility to be more likely both because

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<sup>74</sup> 350 U.S. 891 (1955).

<sup>75</sup> 350 U.S. 985 (1956). See text accompanying note 64 *supra*.

it represents a more idiomatic use of the word "leaves" and because it makes sense of the *Rescue Army* citation. In that case, Mr. Murdock, an officer of the Rescue Army, wished to challenge the constitutionality of an ordinance of Los Angeles that regulated the solicitation of contributions for charity. Mr. Murdock had twice been prosecuted and convicted in the Municipal Court of Los Angeles for alleged violation of the ordinance. Both times, the conviction was reversed by the Superior Court of Los Angeles County, but reversed on grounds that sent the case back to Municipal Court for a new trial. Mr. Murdock, in an attempt to avoid a third trial, filed suit in the District Court of Appeal and asked for a writ of prohibition against the Municipal Court. The writ was denied, the Supreme Court of California affirmed the denial, and Mr. Murdock took an appeal to the United States Supreme Court. The Supreme Court held that it had jurisdiction of the case, but it would decline to exercise that jurisdiction, thus not deciding the constitutional issues raised by Mr. Murdock.

Justice Rutledge's opinion discussed two problems. Since Mr. Murdock was proceeding by way of writ of prohibition, the technical issue was the Municipal Court's power to proceed with the criminal cause. The Municipal Court's power to proceed must be judged upon the allegations made in the charges against Mr. Murdock and not upon the allegations plus the evidence. "Hence only the validity of the provisions on their face, not as applied to proven circumstances, is called into question."<sup>76</sup> Furthermore, it was not clear just how the ordinance under which Murdock was charged should be construed; Justice Rutledge devoted a major part of his opinion to describing the uncertainties in the ordinance.<sup>77</sup>

Murdock was challenging the constitutionality of a local ordinance, but the challenge was to the ordinance on its face, not as applied, and the content of the ordinance was uncertain. Either of these defects in the record of the *Rescue Army* case would have been grounds for avoiding the constitutional issue. Justice Rutledge discussed the doctrines associated with Justice Brandeis' famous concurring opinion in the *Ashwander* case and argued at length that these doctrines would lead to not deciding the issues tendered.<sup>78</sup> Given his co-authorship of *The Federal Courts and The Federal System*—which stressed the importance of decisions like *Rescue Army*—it seems appropriate to assume that Professor Wechsler

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<sup>76</sup> 331 U.S. 549, 555 (1947).

<sup>77</sup> *Id.* at 556-65, 575-83.

<sup>78</sup> *Id.* at 568-75.

would not argue that Justice Rutledge's opinion in *Rescue Army* was "wholly without basis in the law," although he could properly argue that the result in the case was wrong. Consequently, the sting of Wechsler's criticism of *Naim v. Naim* can be significantly eased if *Naim* can fairly be analogized to *Rescue Army*.

Of course, one important assumption is being made, and that is that the Virginia court's defiance is not relevant. We are supposing, with Wechsler, that one should judge the matter on neutral principles and not on personalities. Furthermore, we are assuming that the neutral principles at stake are not the principles that ought to govern the Supreme Court's use of its contempt power. The question is not whether the Supreme Court should have held the Virginia court to be in contempt; it is rather, whether the appeal in *Naim v. Naim* should have been dismissed.

The first question that is relevant is: what was the record before the Supreme Court? In the Virginia Supreme Court there were four documents: (1) the record of the proceedings below, (2) the petition for appeal and the brief filed on behalf of Ham Say Naim, (3) the amicus curiae brief of the Attorney-General of Virginia, and (4) a reply brief. In the United States Supreme Court there were three more documents: (5) statement as to jurisdiction filed on behalf of Ham Say Naim, (6) statement of appellee opposing jurisdiction and motion to dismiss or affirm, and (7) brief in opposition to appellee's motion to dismiss or affirm. We shall take it for granted that (1) is the document that the Court was referring to when it spoke of "the record,"<sup>79</sup> although that document might be supplemented by some statements from the other documents.

Accepting the proposition that (1) is "the record," the first thing that ought to be emphasized is that the record as printed is only seven pages long. Page one reprints the Virginia Supreme Court of Appeals' order awarding an appeal and inviting the Attorney-General to file an amicus curiae brief. Page two and part of page three show Ruby's complaint. The rest of page three, page four, and part of five show Ham's answer. The decree is on page five. Pages six and seven reprint the notice of appeal and the assignments of error.

