Duke Law Journal

VOLUME 52 MARCH 2003 NUMBER 5

JUSTICE LEWIS F. POWELL, JR., AND THE COUNTERREVOLUTION IN THE FEDERAL SECURITIES LAWS

A.C. PRITCHARD†

Copyright © 2003 by A.C. Pritchard.

† Assistant Professor, University of Michigan Law School. A portion of the research for this project was done while I was a Visiting Scholar at the Securities and Exchange Commission (SEC or Commission). Jake Stillman, Solicitor of the SEC, was generous in sharing copies of government briefs in many of these cases as well as his recollections. The Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are mine and do not necessarily reflect the views of the Commission or its staff. Additional research was done while I was a Visiting Fellow in Capital Markets Research at the Cato Institute.

This project would not have been possible without the assistance of John Jacob, archivist of the Powell Archives at the Washington & Lee Law Library. John went above and beyond the call of duty in providing me with access and insights to the collection. He is a credit to his profession and I am grateful for his assistance. Unpublished sources are from the Powell Archives unless otherwise noted, and copies are on file with both the author and the *Duke Law Journal*.

Dan Spies and the libraries of the University of Michigan Law School and the Georgetown University Law Center provided helpful research assistance. Numerous individuals also provided background on Powell's corporate law practice and former Powell clerks offered insights into his work on the Supreme Court; their very helpful contributions are acknowledged in footnotes at appropriate places in the text. Steve Bainbridge, Susanna Blumenthal, Evan Caminker, Steve Choi, Rich Friedman, John Jeffries, Jill Fisch, Mitu Gulati, Don Langevoort, Joan Larsen, Ronald Mann, Richard Painter, Hillary Sale, Mike Seidman, Joel Seligman, Randall Thomas, Bob Thompson, Mark West, and Chris Whitman provided useful comments on earlier drafts of this Article. Any remaining errors of fact or interpretation are my own. The Cook Fund of the University of Michigan Law School provided generous financial support for this research.

ABSTRACT

The confirmation of Lewis F. Powell, Jr., to the Supreme Court coincided with a dramatic shift in the Court's approach to securities law. This Article documents Powell's influence in changing the Court's direction in securities law. Powell's influence was the product of his extensive experience with the securities laws as a corporate lawyer, which gave him much greater familiarity with that body of law than his fellow Justices had. That experience also made him skeptical of civil liability, particularly class and derivative actions. Powell's skepticism led him to interpret the securities law in a consistently narrow fashion to reduce liability exposure and increase predictability. Powell also rebuffed the Securities and Exchange Commission's efforts to expand its reach, most notably in insider trading and takeover regulation. Powell's experience and interest brought a halt to the continuing expansion of the federal securities law.

TABLE OF CONTENTS

INTRODUCTION

The 1960s witnessed a rapid expansion of the federal securities laws, primarily through broad interpretations of Rule 10b-5 of the Securities Exchange Act[1] by the courts and the Securities and Exchange Commission (SEC). Rule 10b-5—ostensibly a simple antifraud provision—threatened to become an overarching "federal corporation law."[2] In 1961, the SEC pioneered prohibitions against insider trading in its *Cady, Roberts* decision.[3] In 1964, the Supreme Court recognized the existence of a private cause of action for proxy violations in *J.I. Case Co. v. Borak*.[4] That recognition tacitly validated private suits under Rule 10b-5 as well, setting loose a plethora of decisions in which lower federal courts imposed a variety of duties on corporate officers and directors. In 1969, Louis Loss observed that "the great Rule 10b-5 . . . seems to be taking over the universe gradually."[5] The lower courts could feel confident that their expansive interpretations would be upheld, given the Supreme Court's consistently broad reading of those laws from the time of their enactment.[6] This trend reached its apogee during the Court's October 1971 term, with two of the most expansive decisions.[7] The federal securities laws seemed poised to take over the law governing corporations entirely.

---

1. 17 C.F.R. § 240.10b-5 (2002).

2. *See generally* Arthur Fleischer, Jr., *"Federal Corporation Law": An Assessment*, 78 HARV. L. REV. 1146 (1965) (arguing that "the growth of federal law in the corporate area is sound," but noting the criticism "that federal law has invaded areas never contemplated by the Congress when adopting the securities acts").

3. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912–13 (1961).

4. 377 U.S. 426, 430–31 (1964).

5. Louis L. Loss, *The American Law Institute's Federal Securities Code Project*, 25 BUS. LAW. 27, 34 (1969); *see also* David S. Ruder, *Pitfalls in the Development of a Federal Law of Corporations by Implication Through Rule 10b-5*, 59 NW. U. L. REV. 185, 185 (1964) ("Despite Congressional unwillingness to enact a 'federal law of corporations', it now appears that such a law is arising by implication through interpretation of the various securities acts.").

6. *See* Alfred F. Conard, *Securities Regulation in the Burger Court*, 56 U. COLO. L. REV. 193, 195 (1985) (demonstrating that of nineteen Supreme Court securities law cases decided between 1933 and 1971, the Court opted for the broader approach in sixteen).

7. The two cases are *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153–54 (1972) (recognizing a presumption of reliance for fraudulent omissions), and *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6, 12 (1971) (expanding the "in connection" requirement under section 10(b)). Neither Powell nor Justice Rehnquist participated in these two cases. *Bankers Life* was Justice Douglas's last securities law opinion for the Court and *Affiliated Ute* was Justice Blackmun's first. Search of Westlaw, SCT database (Mar. 2003). *Bankers Life* was unanimous and *Affiliated Ute* was unanimous except for a partial dissent by Justice Douglas; he would have held the United States liable for the fraud as well. *See Affiliated Ute*, 406 U.S. at 157 (Douglas, J., concurring in part and dissenting in part) (stating that Justice Douglas would

This trend dominated corporate and securities law when Lewis F. Powell, Jr., was sworn in as an Associate Justice of the Supreme Court on January 7, 1972. Powell's swearing in coincided with an immediate sea change in the path of the federal securities laws.[8] Although the Burger Court has been described as "the counter-revolution that wasn't" in constitutional law,[9] that description does not fit securities law. By the time Powell retired from the Court on June 26, 1987, federal securities law had been confined. The threat to state corporate law had been beaten back, if only for a time.[10]

It would be an exaggeration to give Justice Powell sole credit for this retrenchment—other Justices wrote important opinions curtailing the growth of liability under the federal securities law.[11] And the threat of a federal incorporation was beaten back with the election of Ronald Reagan, which augured a renewed commitment to the governing role of the states. Nonetheless, it would be difficult to identify anyone who did more to limit the reach of the federal securities law than Powell.

This Article chronicles Justice Powell's influence on federal securities law. Powell participated in forty-one decisions involving the federal securities laws, writing twelve opinions for the Court. Powell wrote some of the foundational opinions in securities law, found in

---

"go further" than the Court by holding that the United States had "waived sovereign immunity to petitioners' claims"). Justice Blackmun characterized his opinion in *Affiliated Ute* as taking "a very liberal approach to Rule 10b-5. This may represent a step beyond any point the Court has heretofore reached." Memorandum to the Conference from Justice Harry A. Blackmun (Apr. 10, 1972) (from the files of Justice William J. Brennan, Jr., Library of Congress).

8. *See* Lewis D. Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891, 891–92 (1977) (footnotes omitted):

> Before recent Supreme Court decisions, plaintiffs' lawyers and the Securities and Exchange Commission had been relatively free to devise original and imaginative causes of action based upon the federal securities laws. Following these decisions, however, the entire momentum has shifted. In these recent holdings, the Supreme Court has consistently decided in favor of the defendants and has enunciated principles that may circumscribe the rights of plaintiffs under the federal securities laws for many years to come.

9. THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

10. The threat has recently resurfaced in the recently enacted Sarbanes-Oxley Act, which intrudes upon state corporate law in a variety of ways. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

11. *See, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473–74 (1977) (White, J.) (holding that section 10(b) and Rule 10b-5 reach only manipulative or deceptive conduct); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 755 (1975) (Rehnquist, J.) (holding that only purchasers and sellers of securities can bring actions under Rule 10b-5).

every securities casebook: *Chiarella*[12] and *Dirks*[13] on insider trading, *Ernst & Ernst*[14] on scienter, *Forman*[15] and *Landreth Timber*[16] on the definition of a security. Even in those cases in which Powell did not write, he played an important role in their selection and resolution.

The Article makes two principal contributions. First, it fills a major gap in the understanding of Justice Powell's work on the Supreme Court. John Jeffries's otherwise excellent biography of Powell discusses Powell's practice as a corporate lawyer, but it does not discuss Powell's work in securities cases.[17] Securities law, however, was of singular importance to Powell. His background as a corporate lawyer gave him a level of experience and familiarity with the securities laws unmatched by his colleagues. Consequently, Powell felt a special responsibility to guide his colleagues when they faced securities law questions. Of equal importance, Powell's experience as a corporate lawyer had left him with definite views on the direction that the securities laws should take. In contrast to his reputation as a swing vote in constitutional cases, Powell had profoundly conservative views on the proper scope of the federal securities laws, and he pushed the Court toward holdings consistent with those views.

The Article's second contribution is to show *how* Powell, more than any other Justice, helped cabin the federal securities law. In contrast to most studies of the Supreme Court's work, which rely exclusively on published opinions, I draw heavily from Powell's private Court papers, including drafts of opinions and correspondence among the Justices, to explore how the Court's opinions came to their final, published form.[18] Most of the case files contain memoranda dictated

---

12. Chiarella v. United States, 445 U.S. 222 (1980).

13. Dirks v. SEC, 463 U.S. 646 (1983).

14. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

15. United Hous. Found., Inc. v. Forman, 421 U.S. 837 (1975).

16. Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).

17. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR., at xi (1994) (listing "six areas of commanding interest: desegregation, abortion, Watergate, the death penalty, affirmative action, and sexual equality"); Michael J. Gerhardt, *The Art of Judicial Biography*, 80 CORNELL L. REV. 1595, 1601 (1995) (book review) ("Nor does Jeffries show how nearly forty years in corporate practice shaped Powell's corporate and securities opinions for the Court.").

18. The papers are well-organized and comprehensive. Powell took care to ensure that they would be of use to historians. Memorandum from Justice Lewis F. Powell, Jr., to Sally [Smith] and Linda [Blandford] 1–2 (Feb. 28, 1979) (regarding his concern for the legibility of file copies of correspondence and memoranda). Many of the papers relied upon were dictated by Powell and unedited, as they were for his internal use. Consequently, there are some typographical errors in selections that I quote. I quote these materials as they appear in the original documents. The errors should not be construed as carelessness on Powell's part, but rather an effort to

by Powell, either to memorialize his view of a case during the summer recess or to guide the clerk working on the case.[19] Powell frequently outlined the points that he intended to make at conference (particularly in complicated cases). The papers also include Powell's tally of votes on certiorari as well as notes on oral argument and discussion at the Justices' subsequent conference.[20] These materials taken as a whole give a fuller account than is available from reading only published opinions, providing a window into judicial behavior and how the Supreme Court makes law. They also show how Justices work with their clerks to draft opinions. Finally, the papers show the influence that a single Justice can have on his colleagues.

The materials also demonstrate a fact that might be obscured if one looked only at published opinions: in interpreting the securities laws, text and statutory structure mattered to Powell and the other members of the Court, but policy mattered at least as much. Powell's policy views, grounded in his experience as a corporate lawyer, generally favored the narrower reading of the federal securities laws. Powell favored predictability in the application of the securities laws. Moreover, he was suspicious of the efforts of private plaintiffs and the SEC to bring the federal securities law into areas traditionally governed by state law and private agreement. Powell led the Court to reverse its direction from the expansive path it had taken in the 1960s. The cases decided during Powell's tenure helped confine the federal securities laws, slowing the growth of liability and checking the takeover of state corporate law. Powell's emergence as the Court's securities law leader produced a counterrevolution in the federal securities laws.

This Article proceeds in six Parts. Part I provides background on Powell's career before his nomination to the Court. Part II demonstrates the leadership role that Powell played on the Supreme Court in the field of securities law. The remainder of the Article is organized by general themes in Powell's work in securities cases. Part III

---

economize on secretarial time. Powell was meticulous in editing work that was to be published; indeed, he was sufficiently compulsive in this regard that he frequently corrected typographical and grammatical errors in certiorari pool memoranda.

19. In addition, these papers include certiorari memoranda as well as bench memoranda. Powell wrote extensive comments in the margins on the merits and the relative importance of issues presented. He had the helpful habit (for a researcher) of indicating his agreement with a point by writing "Yes" in the margin of documents that he reviewed.

20. These notes must be read with some caution, as they reflect Powell's view of the discussion at conference and his choices on what to record. His attitudes on the underlying issues no doubt affected the record that he made.

describes Powell's efforts to minimize liability exposure under the securities law. It focuses on cases defining "sale," as well as the elements of Rule 10b-5, representative actions, and the implication of private rights of action. Part IV examines Powell's preference for predictability in the securities laws. Predictability allows lawyers to advise their clients of their duties under those laws, but predictability can come into tension with the desire to limit liability, a topic discussed in the context of cases defining "securities." Part V examines Powell's protection of local business from the threat of hostile takeover. Part VI focuses on Powell's skepticism toward the SEC's efforts to expand its authority, focusing in particular on his insider trading opinions.

I. EXPERIENCE AND OUTLOOK

Apart from William O. Douglas, who served as chairman of the SEC before his nomination to the Supreme Court, Lewis Powell is the only securities lawyer to serve on the Court since the federal securities laws were passed in 1933 and 1934. Although other Justices had private practice experience, none could match Powell's hands-on experience with the federal securities laws. Powell's years as a corporate lawyer would profoundly shape Powell's work in securities law during his time on the Court. In addition to being an experienced corporate lawyer, Powell also had an extensive litigation practice on behalf of corporate clients. Powell's political activities were generally pragmatic, based on the needs of his clients, but his involvement in national politics was ideologically motivated. Powell's close interaction with businessmen led him to trust their character. That trust, in turn, made him generally hostile to what he saw as excessive regulation, which he thought infringed on free enterprise—the first step down the path toward socialism.

Lewis F. Powell, Jr., was born in Suffolk, Virginia and raised in Forest Hill, a suburb of Richmond.[21] When he completed his legal education in 1932,[22] Powell turned down an offer of $150 a month to join the Davis, Polk firm in New York.[23] He instead went to Christian,

---

21. JEFFRIES, *supra* note 17, at 16–18.

22. Powell took his law degree at Washington & Lee before getting an LLM from Harvard. *Id.* at 36–41.

23. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, Managing Partner, Hunton & Williams 3 (Aug. 1977).