Seven pages is a slim report. Moreover, pages one, six and seven contain matter that relates solely to the appeal. Thus, the proceedings at the trial are presented in only four pages. Eliminating the running heads of the printed matter and a few other inessential typo-

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<sup>79</sup> 350 U.S. 891 (1955).

graphical devices, pages two through five of the record read as follows:<sup>80</sup>

[BILL OF COMPLAINT]

Your complainant, Ruby Elaine Naim, respectfully represents:

1. That she was married to Ham Say Naim on the 26th day of June, 1952, in Elizabeth City, North Carolina.
2. That your complainant is an actual *bona fide* resident of and has been domiciled in the State of Virginia for more than one year next preceding the commencement of this suit, and now resides in the City of Portsmouth, Virginia; that the defendant is a non-resident.
3. That your complainant is a member of the Caucasian race and that the defendant is a member of the Malayan race.
4. That there were no children born of this marriage.
5. Your complainant alleges that the said marriage is void in law.
6. Your complainant further alleges that the said defendant committed adultery on the 7th and 8th days of September, 1952, with "Kay" on Mowbray Arch, in the City of Norfolk, Virginia; that it has not been five years since said act of adultery occurred, and that it was not committed by the procurement or connivance of your complainant, and that your complainant has not cohabited with the said defendant since knowledge of the said acts of adultery.

IN CONSIDERATION WHEREOF, your complainant prays that the said marriage be declared null and void, and of no effect, and if the evidence be insufficient, then that she be granted a divorce from the bonds of matrimony.

RUBY ELAINE NAIM  
By A. A. BANGEL, p.q.  
of BANGEL, BANGEL & BANGEL  
Law Building  
Portsmouth, Virginia

Filed in the Clerk's Office the 30 day of September 1953.

Teste:

K. A. BAIN, JR., Clerk  
DORIS V. MAJOR, D. C.

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<sup>80</sup> The standard re-prints of the briefs and records filed in the U.S. Supreme Court do not include this case; the editors have excluded from their re-prints cases that were dealt with summarily by memoranda. Since the record has significant historic value, since it is essential to understanding the case, and since it is available in only a few libraries, we have decided to quote generously from it.

PLEAS, MOTION AND ANSWER OF DEFENDANT.

Comes now the defendant herein and makes the following pleas to this Honorable Court:

I. Defendant alleges that this Court has no jurisdiction over the Complainant herein.

1. Complainant is domiciled in and is a permanent resident of Indianapolis, Indiana, and has maintained her place of permanent abode in said city and state at 513 North New Jersey Avenue, Indianapolis, Indiana.

2. The physical presence of the complainant in the Commonwealth of Virginia has been intermittent and transitory from a period beginning on or before the 26th of June, 1952, and continuing through the 23rd day of September.

3. That at the time that the Bill of Complaint was filed herein the Complainant was temporarily residing at 354 West York Street, Norfolk, Virginia; she has never lived in the City of Portsmouth.

4. Defendant is an alien seaman and is a native citizen of China and is not domiciled in the Commonwealth of Virginia.

II. Defendant further alleges that the Bill in Equity is insufficient as a matter of law in that the Bill, as filed, contains inconsistent causes of action which require the Complainant to elect one remedy among two.

1. Complainant in Paragraph 5 of the Bill alleges that the marriage herein is void in law, and in the prayer for relief, she seeks an annulment.

2. Complainant in Paragraph 6 of the Bill alleges that the defendant has committed adultery and in the prayer for relief, she seeks an absolute divorce.

III. Defendant further alleges that insofar as the Bill is deemed a Bill for Annulment it is insufficient as a matter of law in that the said marriage is not void in law.

1. The said marriage was valid in the State of North Carolina, the State in which the marriage was celebrated.

2. The provisions of the Code of Laws of Virginia which prohibit marriage ceremonies between members of the Caucasian race and those persons who are possessed with non-Caucasian blood are not applicable to persons who do not enter into marriage ceremonies within the Commonwealth of Virginia, or to persons who are not domiciled in the Commonwealth, or to

persons whose marital domicile is outside of the Commonwealth of Virginia.

3. The aforesaid provisions of the Code of Laws of Virginia which prohibit intermarriage between Caucasian and those persons who are possessed with non-Caucasian blood, in so far as the defendant may be held to be within the jurisdiction of the Commonwealth of Virginia, are in violation of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, upon the basis of each of the foregoing pleas, the defendant demurs to the Bill herein and moves that it be dismissed.

IV. For Answer to the Bill, defendant respectfully represents to the Court as follows:

1. That the allegations in Paragraph 1 of the Bill are admitted.
2. That the allegations in Paragraph 2 are denied, except that defendant admits that he is a non-resident of the Commonwealth of Virginia.
3. That the defendant is without knowledge as to the truth of the allegations in Paragraph 3.
4. That the allegation in Paragraph 4 is admitted.
5. That the allegation in Paragraph 5 is a conclusion of law, but to the extent that it is material, it is denied.
6. That the allegations in Paragraph 6 are denied.

WHEREFORE, your defendant prays that the Bill herein be dismissed.

HAM SAY NAIM  
by Counsel

DAVID CARLINER, p.q.  
201 Rupley Building  
815 King Street  
Alexandria, Virginia

#### DECREE

This cause came on this day to be heard on the bill of complaint, the defendant's answer, evidence heard in open court, and argument of counsel for both parties.

It appearing to the court that the complainant is a member of the Caucasian race and the defendant not of the white race, and complainant is an actual *bona fide* resident of and domiciled in the State of Virginia, and has been for more than one year next preceding the commencement of this action, and was

residing in this city at the time of the institution of this suit; the defendant is a non-resident; that the parties left the State of Virginia on the 26th day of June, 1952, for Elizabeth City, North Carolina, to enter into a marriage, and immediately returned to this State and lived together as husband and wife.

It is adjudged, ordered and decreed that the marriage of the parties on June 26, 1952, in Elizabeth City, N.C., is void. That defendant pay to Bangel, Bangel & Bangel an attorney's fee of \$200.00 and the costs of these proceedings.

Enter 2/19/54.

F.E.K.

The most conspicuous defect in this record, judging it as a vehicle for raising constitutional issues, is that it does not set forth or summarize in any way the "evidence heard in open court." The parties agreed that Ruby and Ham were married in Elizabeth City, North Carolina, one year and three months prior to the beginning of the lawsuit, that Ham is not a resident of Virginia, and that there are no children. There is a significant dispute as to Ruby's residence and as to Ham's fidelity. The decree states that evidence was heard on these matters, and the briefs corroborate this. However, although the decree makes findings as to residence, it does not make any findings on the alleged adultery. Furthermore, there is no recital of evidence on which either the finding or lack of finding was made. The lack of explanation of the finding on residence is particularly puzzling. The trial court found that Ruby was a resident of Virginia and that Ham was a non-resident, a finding that contrasts rather curiously with its finding that Ham and Ruby had lived together as husband and wife after they returned to Virginia from North Carolina. One way to explain the contrast is to postulate desertion, but if that is true, then why was desertion not alleged? Did the court adopt Ruby's allegation about no cohabitation since the adultery? If so, why was there no finding about the adultery?

It is difficult to be specific about the Virginia law of annulment since there are very few cases. However, the leading Virginia case, *Pretlow v. Pretlow*, which was cited in the Virginia court's opinion in *Naim v. Naim*, contains the following language:

Divorce is the creature of statute; annulment rests within the inherent power of equity, inherited by it from the ecclesiastical courts of England. Fraud, particularly before consummation, is within the reach of its long arm, and that power is not lost

because other grounds are specifically mentioned in the statute.<sup>81</sup>

In *Pretlow*, the particular fraud was that the wife married intending at the time of the marriage to refuse sexual intercourse to her husband. The husband sued to annul and the Supreme Court held that he was entitled to a decree of annulment despite the fact that no such grounds were mentioned in the statute. There is no way of knowing the proper scope of the *Pretlow* case. Presumably there are other types of fraud, aside from the type of fraud involved in that case, that could be grounds for annulment. More significantly, there is the possibility that there might be grounds for annulment in equity aside from fraud, since the Virginia court has never committed itself on that question.

Before one criticizes the Supreme Court's action in *Naim v. Naim*, one ought to consider the following possible scenario. Suppose the Supreme Court had said that the statute was unconstitutional and vacated the decree of annulment granted below; Ruby then went back into the Circuit Court for the City of Portsmouth and filed a second annulment lawsuit. Suppose the trial court then granted her an annulment that was affirmed by the Virginia Supreme Court of Appeals. To some degree, the options that would be open to the Supreme Court at that point would depend upon the opinion written by the Virginia court. The Supreme Court of Virginia might have written an opinion based upon the *Pretlow* doctrine and the general power of equity to avoid marriages whenever the circumstances are unusual enough.<sup>82</sup> The Virginia Supreme Court might have said that prejudice in Portsmouth, Virginia, was such that Ruby was unable to have any friends, that people would not speak to her, and that her life and her marriage had become intolerable, and noted the psychological effect of such prejudice upon Ruby's self esteem and her ability to be a good wife, and concluded that the marriage had now become a marriage in name only and should therefore be dissolved.

We need not suppose that any such opinion would be written in

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<sup>81</sup> *Pretlow v. Pretlow*, 177 Va. 524, 548-49, 14 S.E.2d 381, 387 (1941). The Virginia opinion rests in part on a dictum by a former judge of that court, Martin P. Burks, in *Heflinger v. Heflinger*, 136 Va. 289, 118 S.E. 316 (1923). The citation is significant to a Virginia lawyer. The learned judge wrote a book known as *BURKS' PLEADING AND PRACTICE*; young lawyers were formerly instructed by their elders at bar that if there was a conflict between *BURKS' PLEADING AND PRACTICE* and the Virginia statutes, then they were to follow Burks.