Barton and Parker in Richmond for a monthly salary of fifty dollars.[24] No other firm in town would offer him even an office in the lean years of the Depression.[25] He left two and a half years later to join Hunton & Williams, where he practiced (interrupted only by military service) until his nomination to the Supreme Court in 1971.[26] Hunton & Williams was Richmond's leading firm and Powell, a consummate rainmaker,[27] became its dominant partner.[28]

Powell began his career as a litigator. In his first major case, a fiduciary claim, he represented the receiver of a failed bank against its former directors.[29] His cases were a typical mix, including negligence cases against the Southern Railway Company,[30] a tax case for a real estate developer,[31] a patent infringement case for General Motors,[32] railroad reorganizations,[33] and litigation over a stock subscription agreement.[34] Powell lost his only case before the Supreme Court, a constitutional challenge to an "entrance fee" that Virginia imposed on foreign corporations wishing to do business in the state.[35] Powell continued to litigate cases throughout his career, winning his last one, an antitrust challenge by the Justice Department to United Virginia

24. *Id*.

25. *Id*.

26. *Id.* at 4, 9.

27. Telephone Interview with Lawrence E. Blanchard, Jr., Former Attorney, Hunton & Williams (Mar. 22, 2002) (describing Powell as a "master of making connections").

28. JEFFRIES, *supra* note 17, at 187. Powell's abilities evidently were apparent from the beginning. When Powell was just beginning as a lawyer, his first boss, Andrew Christian, told Morton G. Thalhimer (a department store owner who would later become a client of Powell's): "Mark my words. Our mutual friend, Lewis Powell, is going to go to the very top of the legal profession. He is one of the most brilliant men I have ever had the privilege of meeting and one of the nicest." Letter from Morton G. Thalhimer to Justice Lewis F. Powell, Jr. 1 (Mar. 17, 1976).

29. Memorandum from Justice Lewis F. Powell, Jr., to Jody, Penny, Molly, and Lewis III [Powell] 5 (Dec. 15, 1981).

30. Southern Ry. Co. v. Barker, 4 S.E.2d 395 (Va. 1939).

31. Camp v. Murray, 226 F.2d 931 (4th Cir. 1955).

32. Welch v. Gen. Motors Corp., 330 F. Supp. 80 (E.D. Va. 1970).

33. Old Colony Bondholders v. N.Y., New Haven & Hartford R.R. Co., 161 F.2d 413 (2d Cir. 1947).

34. Marcuse v. Broad-Grace Arcade Corp., 180 S.E. 327 (Va. 1935).

35. Atl. Ref. Co. v. Virginia, 302 U.S. 22 (1937). Although he lost the case, Powell did win the admiration of opposing counsel in getting the Court to hear it at all. Letter from W.W. Martin, Assistant Attorney General, Commonwealth of Virginia, to Lewis F. Powell, Jr. 1 (May 20, 1936) (congratulating Powell on the grant of certiorari and "the most creditable manner by which you won this opportunity").

Bank's acquisition of a local bank; the trial concluded just a few days before Powell's nomination to the Court.[36]

Gradually, however, Powell moved toward a "general business practice,"[37] with clients ranging from Eskimo Pie to Philip Morris.[38] This practice was built on a foundation of securities work. Powell recalled that "I . . . file[d] two of the earliest registration statements filed from the Richmond area under the Act of '33. This qualified me as an 'expert,' with the result that I was retained to do a good deal of securities work."[39] In a field that values precision, Powell developed a reputation for "meticulous" work.[40] Powell's work on registered offerings for Scott & Stringfellow (a local investment bank) led to other corporate work.[41] Powell advised clients on the private offering exemption from registration under the Securities Act[42] and corporate governance issues,[43] drafted charter amendments for preferred stock

36. Letter from Justice Lewis F. Powell, Jr., to Robert P. Buford, Attorney, Hunton, Williams, Gay & Gibson 1 (May 24, 1973); Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 19.

37. Letter from Justice Lewis F. Powell, Jr., to Robert P. Buford 1 (May 8, 1981).

38. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 21, 23. Powell never lost interest in the companies that he represented, continuing to read their annual reports during his time on the Court. Letter from Justice Lewis F. Powell, Jr., to Paul H. Riley, Chairman of the Board, Commonwealth Natural Gas Corp. 1 (Jan. 5, 1976) (requesting the annual report and quarterly statements of Commonwealth Natural Gas Corporation). He also maintained his interest in investing, continuing to consult Harvie Wilkinson on stock recommendations. Letter from Justice Lewis F. Powell, Jr., to J. Harvie Wilkinson, Jr. 1 (Mar. 25, 1982). Powell sold his stocks in companies subject to federal regulation upon joining the Court to limit the need for recusals. Letter from Justice Lewis F. Powell, Jr., to John W. Riely, Attorney, Hunton & Williams 1 (Oct. 1, 1980). While he held a significant portfolio, Powell was not an active trader. He became quite defensive on the subject after newspaper accounts suggested that he was an active trader and that his stock ownership was causing a substantial number of recusals. Letter from Justice Lewis F. Powell, Jr., to Ste[phen] Wermiel, Wall Street Journal 1–3 (June 15, 1981). Powell's letter had a salutary effect, as the *Wall Street Journal* wrote an article that Powell considered more balanced. Letter from Justice Lewis F. Powell, Jr., to Stephen Wermiel, Wall Street Journal 2 (Aug. 25, 1981) (thanking Wermiel for his "constructive" article).

39. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 9.

40. Telephone Interview with Lawrence E. Blanchard, Jr., *supra* note 27 (stating that Powell was the "[t]he most meticulous securities lawyer I ever knew").

41. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 10–11, 13–14.

42. Memorandum from Lewis F. Powell, Jr., to James J. Ward and James E. Galleher 2 (Oct. 5, 1940) (advising that "an offering to ten or fifteen institutions would clearly seem to be private, other things being consistent, whereas, an offering to from twenty to twenty-five institutions may not be such a clear case").

43. Letter from Lewis F. Powell, Jr., to Edwin B. Horner 1–2 (Mar. 22, 1957).

issues,[44] helped them wage proxy battles,[45] and set up life insurance companies[46] and public utilities.[47] In sum, Powell faced the broad range of issues handled by the typical corporate lawyer.[48]

Powell also did deals. Powell represented Miller & Rhoads (a local retailer) when it merged with Garfinckel, serving on the board of the merged company and acting as its general counsel.[49] More prominently, Powell represented Albemarle (a small Virginia paper company) in its 1962 acquisition of Ethyl, a joint venture of General Motors and Standard Oil.[50] Albemarle was Powell's first major corporate client. Powell met its president, Floyd Gottwald, in the late 1940s, when Powell represented an investment bank that was arranging a loan to Albemarle.[51] Gottwald made Powell Albemarle's counsel shortly thereafter and invited him to join its board in 1953.[52]

Gottwald had a flair for the audacious. At the time, the Ethyl transaction was called "Jonah swallowing the whale";[53] today, it would be called a leveraged buyout. Albemarle, with a net worth of $25 million and no background in the chemical industry, needed to borrow $200 million to acquire the much larger Ethyl, which would leave it with "an almost unheard of 85 to 90 per cent debt ratio."[54] Ethyl was closely held by General Motors and Standard Oil, but the holding

44. Letter from Lewis F. Powell, Jr., to Martin Victor, Attorney, Sullivan & Cromwell 1 (Nov. 15, 1946).

45. Letter from Lewis F. Powell, Jr., to Edwin Hyde 1–2 (June 1, 1956).

46. Letter from Edwin B. Horner to Lewis F. Powell, Jr. 1 (Nov. 8, 1971) ("I remember vividly in your office the day you said, 'You cannot start a life insurance company. You have done enough funny things.' But at your desk First Colony was created.").