<sup>82</sup> The *Pretlow* case was cited in the Virginia court's first *Naim v. Naim* opinion. 197 Va. 80, 82, 87 S.E.2d 749, 751 (1955).



good faith, but we ought to consider the fact that such an opinion could have been written, and that the Supreme Court would then have been forced into the position of holding whether Ruby Elaine Naim and Ham Say Naim must stay married. So long as the continuation of the marriage was not constitutionally required, the *Rescue Army* and *Ashwander* citations are correct in the sense that they embody the applicable rules of law.

At this point, the reader might protest that *Rescue Army* and *Ashwander* are distinguishable. Indeed, they are. In *Rescue Army*, however, Justice Rutledge noted that the constitutional question presented there was the ordinance as judged on its face rather than as applied, and given the lack of facts in the *Naim* record, one could make the same observations about that appeal. Furthermore, in *Rescue Army*, Justice Rutledge said that there was uncertainty as to how the ordinance should be construed; in *Naim*, there was uncertainty as to Virginia's law about annulment that might be relevant to the disposition of the case. Finally, as our hypothetical indicates, it is true in *Naim* that, as Justice Brandeis noted in *Ashwander*,<sup>83</sup> alternative grounds for decision could transform a constitutional ruling into an advisory opinion.

It might be argued that the Supreme Court nevertheless was compelled to act because *Naim* had no further official recourse in connection with the recovery of the wife he had lost. In other words, one could argue that *Rescue Army* should be distinguished because in that case the Supreme Court's judgment left the way open for another trial, at which Mr. Murdock could present his constitutional claims, while in *Naim* the Supreme Court's judgment ended the proceeding. This proposed distinction must be assessed in light of the petition for appeal filed on Ham Say Naim's behalf in the Virginia court, document #2 of the list set forth *supra*. Pages 2-3 of that petition contain the following:

#### STATEMENT OF THE PROCEEDINGS

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A hearing on the Bill, Motions, and Answer was held on February 19, 1954, in the Circuit Court of the City of Portsmouth. After hearing testimony *in extenso* as to the domicile and residence of the parties, their races, and the marriage and the allegations of adultery as to both parties, the Court heard oral argument upon the Appellee's prayer for a decree of annul-

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<sup>83</sup> 297 U.S. 288, 345-48 (1936).

ment upon the grounds that the parties were residents of Virginia at the time of their marriage, and that as such residents their marriage was in contravention of Sections 54 and 58, Title 20 of the Code of Laws of Virginia.

Appellant opposed the entry of a decree of annulment and moved to dismiss it upon the following grounds:

That Section 54, Title 20 of the Code is in violation of the Fourteenth Amendment of the Constitution of the United States; That the Court, as an instrumentality of the State of Virginia is constitutionally, upon the basis of the Fourteenth Amendment, without power to annul the marriage of the parties upon the basis of race; That Section 58, Title 20 of the Code is inapplicable to defendant in view of the evidence that he is a citizen of China and is present in the United States only as a non-immigrant seaman; That the marriage between the parties was valid in North Carolina and is required to be given full faith and credit by the Constitution of the United States; That the definition of "white person" in the statute is so vague as to render the statute void; That the statute is in conflict with and is superseded by the Immigration Treaties concluded between the United States and China; That the complainant has failed to establish that she was a "white person" within the meaning of the statute.

The trial court overruled appellant's motion, of which exception was noted, and entered a decree annulling the marriage.

#### ASSIGNMENTS OF ERROR

In this petition for appeal, the appellant assigns the following errors:

1. In failing to hold that the Circuit Court of the City of Portsmouth, as an instrumentality of the State of Virginia, is constitutionally without the power to annul the marriage of the parties herein upon the basis of race.
2. In failing to hold that the provisions of the Code of Laws of Virginia which make it unlawful for any white person in the State of Virginia to marry any save a white person are in violation of the Fourteenth Amendment to the Constitution of the United States.

Appellant abandons all other assignments of error hitherto noted.