47. Letter from Justice Lewis F. Powell, Jr., to John W. Riely, *supra* note 38 (discussing the formation of Commonwealth Natural Resource Corporation).

48. He also found time to lecture to the corporations class at the University of Richmond's law school on "the legal problems involved in the obtaining of public capital by corporations. This will include the registration of securities with the SEC, and also 'intrastate within Virginia' and 'private placements'." Letter from Lewis F. Powell, Jr., to William T. Muse, Dean, T.C. Williams School of Law, University of Richmond 1 (Apr. 1, 1955). Powell also was a lecturer at the graduate business school at the University of Virginia. Letter from Francis L. Berkeley, Secretary, University of Virginia, to Lewis F. Powell, Jr. 1 (Dec. 10, 1954).

49. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 10–11.

50. *See* JEFFRIES, *supra* note 17, at 189–92 (describing the transaction).

51. Letter from Justice Lewis F. Powell, Jr., to Anne Gottwald 1 (Aug. 16, 1982).

52. Letter from Lewis F. Powell, Jr., to F[loyd] D. Gottwald, President, Albemarle Paper Manufacturing Company 1 (Jan. 5, 1954) ("Just about the nicest thing that happened to me during 1953 was being invited to join your Board.").

53. Lawrence E. Blanchard, Jr., The Albemarle-Ethyl Deal in 1962, at 16 (Aug. 1974).

54. *Id.* at 7, 16.

made little strategic sense for those firms.[55] Despite Albermarle's small size, they were willing to give Gottwald a chance to get the deal done, apparently impressed by his vision and energy. Arranging the financing for this transaction was an enormous effort, involving a series of delicate negotiations and a fair amount of creativity. The acquisition was financed through four levels of financing: insurance companies lent the first $114 million; $16 million came from Chase Manhattan; General Motors and Standard Oil took back $20 million of the purchase price as debt; and $50 million in "Junior-Junior Notes"—subordinated debt accompanied by warrants—was sold to institutional investors.[56] Standard Oil complicated the transaction by insisting that its part in the negotiations be done in Nova Scotia so that its gain from the sale would qualify as foreign income.[57] Powell drafted the proxy statement for the Albemarle shareholders himself, "walking an extremely tight rope between disclosing enough but not too much."[58] "Too much" in this context presumably meant unduly emphasizing the risks of this high stakes gamble by Albemarle. The deal's success astounded Wall Street and cemented Hunton, Williams's reputation as a corporate firm.[59]

Another milestone transaction was the aggregation of a number of regional banks to create United Virginia Bankshares (UVB, now part of SunTrust).[60] Powell's best friend was Harvie Wilkinson,[61] president of the State-Planters Bank of Commerce and Trusts, Virginia's largest bank, which was headquartered in Richmond.[62] Wilkinson arranged for Powell to serve as general counsel of the bank and Powell became a director in 1959.[63] Powell served as much as a busi-

---

55. *Id.* at 3.

56. *Id.* at 15.

57. *Id.* at 5.

58. *Id.* at 17.

59. Justice Lewis F. Powell, Jr., The Albemarle/Ethyl Deal in 1962: Addendum to Larry Blanchard's Memorandum of August 1974, at 2 (July 3, 1975).

60. *See* JEFFRIES, *supra* note 17, at 188 (describing Powell's role in helping State-Planters Bank become United Virginia Bankshares).

61. Wilkinson and Powell attended McGuire's University School together and became reacquainted when both returned to Richmond after completing their education. WILLIAM K. KLINGAMAN, J. HARVIE WILKINSON, JR.: VIRGINIAN, BANKER, VISIONARY 8–9 (1994).

62. *Id.* at 73.

63. Letter from J. Harvie Wilkinson, Jr., to Lewis F. Powell, Jr. 1 (Oct. 8, 1959).

ness advisor as a lawyer; Wilkinson observed that Powell had more business sense than most businessmen that Wilkinson knew.[64]

Virginia had difficulty competing with other states to attract business because its fragmented banking structure did not allow for the large aggregation of capital necessary to finance business development.[65] Wilkinson wanted to create a larger bank, but that goal raised important strategic questions.[66] Businesses and bankers in smaller communities such as Lynchburg and Danville were wary of the larger Richmond banks.[67] Rather than merging the disparate banks into one company, Wilkinson and Powell settled on a holding company structure.[68] This structure not only allowed for the banks to retain their local identities, but also allowed management of the acquired banks to retain their positions, thus neatly sidestepping a potential obstacle to the plan.[69]

To achieve the goal of a statewide bank, however, required a change in Virginia law.[70] Fortunately, Powell moved easily among Virginia's political, legal, and business circles. He not only drafted the necessary legislation, he lobbied the Virginia General Assembly on its behalf, testifying at committee hearings.[71] He also participated in the negotiations with the banks to be joined under the holding company's umbrella.[72] Powell served on UVB's board,[73] as he did for many clients,[74] resigning only after his nomination to the Court.

Powell's political ties benefited not only UVB, but also his other clients, and he carefully maintained those ties. Explaining to Wilkinson's son why he could not support his candidacy for Congress, Powell wrote:

---

64. Telephone Interview with J. Harvie Wilkinson III (Mar. 18, 2002) (commenting on his father's opinion of Powell).

65. KLINGAMAN, *supra* note 61, at 89–95.

66. *Id.* at 90–91.

67. *Id.* at 92–93.

68. *Id.* at 93–94.

69. *Id.* at 94–98.

70. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 17.

71. *Id.* at 18.

72. Telephone Interview with J. Harvie Wilkinson III, *supra* note 64.

73. KLINGAMAN, *supra* note 61, at 101.

74. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 30:

> I served on the boards of directors of a high percentage of my corporate clients. Where the client is a Virginia corporation, the lawyer responsible for its general legal work often can be most useful if he serves on the board. Moreover, many clients find that lawyers make constructive directors. . . . [P]erhaps the single best way to retain client loyalty, as well as serve the client, was to be an active member of its board.

> I feel morally obligated to support Dave Satterfield. He has been extremely helpful to important clients of Hunton, Williams for whom I am responsible. He has gone far beyond the ordinary "call of duty" of a Congressman to support constituents. The House is now considering legislation which—quite literally—is a matter of life and death to a significant part of Ethyl Corporation's business. My team here—including myself personally—has been working intimately with Dave (almost daily) to amend the most objectionable features of the proposed law. He is a member, with some seniority now, of the important committee on Interstate Commerce—a Committee which deals with a number of matters of vital interest to our major clients.[75]

Being the leading lawyer in Richmond required a total commitment, sometimes at the expense of personal friendships.

Powell bolstered his political connections through heavy involvement in civic affairs.[76] In addition to his involvement with the American Bar Association (which he eventually led as its president), Powell also played a number of roles with the local chamber of commerce, including its president.[77] Powell's connections would prove invaluable in his efforts to reform Richmond's public schools and keep their doors open in the face of desegregation.[78] Powell's wide involvement in civic affairs produced the "positive by-product" of establishing his name among prospective clients as well.[79]

Powell's work with businessmen in community affairs made him a strong defender of "free enterprise" against political incursion. His defense of free enterprise was grounded in his belief in the integrity of American businessmen: "[S]ince about the middle Thirties the 'business' morals of the average American business man have been exceptionally high."[80] Writing about his friend Wilkinson, Powell re-

---

75. Letter from Lewis F. Powell, Jr., to J. Harvie Wilkinson III 1 (Apr. 28, 1970). Wilkinson III bounced back from his electoral defeat to later clerk for Powell on the Supreme Court and now serves as a judge on the Fourth Circuit Court of Appeals.