Once again, the discussion of the testimony tantalizes rather than satisfies, this time with the possibility that there was mutual adultery. The petition reveals, moreover, that Ham's lawyer abandoned

other issues raised by the case and limited his appeal to an attack on the anti-miscegenation statute, despite the fact that such issues might have raised substantial federal questions.<sup>84</sup> Aside from the procedural complexities, *Naim* is not the best case on the merits for considering the constitutionality of an anti-miscegenation statute, since the case is a civil lawsuit, rather than a criminal action filed by the state. The more recent *Loving* decision,<sup>85</sup> in which Virginia's application of criminal sanctions against an interracial marriage was held unconstitutional, is distinguishable, since the constitutional issue presented by a statute that gives power to the state to avoid a marriage on some particular ground that is unconstitutional may not squarely be presented by a statute that gives the very same power to an individual in connection with his own marriage. The distinction we would draw between *Naim* and *Loving* is identical to that on the basis of which Wechsler found the decision in *Shelley v. Kraemer*<sup>86</sup> to be unprincipled:

Assuming that the Constitution speaks to state discrimination on the grounds of race but not to such discrimination by an individual even in the use or distribution of his property, although his freedom may no doubt be limited by common law or statute, why is the enforcement of the private covenant a state discrimination rather than a legal recognition of the freedom of the individual.<sup>87</sup>

Admittedly, neither the Virginia court nor the Virginia legislature have made this distinction between the state and the individual. Suppose, however, that the distinction is made. Suppose that a man and a woman of different races become husband and wife. Suppose then that one of them discovers that he or she is a bigot. (Perhaps one of them has repressed that ugly fact about his or her psyche; or it may be that what one of them has repressed is how vulnerable one can be to the pressures of a community.) A divorce could be granted if the parties appeared before a court where incompatibility is recognized as a legitimate grounds for divorce.<sup>88</sup> Should it be different if

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<sup>84</sup> See, e.g., *De Canas v. Bica*, 424 U.S. 351 (1976); *Graham v. Richardson*, 403 U.S. 365 (1971); *U.S. v. Oregon*, 366 U.S. 643 (1961); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *New York City v. Miln*, 36 U.S. (11 Pet.) 102 (1837), *rev'd*, *Henderson v. New York City*, 92 U.S. 259 (1876).

<sup>85</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>86</sup> 334 U.S. 1 (1948).

<sup>87</sup> Wechsler, *supra* note 58, at 29.

<sup>88</sup> *Kober v. Kober*, 16 N.Y.2d 191, 264 N.Y.S.2d 364, 211 N.E.2d 817 (1965). This case is an annulment case, so the result would be *a fortiori* for an incompatibility

the state, through its courts or its legislature, declares this particular sort of incompatibility to be a ground for ending a marriage without so providing for incompatibility in general? That the answer to this question is Yes seems to us to be the meaning of the precedent of *Shelley v. Kraemer*.

## V.

This distinction proposed as fundamental to the application of *Shelley v. Kraemer* is grounded in the view that the meaning of *Brown v. Board of Education* was a judicial recognition of the historical need to admit blacks into the United States community on equal terms, to overcome the legacy of the Supreme Court decision in *Dred Scott* as to "whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States":<sup>89</sup>

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States. . . .<sup>90</sup>

. . . .  
In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument.<sup>91</sup>

. . . .  
[T]he men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood

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divorce. In *Kober*, the defendant-husband, who had been a member of the Nazi party and an officer in the German Army in WW II, was fanatically anti-Semitic and approved of the attempt at genocide of the Jews. During courtship, he concealed his prejudice and associated amiably with his prospective wife's Jewish friends. After marriage, he revealed this prejudice and ordered her to cease associating with Jews. Note that there was no allegation that the wife-plaintiff was herself a Jew, and the comment in 35 *FORDHAM L. REV.* 125 (1966) indicates that she was not.

<sup>89</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393, 402 (1857).

<sup>90</sup> *Id.* at 403.

<sup>91</sup> *Id.* at 407.

the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.<sup>92</sup>

If our view of *Brown* is accepted, the legal justification for the *Shelley* decision rests on the Court's explicit statement that "[t]he parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color."<sup>93</sup> It could, of course, be claimed that once it is agreed that the court whose action is being reviewed would, in fact, enforce such a covenant, it denies equal protection of the laws to force a party to bear the burden of creating the situation in which such enforcement would take place. That the fact of the existing historical context is a sufficient basis on which to reject such a claim is what the Supreme Court of the United States held in *Reitman v. Mulkey*.<sup>94</sup> That decision affirmed the action of the California Supreme Court invalidating a state constitutional amendment providing in part that: "Neither the State nor any . . . agency thereof shall . . . limit . . . the right of any person . . . to decline to sell, lease, or rent . . . property . . . as he, in his absolute discretion, chooses." As the dissent in the United States Supreme Court noted:

The only "factual" matter relied on by the majority of the California Supreme Court was the context in which Proposition 14 was adopted, namely, that several strong antidiscrimination acts had been passed by the legislature and opposed by many of those who successfully led the movement for adoption of Proposition 14 by popular referendum. These circumstances, and these alone, the California court held, made [the

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<sup>92</sup> *Id.* at 410.

<sup>93</sup> 334 U.S. 1, 22 (1948).

<sup>94</sup> 387 U.S. 369 (1967).

resulting constitutional provision] unlawful under this Court's cases interpreting the Equal Protection Clause.<sup>95</sup>

Our contention is not that reliance on historical context is neutral in adjudicating between the contending parties; only that it is at times necessary in the process of making law for a diverse and rapidly changing society.