76. *See* Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 28 ("It was necessary to keep a sensible balance between community and public service activities and a lawyer's obligations to clients and partners.").

77. JEFFRIES, *supra* note 17, at 124.

78. *See id.* at 131–80 (detailing how Powell worked behind the scenes to help Virginia schools desegregate).

79. Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 8.

80. Letter from Lewis F. Powell, Jr., to Morton G. Thalhimer 1 (Nov. 27, 1951). Prior to that time, there had been lapses that had played a role in the rise of the regulatory state, Powell thought:

flected: "It is fashionable to criticize businessmen as being interested only in making money for stockholders. I have never thought this was a fair or even honest generalization. The leading businessmen in most communities also are among the leaders in civic, educational, charitable, and cultural affairs."[81]

These days, some might think that describing a businessman "as being interested only in making money for stockholders" was meant as praise. Powell, however, saw the role of business through the lens of his civic involvement:

> The free enterprise system is now under a wide-ranging attack from many in the media, in politics, and on the campus. Young people are no longer taught in schools and colleges that this system—and only this system—enabled America to achieve its greatness. There are many who would substitute a stultifying socialism, leading us down the road which England is following so disastrously. In a socialistic system, there would be no room for men like Harvie Wilkinson. The great things that he has done to improve the well being of his fellow man would be relegated to faceless bureaucrats.[82]

Powell was a fierce opponent of socialism throughout his career, particularly objecting to the use of the courts to redistribute wealth.[83]

Powell's hostility to socialism and his hawkish views on national defense appear to have driven his involvement in national politics. Although he was a "Virginia Democrat" in local elections,[84] he campaigned for Republican presidential candidates.[85] Powell feared

---

> the comparative lack of morals in business during the latter part of the Nineteenth Century caused a great deal of public and private criticism of business, and resulted in the era of governmental regulation of business. This same situation developed again following the boom of the Twenties and the collapse of the early Thirties.

Id.

81. Letter from Justice Lewis F. Powell, Jr., to Virginius Dabney 3 (June 3, 1975).

82. *Id.*

83. *See* Memorandum from Justice Lewis F. Powell, Jr., to Joe Carter, *supra* note 23, at 31 ("Unfortunately, government grows ever larger and more intrusive; the legislative branch enacts laws at every session that both require and stimulate litigation; and, increasingly, the judicial system is exploited for the redistribution of wealth—despite the inherent inequity in such a process.").

84. Powell's work on behalf of local Democrats was limited to financial support and some speeches on behalf of politicians who were friends. *See* Letter from Justice Lewis F. Powell, Jr., to Colgate W. Darden, Jr. 1 (Mar. 15, 1976) ("Although I was always a Virginia Democrat in state politics . . . I was never actually a participant in party affairs or decision-making.").

85. *See* Memorandum from Justice Lewis F. Powell, Jr., to Jody, Penny, Molly, and Lewis III [Powell], *supra* note 29, at 9 (stating that Powell and others organized a group called "Democrats for Eisenhower" in the 1952 and 1956 elections).

Franklin Roosevelt's vendetta against the capitalist system: "I really cannot tell you how strongly I feel that the welfare of this country requires the defeat of Mr. Roosevelt . . . and the election of a man who is sympathetic (rather than antagonistic) to the system of private profit which has enabled this country to attain its present greatness."[86] Powell also lobbied against Roosevelt's "Court packing" plan.[87] Powell similarly feared Harry Truman and Adlai Stevenson's "left-wing socialism."[88] Powell campaigned for Dwight Eisenhower, helping to organize the Virginia Democrats for Eisenhower.[89] He also supported Richard Nixon, who later appointed him to the Supreme Court.[90]

---

86. Letter from Lewis F. Powell, Jr., to Henry C. Riely 2 (Oct. 5, 1940).

87. Letter from Lewis F. Powell, Jr., to Senator Burton K. Wheeler 1 (Mar. 25, 1937) ("I am doing what I can in a quiet way to stimulate activity against this attack on the Supreme Court.").

88. Letter from Lewis F. Powell, Jr., to Senator Harry F. Byrd 1 (Oct. 15, 1952) ("Stevenson will be more successful than Truman in obtaining the passage of pet left-wing legislation such as the FEPC, socialized medicine, continued deficit spending, higher taxes and the like. In short, the trend toward socialism will inevitably be accelerated if Stevenson is elected.").

89. Letter from Lewis F. Powell, Jr., to Webster S. Rhoads 1 (Oct. 13, 1952) ("I am now in this campaign up to my neck. With the indulgence of my partners and my clients, I am averaging only three or four hours per day practicing law. The remainder of my time, usually until about midnight, is devoted to the campaign."). Powell also campaigned for Eisenhower in 1956. Letter from Lewis F. Powell, Jr., to Senator Harry F. Byrd 3 (Oct. 10, 1956) ("[I]f Stevenson should be elected the trend toward an American brand of socialism will be greatly accellerated [*sic*]. In short, we know that Virginia should support Eisenhower and conversely we all should do everything in our power to defeat Stevenson and Kefauver.").

90. *See* Letter from Lewis F. Powell, Jr., to Winthrop Rockefeller, Governor of Arkansas 1 (Sept. 19, 1968) ("We are making a major effort here in Virginia to carry the state for Nixon."); Letter from Lewis F. Powell, Jr., to Private James Harvie Wilkinson III 2 (Oct. 20, 1968) ("I am afraid Virginia is going for Humphrey. . . . The idiot vote—and lots of otherwise sensible votes—will go to Wallace; the Negro bloc and the straight-ticket Democrats will, of course, go for Humphrey."); Letter from Lewis F. Powell, Jr., to Richard M. Nixon 1 (Oct. 27, 1960):

> I appreciate very much your letter concerning my support in the campaign. I want you to know that I think, regardless of the outcome, that you are making a magnificent effort against the most formidable odds. I have also been proud of the way in which you have stood by your principles, and not endeavored to 'out promise' your opponent.

Powell's appointment to the Court put an end to active involvement in politics, but not his interest. *See* Letter from Justice Lewis F. Powell, Jr., to J. Harvie Wilkinson, Jr. 1 (Nov. 4, 1980) ("I write this on election day, with 'butterflies' very much in my tummy."). Powell's abstention from politics even extended to not voting. Letter from Justice Lewis F. Powell, Jr., to Senator Harry F. Byrd, Jr. 1 (Dec. 27, 1980). He did, however, continue to advise Senator Byrd on political issues. *See id.* (advising Byrd to join the Republican Party); Letter from Senator Harry F. Byrd, Jr., to Justice Lewis F. Powell, Jr. 1 (Nov. 21, 1980) (soliciting Powell's views on points to be made to President-elect Reagan); *id.* (handwritten notes of Justice Lewis F. Powell, Jr.) (noting that "Harry came to my chambers and we had an interesting, off-the-record discussion"). Powell was pleased by Nixon's victory over McGovern. *See* Letter from Justice Lewis F. Powell, Jr., to Edwin Hyde 1 (Nov. 8, 1972) (opining that the election had turned out better than

II. POWELL'S INFLUENCE

Powell's experience as a corporate lawyer lent him credibility with his colleagues on the Supreme Court in securities law cases. Powell worked diligently to maximize that influence, coming well prepared to conferences in securities cases, having mastered the often complicated facts and reduced a carefully thought-out analysis to writing.[91] Powell believed in hard work and organization, and his thorough preparation may have given him an edge in the Court's deliberations. In a frequently technical area where the other Justices were unlikely to have strongly held views, Powell's superior knowledge and preparation were a powerful force. And Powell was not afraid to use that influence from his earliest time on the Court. Unlike many areas of the Court's docket that Powell was confronting for the first time,[92] he *knew* securities law and was confident of his views. Those views remained very much informed by his experience as corporate counsel.[93]

Consider the first securities case in which Powell participated, *Kern County Land Co. v. Occidental Petroleum*.[94] The Court split 4-4 at conference, with Justice White passing.[95] After sending Justice White a memorandum on the merits, Powell—not content to wait on Justice White's response—sent a memorandum to his law clerk the

---

hoped). He strongly favored Ronald Reagan over Jimmy Carter. *See* Letter from Justice Lewis F. Powell, Jr., to Virginius Dabney et al. 1–2 (Nov. 18, 1980):

> [M]y relief that the country will not be in such inept hands for the next four years is tempered by the fear that our economic problems are too intractable to be resolved in the short term by any government. . . . I do think that the federal judiciary will benefit substantially from the change in Administration.

He worried, however, about the boldness of some of President Reagan's policies. *See* Letter from Justice Lewis F. Powell, Jr., to J. Harvie Wilkinson, Jr. 1 (Apr. 8, 1982) ("Granted that the President has inherited much of his economic problems from the excesses of a welfare state from Roosevelt through Carter, and from a world-wide recession, it does seem to me that Reagan's simplistic notions have been carried to a dangerous extreme.").

91. *See, e.g.*, Memorandum, Characteristics of Common Stock, N.Y. v. Foreman [*sic*] (Apr. 22, 1975) (outlining features of stock that this instrument lacked, including transferability, voting rights tied to ownership, the opportunity to profit and dividends).

92. *See* E-mail from Chris Whitman (former Powell clerk) to Adam Pritchard (Apr. 18, 2002) (stating that Powell was hazy on some distinctions in torts and civil rights cases).

93. Telephone Interview with John Buckley (former Powell clerk) (June 5, 2002).

94. 411 U.S. 582 (1973).

95. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Kern County Land Co. v. Occidental Petroleum Corp. 1 (Dec. 8, 1972). Powell's notes indicate that Justice Blackmun tentatively voted to reverse, but subsequently switched his vote. *Id.*

next day, instructing him to begin working on an opinion.[96] Powell explained that "[a]s I led the discussion at the Conference, I would think the chances are good that the opinion would be assigned to me if we have a majority. If I am in the minority, I will wish to dissent."[97] As a strategic matter, Powell noted that "[t]here is obvious advantage in our circulating a draft at a fairly early date."[98] Being first to write improved his chances of getting the crucial fifth vote. This memorandum from Powell's first securities case strikes a note that would become familiar in subsequent cases—Powell leading the discussion and expecting to write the opinion in his area of expertise.[99]

Within a few years, Powell was also confident in his role as the Court's securities law expert. Consider the following passage from a memorandum in *Piper v. Chris-Craft Industries*:

> If I should vote with the majority, there is a fair possibility—I would guess—that the opinion would be assigned to me in view of my having written several SEC cases. In view of the relevance of *Ernst and Ernst* to a central issue in this case, the Conference will expect me take the lead in advising the Conference whether the standard of liability imposed by CA2 (see Judge Timber's opinion) is compatible with the standard we adopted in *Ernst and Ernst*.[100]

After only four years on the Court, Powell had established the securities laws as his domain. As it happened, however, Powell's expecta-

96. Memorandum from Justice Lewis F. Powell, Jr., to William C. Kelly, Jr. 1 (Dec. 10, 1972).

97. *Id*.

98. *Id.* at 2.

99. Powell did not hesitate to remind his colleagues of his superior experience. Objecting to a passage in an opinion by Chief Justice Burger characterizing a bank as lending money to "obtain" the pledge of securities, Powell invoked his work as counsel to State Planters and United Virginia Bank:

> Any bank officer who makes a loan for the purpose of obtaining an inchoate interest in collateral should be fired. Collateral may be indispensable to the extension of credit, but lending officers of the bank I represented were instructed never to make a loan on the assumption that it probably could be repaid only by liquidating the borrower's collateral.

Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 1–2 (Jan. 8, 1981). Chief Justice Burger modified the offending language.

100. Memorandum from Justice Lewis F. Powell, Jr., to File, Piper v. Chris-Craft Indus., Inc. 2 (Aug. 26, 1976).

tion that the case would be assigned to him proved wrong, as the Chief Justice kept it for himself.[101]

More often, Powell's hard work in preparation for conference was rewarded with the opinion assignment. Not only did Powell write some of the most important cases during his tenure, he dominated in sheer numbers, writing close to thirty percent (twelve of forty-one) of the majority opinions in securities cases in which he participated. As the chart below demonstrates, this is more than any other Justice during that period.

Table 1
Supreme Court Federal Securities Law Decisions
During Lewis F. Powell, Jr.'s Tenure[102]

	Cases	For Cert.	Majority	Majority Opinions	Dissent	Majority%
Lewis F. Powell, Jr.	41	40	40	12	1	98%
Antonin Scalia	2	0	2	0	0	100%
Sandra Day O'Connor	11	6	11	2	0	100%
John Paul Stevens	32	16	25	3	7	78%
William H. Rehnquist	44	29	42	4	2	95%
Harry A. Blackmun	45	26	38	3	7	84%
Warren E. Burger	43	26	42	6	1	98%
Thurgood Marshall	45	19	32	4	13	71%
Byron R. White	46	35	39	3	7	85%
Potter Stewart	32	23	30	4	2	94%
William J. Brennan, Jr.	46	24	27	5	19	59%
William O. Douglas	11	5	2	0	9	18%

The chart also demonstrates that Powell rarely found himself in the minority. Of the forty-one securities cases in which Powell par-

101. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 3 (1977). The Court sidestepped the scienter issue, instead holding that the Williams Act did not provide a cause of action for damages to a defeated bidder in a takeover contest. *Id.* at 35; *see infra* notes 269–72 and accompanying text.

102. A Westlaw search of the SCT database within the period June 7, 1972, to June 26, 1987, and with the query "Securities Act," "Exchange Act," Investment Company Act," or "Investment Advisors Act" yielded forty-one cases.

ticipated on the merits, he dissented only once.[103] This record of success is more remarkable when one considers that Powell consistently took the most pro-business position of any Justice in securities cases. Powell's one dissent took a more conservative position than the majority. One looks in vain for more conservative positions than Powell's in either published dissents or internal conference notes.[104] By contrast, in Powell's more widely noticed constitutional law opinions, he often found the middle ground in some multi-factor balancing test that may have had stronger roots in political expediency than in constitutional principle.[105] Not surprisingly, this gave Powell a reputation among Court followers as a "swing vote." That description does not fit Powell's work in the field of securities law; he was a fixture in the majority, but it was a consistently conservative majority.

Powell was proud of the work that he was doing to curb the SEC and the plaintiffs' bar and pleased by the reception that his work received among his friends in the corporate bar. Writing to his former law clerk, Powell noted that:

> [T]he Harvard Law Review . . . did a real hatchet job on *Ernst & Ernst*. That part of the Supreme Court Review must have been written by a summer intern at the SEC. The experienced corporate bar (many of whom spoke to me at the ABA meeting in Atlanta and also at the Virginia Bar meeting) view *Ernst & Ernst* as a landmark decision, the result being compelled by the language, legislative history and structure of the Act. I remain more than content with the opinion.[106]

Powell wrote his opinions with practicing lawyers, not law students, in mind.[107]

---

103. Steadman v. SEC, 450 U.S. 91, 104 (1981) (Powell, J., dissenting). Chief Justice Burger has the same percentage of votes in the majority as Powell over this period, but his percentage is inflated by his not infrequent practice of reserving his vote until a majority emerged so he could assign the opinion.