In upholding the application of Massachusetts' child labor laws to Jehovah's Witnesses, Justice Rutledge articulated the pressures compelling resort to history in adjudicating claims for exemption from secular laws under the Free Exercise Clause:

To make accommodation between religious freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.<sup>96</sup>

Because of the need for government to remain neutral between secularism as an ideology and religion, however, even reliance on historical context is often insufficient to overcome the difficulties involved in formulating a consistent pattern of decision. As Justice Jackson noted in the decision denying exemption from Massachusetts' child labor laws:

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<sup>95</sup> 387 U.S. 369, 391 (1967) (Harlan, J., dissenting).

<sup>96</sup> *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

The novel feature of this decision is this: the Court holds that a state may apply child labor laws to restrict or prohibit an activity of which, as recently as last term, it held: "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion." "[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Murdock v. Pennsylvania*, 319 U. S. 105, 109, 111.

It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets "occupy the same high estate" and have the "same claim to protection" it would seem that child labor laws may be applied to both if to either. If the *Murdock* doctrine stands along with today's decision, a foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.

. . . .

My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against

one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.<sup>97</sup>

The difficulty involved in ascertaining when something "concerns" non-members of a given sect, when a given denomination is legitimately perceived as threatening by the society in which it exists, is demonstrated in connection with the Church of Jesus Christ of Latter-Day Saints, both by *Reynolds v. United States*,<sup>98</sup> which refused to grant exemptions from laws against polygamy on free exercise grounds, and by *Mormon Church v. United States*,<sup>99</sup> which upheld Congressional legislation seizing the property of the church. And the number and diversity of opinions in *Wolman v. Walter*<sup>100</sup> underline the extent to which the "wall of separation" erected between church and state by the spending prohibition embodied in the Establishment Clause constitutes, today, "a blurred, indistinct, and variable barrier."<sup>101</sup> Given that situation, it seems noteworthy that the Warren Court opinion that constituted a significant expansion of federal taxpayer's standing in connection with government spending occurred in a case raising precisely such issues.<sup>102</sup>

## VI.

Justice Marshall summarized the basis for his dissent from the Burger Court's opinion in *Beal v. Doe*<sup>103</sup> in the following terms:

When this Court decided *Roe v. Wade* . . . it properly embarked on a course of constitutional adjudication no less controversial than that begun by *Brown v. Board of Education*, 347 U.S. 483 (1954). The abortion decisions are sound law and undoubtedly good policy. They have never been questioned by the Court and we are told that today's cases "signal[ ] no retreat from *Roe* or the cases applying it. . . ." The logic of those cases inexorably requires invalidation of the present enactments. Yet I fear that the Court's decisions will be an invitation to public officials, already under extraordinary pressure

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<sup>97</sup> *Id.* at 176-78.

<sup>98</sup> 98 U.S. 145 (1878).

<sup>99</sup> 136 U.S. 1 (1890).

<sup>100</sup> 97 S. Ct. 2593 (1977).

<sup>101</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

<sup>102</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>103</sup> 97 S. Ct. 2366 (1977).



from well financed and carefully orchestrated lobbying campaigns, to approve more such restrictions. The effect will be to relegate millions of people to lives of poverty and despair. When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.<sup>104</sup>

The interpretation of *Wade* given in the majority opinion focuses on an interest strikingly similar to the one the Court postulated as the basis for Massachusetts' child labor laws:<sup>105</sup>

As we acknowledged in *Roe v. Wade*, 410 U.S. 113 (1973), the State has a valid and important interest in encouraging childbirth. We expressly recognized in *Roe* the "important and legitimate interest [of the State] in protecting the potentiality of human life." *Id.*, at 162.<sup>106</sup>

The holding in *Beal v. Doe*, moreover, was explicitly presented as one based on textual analysis:

The only question before us is one of statutory construction: whether [the Social Security Act] requires Pennsylvania to fund under its medicaid program the cost of *all* abortions that are permissible under state law. "The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).<sup>107</sup>

Respondents point to nothing in either the language or the legislative history of Title XIX [of the Social Security Act] that suggests that it is unreasonable for a participating State to further [its] unquestionably strong and legitimate interest in encouraging normal childbirth. Absent such a showing, we will presume that Congress intended to condition a State's participation in the Medicaid Program on its willingness to undercut this important interest by subsidizing the costs of nontherapeutic abortions.<sup>108</sup>

The claims that no conflict with *Roe v. Wade* existed, that the logic of precedent did not "inexorably require" invalidation of the

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<sup>104</sup> *Id.* at 2398 (Marshall, J., dissenting).

<sup>105</sup> See text accompanying note 96 *supra*.

<sup>106</sup> 97 S. Ct. 2395, 2371 (1977).

<sup>107</sup> *Id.* at 2370.

<sup>108</sup> *Id.* at 2372 (footnotes omitted).

state and local enactments under review, were made in *Maher v. Roe*<sup>109</sup> in terms of a distinction that was explicitly invoked forty years earlier in upholding Title IX of the Social Security Act against the charge that it "involv[ed] the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."<sup>110</sup> What *Maher v. Roe* argued was that: "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."<sup>111</sup> And the earlier opinion rejected the Tenth Amendment argument on the basis that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. . . . We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future."<sup>112</sup>

As this argument makes explicit, the difficulty facing the judicial process has its roots, not only in the federal nature of the political structure, but also in the lack of clarity that necessarily results from "assum[ing] the freedom of the will as a working hypothesis",<sup>113</sup> from attempting to formulate logically consistent patterns of law that nevertheless remain relatively impervious to manipulation. The basis for this lack of clarity in connection with the work of the Securities and Exchange Commission was delineated by the author of the law review article cited in *Santa Fe Industries Inc. v. Green*,<sup>114</sup> in an opinion written while he was serving as chairman of that agency in 1964. Discussing the question whether "disclosure [could] be required in a prospectus regarding the adequacy of performance of managerial functions by registrant's board of directors,"<sup>115</sup> he noted that "outright fraud or reckless indifference by directors might be readily identifiable and universally condemned. But activity short of

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<sup>109</sup> 97 S. Ct. 2376 (1977).

<sup>110</sup> *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937).

<sup>111</sup> 97 S. Ct. at 2383.

<sup>112</sup> *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90, 591 (1937).

<sup>113</sup> *Id.* at 590.

<sup>114</sup> See note 28 *supra* and accompanying text.

<sup>115</sup> In the Matter of Franchard Corporation (Formerly Glockman Corporation) Securities Act. Rel. No. 4710, 42 S.E.C. 163, 175 (1964).

that, which may give rise to legal restraints and liabilities, invokes significant uncertainty,"<sup>116</sup> and that "[t]o be sure, we have required disclosures concerning particular transactions which have raised questions of non-compliance with state or federal law governing business conduct. . . . But the disclosures sought here . . . would either result in self-serving generalities of little value to investors or grave uncertainties both on the part of those who must enforce and those who must comply with [the Securities] Act."<sup>117</sup>

Beyond question, however, the political structure of federalism—the existence of competing political authorities—considerably exacerbates these difficulties in many areas of the law. With states, as with religious sects, it is the fact of competing power centers and the resultant diversity that requires the making of value choices that are not "neutral," in the sense that they have necessary substantive consequences rather than being capable of being rationalized solely in terms of process.

In *Serbian Orthodox Diocese v. Milivojevich*,<sup>118</sup> which involved ecclesiastical proceedings against a church official growing out of several attempted administrative reorganizations of church organizations and property, Mr. Justice White made precisely such a substantive holding when he concurred in Mr. Justice Brennan's majority opinion solely on the basis that "[m]ajor predicates for the Court's opinion are that the Serbian Orthodox Church is a hierarchical church and the American and Canadian Diocese, involved here, is part of that church."<sup>119</sup> As Mr. Justice Rehnquist put it in dissent:<sup>120</sup>

There is nothing in this record to indicate that the Illinois courts have been instruments of any . . . impermissible intrusion by the State on one side or the other of a religious dispute. . . . Instead, [the Supreme Court of Illinois'] opinion appears to be precisely what it purports to be: an application of neutral principles of law consistent with the decisions of the Court. Indeed, petitioners make absolutely no claim to the contrary. They agree that the Illinois courts *should* have decided the issues which *they* presented; but they contend that in doing so those courts should have deferred entirely to the representations of the announced representatives of Mother

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<sup>116</sup> *Id.* at 177.

<sup>117</sup> *Id.* at 178.

<sup>118</sup> 426 U.S. 696 (1976).

<sup>119</sup> *Id.* at 725.

<sup>120</sup> Mr. Justice Stevens joined in the dissent. *Id.*

Church. . . . To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the Free Exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.<sup>121</sup>

If it is accepted that the Supreme Court has no alternative to the making of value choices, one way of stating the task facing the Burger Court is its need to make acceptable society's recognition that the ambiguous value choice in favor of equality embodied in *Brown v. Board of Education* is being explicitly restricted to the entry of minority groups into the community on equal terms. Many of the Warren Court decisions, although enunciated in more limited terms, could justifiably have been construed as entailing a considerably broader commitment to the ideal of individual equality. In the field of criminal law, for example, *Escobedo v. Illinois*<sup>122</sup> was phrased in terms of sixth amendment guarantees and *Miranda v. Arizona*<sup>123</sup> was couched in fifth amendment language. *Escobedo*, however, relied on the "lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights,"<sup>124</sup> and, it therefore appears what *Escobedo* and *Miranda* could be read to postulate was the duty to equalize, between those who are aware of their constitutional rights and those who are not, the opportunity for access to counsel prior to interrogation that may result in invocation of fifth amendment rights.