104. The only exception would be Rehnquist's dissent in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979) (Rehnquist, J., dissenting); *see infra* notes 206–12 and accompanying text.

105. *See* JEFFRIES, *supra* note 17, at 560–61 (stating that Powell was a centrist who kept an open mind to all sides).

106. Letter from Justice Lewis F. Powell, Jr., to Gregory K. Palm 1 (Jan. 1, 1977). The "hatchet job" refers to *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 255 (1976).

107. Judges apparently were also part of that audience. Powell sent a copy of *Ernst & Ernst* to Judge Henry Friendly, telling Judge Friendly that his "opinions and writing contributed significantly to our resolution of . . . [the] case[]." Letter from Justice Lewis F. Powell, Jr., to Judge Henry J. Friendly 1 (Apr. 6, 1976). Judge Friendly responded that he "was delighted both at the

Perhaps Powell's success in bringing the Court to narrow the scope of the securities laws stemmed from the fact that there was no one on the other side to counter Powell's views. Of the forty-one cases in which Powell participated, only four involved 5-4 votes. Douglas had been chairman of the SEC, but he was a marginal figure by the time Powell joined the Court, and he retired early in Powell's tenure. Justice Brennan served during Powell's entire tenure and opposed Powell in securities cases more that any other Justice, but Justice Brennan did not have Powell's interest or experience in the securities laws. Justice Brennan's undisputed intellect and coalition-building skills were saved for more politically charged cases, leaving the securities law as Powell's domain.[108]

Powell's influence was felt not only through his opinions and affect on outcomes, but also in the Court's agenda. The chart also demonstrates that Powell, more than any other Justice, was responsible for the substantial number of securities law cases the Court heard during his tenure. From 1933 to 1971, the Court decided thirty securities cases, an average of less than one per term.[109] The Court averaged three securities cases per term for the fifteen full terms that Powell sat on the Court. Powell voted to grant certiorari in forty of the forty-six securities cases granted during his time on the Court (and three cases heard the term following his retirement). In the fifteen terms since Powell's retirement, the Court has heard only seventeen securities cases, an average of slightly more than one per term.[110] While the smaller docket since Powell's retirement accounts for some of this decline, the Court's diminished interest in the securities law persists even after the numbers are adjusted to reflect the smaller overall docket. During Powell's tenure, securities cases were two percent of

result and at your skillful handling of the problems." Letter from Judge Henry J. Friendly to Justice Lewis F. Powell, Jr. 1 (Apr. 9, 1976).

108. This may have been a shrewd strategic choice on Justice Brennan's part; by letting Powell have his way in the cases that he cared about, Justice Brennan may have built a reservoir of good will that he could tap in the cases about which he cared the most.

109. H.W. Perry quotes an anonymous Justice on this point: "[T]here was a time when four members simply weren't interested in hearing Securities and Exchange Commission cases. . . . Now I believe the Court is more disposed to hearing those cases." H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 261 (1991). Perry also quotes an anonymous Justice for the proposition that "Justice [unnamed] is intensely interested in the securities area." *Id.* at 262. Although this is speculation, the unnamed Justice is almost certainly Powell.

110. If the October 1987 Term is excluded, during which three cases in which Powell voted to grant certiorari were heard, the average drops below one per term.

the Court's docket; since his retirement, securities cases have made up only one percent.[111]

Powell enhanced his influence over the Court's docket with his willingness to write dissents from the denial of certiorari in securities cases.[112] Powell wrote five such dissents during his time on the Court, persuading the Court to grant certiorari four times.[113] Other Justices wrote only four dissents from denial in securities cases during Powell's tenure, and none of those resulted in a grant of certiorari.[114] Since

111. Totals are taken from the *Harvard Law Review*'s annual Supreme Court volume; securities case totals are derived from Westlaw searches of the SCT database within the period June 26, 1987, to December 31, 2002, for the terms "Securities Act," "Exchange Act," Investment Company Act," and "Investment Advisors Act."

112. It was also not unusual for Powell to note on certiorari memoranda that he would "write if not granted." *E.g.*, Preliminary Memorandum, Int'l Bhd. of Teamsters v. Daniel, to Justice Lewis F. Powell, Jr. 1 (Feb. 17, 1978 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.); Preliminary Memorandum, Dirks v. SEC, to Justice Lewis F. Powell, Jr. 1 (Nov. 12, 1982 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.); Preliminary Memorandum, Shearson/American Express, Inc. v. McMahon, to Justice Lewis F. Powell, Jr. 1 (Sept. 29, 1986 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

113. John Nuveen & Co. v. Sanders, 450 U.S. 1005, 1005 (1981) (Powell, J., dissenting from the denial of certiorari); Justice Lewis F. Powell, Jr., Draft Dissent from Denial of Certiorari, United Hous. Found., Inc. v. Forman 1 (Jan. 16, 1974); Justice Lewis F. Powell, Jr., Draft Dissent from Denial of Certiorari, TransAmerica Mortgage Advisors, Inc. v. Lewis 1 (Oct. 12, 1978); Justice Lewis F. Powell, Jr., Draft Dissent from Denial of Certiorari, Carpenter v. United States 1 (Dec. 10, 1986); Justice Lewis F. Powell, Jr., Draft Dissent from Denial of Certiorari, Pinter v. Dahl 1 (Apr. 10, 1987). Powell's failure to persuade his colleagues to grant certiorari in *Nuveen* may be explained by the fact that Justice Stevens had written the relevant lower court decision while he was a judge on the Seventh Circuit. Sanders v. John Nuveen & Co., 554 F.2d 790 (7th Cir. 1975) (Stevens, J.).

It is apparently not unusual for dissents from denials to result in a grant of certiorari. *See* PERRY, *supra* note 109, at 171 (quoting an anonymous Justice: "Many times a dissent from denial will pick up a fourth vote."). Perry got estimates that ten to thirty dissents from denial per term picked up additional votes. *Id.* at 173. Powell does not appear to have carried over this willingness to write at the certiorari stage to other areas; he was less likely to write dissents from denial than most of his colleagues. *See id.* at 186–87 (reporting that Justices Brennan, White, Marshall, Blackmun, and Stewart all wrote more dissents from denial than Powell, during the period 1976–80).

114. The one that stands out is *Mordaunt v. Incomco*, 469 U.S. 1115, 1115 (1985) (White, J., dissenting from the denial of certiorari), which raised the issue of whether horizontal commonality was required for an investment contract. *Id.* at 1115–16. Powell was absent from the Court at the time due to complications from surgery. It is inconceivable that he would have voted against hearing the case, given the clear conflict and the importance of the issue. It remains unresolved. The other three are *Dupuy v. Dupuy*, 434 U.S. 911, 911 (1977) (White, J., dissenting from the denial of certiorari) (deciding the standard of care required of plaintiffs in Rule 10b-5 actions), *Yeomans v. Kentucky*, 423 U.S. 983, 983 (1975) (Brennan, J., dissenting from the denial of certiorari) (determining whether sovereign immunity applies in a securities case), and *Sennott v. Rodman & Renshaw*, 414 U.S. 926, 926 (1973) (Douglas, J., dissenting from the denial of certiorari) (deciding the standard for control person liability under section 20(a) of the Exchange Act).