In *Brewer v. Williams*,<sup>125</sup> the Burger Court explicitly refused "to review in this case the doctrine of *Miranda v. Arizona*, . . . a doctrine designed to secure the constitutional privilege against compulsory self-incrimination."<sup>126</sup> Brewer had been warned both by his own lawyer and by the lawyer at his arraignment not to make statements until after consulting with his lawyer, located in another city. As one of the concurrences in the Court's opinion noted:

As the dissenting opinion of *The Chief Justice* sharply illus-

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<sup>121</sup> 426 U.S. 696, 733-34 (1976) (Rehnquist, J., dissenting).

<sup>122</sup> 378 U.S. 478 (1964).

<sup>123</sup> 384 U.S. 436 (1966).

<sup>124</sup> 378 U.S. 478, 490 (1964).

<sup>125</sup> 97 S. Ct. 1232 (1977).

<sup>126</sup> *Id.* at 1239.

trates, resolution of the issues in this case turns primarily on one's perception of the facts. There is little difference of opinion, among the several courts (and numerous judges) who have reviewed the case, as to the relevant constitutional principles

. . . .  
The critical factual issue is whether there had been a voluntary waiver, and this turns in large part upon whether there was interrogation [during the automobile ride to the city in which his lawyer was located].<sup>127</sup>

The Iowa Supreme Court had affirmed the state trial court's determination of waiver, but lower federal courts, in federal habeas corpus proceedings, granted a new trial on the basis that "the issue of waiver was not one of fact but of federal law [and] that the Iowa courts had 'applied the wrong constitutional standards' in ruling that Williams had waived the protections that were his under the Constitution."<sup>128</sup>

The Supreme Court of the United States affirmed the lower federal courts on the basis that "[t]he circumstances of this case are . . . constitutionally indistinguishable from those presented in *Massiah v. United States* [377 U.S. 201 (1964)] . . . the clear rule of [which] is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."<sup>129</sup> Mr. Justice White dissented:<sup>130</sup> "[T]he issue is, as the majority recognizes, one of the proof necessary to establish waiver. If an intentional relinquishment of the right to counsel under *Miranda* is established by proof that the accused was informed of his right and then voluntarily answered questions in counsel's absence, then similar proof establishes an intentional relinquishment of the *Massiah* right to counsel."<sup>131</sup>

Given the dissent's analysis of the bearing of the *Massiah* precedent on the situation before the Court, it seems clear that the majority's focus on the fact that "adversary proceedings have commenced against an individual," while it may constitute a holding based on operational categories for the lawyer, is of only formal significance to the layman. If the choice made by the Court is a legitimate one, however, it will be so, not because of the mode of analysis in terms

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<sup>127</sup> *Id.* at 1245 (Powell, J. concurring).

<sup>128</sup> *Id.* at 1241.

<sup>129</sup> *Id.* at 1240 (footnote omitted).

<sup>130</sup> Mr. Justice Blackmun and Mr. Justice Rehnquist joined in the dissent.

<sup>131</sup> 97 S. Ct. at 1258 n.5 (White, J., dissenting).

of which it was derived, but because its substantive content focuses on a time when the relevant actor (the policeman to whom the incriminating statements were made) can be perceived as representing the government rather than as acting in his individual capacity—a distinction that we have argued explicates the meaning of the *Shelley v. Kraemer* precedent.<sup>132</sup>

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Whatever one's views concerning the decisions of the Warren Court, the Burger Court's response to them has been such as to make possible a new strategy in securities litigation. Securities lawyers have habitually analyzed issues in terms of the dichotomy that the issue is governed either by state corporate or federal securities law. We would like to suggest that there is a *tertium quid*: the issue is governed by state corporate law, but the content of state corporate law is limited by federal securities law. Thus, the restrictive covenant involved in *Shelley v. Kraemer* is governed by state property law, but the permissible content of the state property law is limited by that decision. If the content of the state real property law can be limited by federal constitutional law, why can't the content of the state substantive law of corporations be limited by federal securities law? Although we cannot predict the Burger Court's response to this strategy, it would seem to fit well with the Court's approach to other issues in that federal policy would be made obligatory upon the states without any transfer of jurisdiction to the federal courts.

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<sup>132</sup> See text accompanying note 88 *supra*. Cf. *Screws v. United States*, 325 U.S. 91 (1945). For a denial of an analogous distinction, see text accompanying note 34 *supra*.