Powell's retirement, only one securities case has resulted in a published dissent from the denial of certiorari.[115]

Powell's influence over the Court's docket persisted to the end of his career. Powell's last securities law opinion during his Court tenure was a dissent from denial that persuaded his colleagues to grant review (his second[116] of the term). *Pinter v. Dahl*[117] raised the issue of the application of the *in pari delicto* defense.[118] Dahl purchased interests in an oil and gas venture from Pinter and encouraged friends, relatives, and business associates to invest as well.[119] When the investments soured, Dahl sued Pinter for failing to register the offering with the SEC.[120] Pinter raised the *in pari delicto* defense, based on Dahl's solicitation of the other investors, but the Fifth Circuit rejected it. Powell disagreed with this result:

> [S]ophisticated investors who purchase unregistered securities place themselves in a no-lose situation. If the investment proves profitable, the buyer comes out ahead. If the venture is unprofitable, the buyer can sue to recover his investment, with interest, in a § 12(1) action. . . . [Dahl] faces no sanctions of any kind for his participation in the illegal transactions. Moreover, § 12(1) imposes liability without regard to whether the seller intended to defraud the buyer. Absent an *in pari delicto* defense, buyers will indeed obtain an "enforceable warranty" that their investment will be profitable.[121]

Powell's complaint here seemed to concern section 12(1)'s liability without fault for the sale of unregistered securities[122] as much as the Fifth Circuit's application of the *in pari delicto* defense. The "enforceable warranty" he invoked exists whether or not there is an *in pari delicto* defense. And under the interpretation of "seller" that Powell appeared to favor, the disappointed buyers might well seek

115. J. Alexander Sec., Inc. v. Mendez, 511 U.S. 1150, 1150 (1994) (O'Connor, J., dissenting from the denial of certiorari) (determining the availability of punitive damages in an arbitration proceeding against a broker-dealer).

116. The other was *Carpenter*, 484 U.S. at 19. *See supra* note 113 and accompanying text.

117. 486 U.S. 622 (1988).

118. *Id.* at 624. The case also raised the definition of "seller" under section 12(1) of the Securities Act. This issue appears to have been of less concern to Powell, although it is an important holding of the Court. *Id.* at 625.

119. *Id.* at 626.

120. *Id.* at 627.

121. Justice Lewis F. Powell, Jr., Draft Dissent From Denial of Certiorari, Pinter v. Dahl, *supra* note 113, at 5–6.

122. 15 U.S.C. § 77*l* (2000).

relief from Dahl as well as Pinter, so there would be some sort of sanction.

Notwithstanding the weakness in Powell's position, he nonetheless continued to wield sufficient influence in this area that he was able to attract two more votes so the case could be heard.[123] By the time the case was argued, Powell had retired. Although Powell's argument for the *in pari delicto* defense was rejected in a footnote,[124] the Court did recognize a form of the defense.[125]

In sum, Powell was the Court's leader in securities law.[126] That leadership is reflected not only in Powell's many majority opinions, but also by his extraordinary winning percentage and influence over the Court's docket. Powell's extensive experience in the area, bolstered by his willingness to write at the certiorari stage when other Justices did not recognize the importance of a securities issue, made him a force to be reckoned with. These advantages were magnified by Powell's hard work and thorough preparation. No other Justice could (or perhaps, would) match his mastery of the facts of the cases and the law in this area.

III. CURTAILING LAWSUITS

The proliferation of securities class actions was still a nascent trend in the 1960s. The lower courts, particularly the Second Circuit, steadily broadened the litigation exposure that corporations faced under the securities laws,[127] a trend validated by the Supreme Court's

---

123. At the initial conference, only Powell and Justice Rehnquist favored a grant, with even Justice Rehnquist's support a tepid "Join 3." Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Pinter v. Dahl 1 (Apr. 3, 1987). Justices White and O'Connor switched their votes. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Pinter v. Dahl 1 (Apr. 17, 1987).

124. *Pinter*, 486 U.S. at 637 n.13.

125. *See id.* at 639 ("Thus, the *in pari delicto* defense may defeat recovery in a § 12(1) action only where the plaintiff's role in the offering or sale of nonexempted, unregistered securities is more as a promoter than as an investor.").

126. This observation is made by others as well. *See* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 138–46 (2002) (stating that Powell is the exception that proves the rule that Supreme Court Justices do not have much interest in developing securities expertise).

127. *See, e.g.*, SEC v. Tex. Gulf Sulfur Co., 401 F.2d 833, 848 (2d Cir. 1968) (holding that a corporation need not have engaged in a securities transaction to be sued under Rule 10b-5). Other cases can be found in Ruder, *supra* note 5.

1964 decision in *J.I. Case v. Borak*.[128] Powell played a key role in stemming that tide in a series of cases involving the requirements for a cause of action under Rule 10b-5, the definition of "sale," procedures applicable to representative actions, and judicial implications of private rights of action. Congress would not step in to curb securities class actions until 1995 when it adopted the Private Securities Litigation Reform Act;[129] Powell and the Supreme Court began the process of limiting securities class actions in the mid-1970s.

Powell's distrust of litigation reflected his experience as a corporate lawyer. Before hearing *Herman & Maclean v. Huddleston*,[130] which raised the question of the standard of proof in private causes of action under Rule 10b-5, Powell made the following "somewhat personal" observations in a memorandum to his law clerk:

> In balancing the "equities" or policy considerations relevant to the standard of proof, I . . . know from my corporate experience in the latter years of my practice that the increase in damage suits has certain negative effects. . . .
>
> The typical private damages action under the Securities Acts takes place several years after the alleged fraud. There are bankrupt companies today that, only a year or two ago, were widely viewed as fine investments. Jurors—and indeed judges—tend to be influenced by the present rather than conditions existing at the time of the alleged fraud. Information that may not have seemed important then can loom quite large years later. The number of suits have multiplied, and sometimes damages have been large and—as your memorandum noted—reputations destroyed.
>
> One consequence of all of this is that many of the ablest people in our country no longer will serve on boards of directors. I know this from personal experience. Even insurance covering directors is usually limited to negligence and not fraud. Premiums are high, an expense consumers ultimately pay. Our basic economic system—the free enterprise system—is a "risk" system and investors should not expect guaranteed equity investments in particular.

128. 377 U.S. 426, 435 (1964) (finding that federal courts have the power to grant all necessary remedial relief in shareholder suits).

129. Pub. L. No. 104-67, 109 Stat. 737 (1995).

130. Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).

> Against this background, if the following information is readily obtainable on Lexis it might be interesting, and possibly relevant to the standard of proof: How many 10b cases have there been since *Fleschman* was decided in 1951? Has the number accelerated in recent years? Will Lexis identify suits filed against various categories of defendants: persons who sign registration statements, officers and directors, underwriters, experts—particularly accounting firms. My impression is that a good many small accounting firms no longer will work on registration statements.
>
> In the literature in this area, is there any discussion . . . as to the public interest that may be adversely affected by opening the field wide to damage suits that have never been expressly authorized by Congress.[131]

This passage captures several themes that drove Powell's efforts to rein in securities fraud class actions. First, Powell considered the judge-made remedy under Rule 10b-5 to be a species of federal common law, and thus appropriate for judges to consider policy in defining its limits.[132] Second, Powell understood, based on experience counseling corporate clients, the consequences that the phenomenon of class action lawsuits had for corporations and their officers and directors.[133] Finally, Powell was profoundly suspicious of judicially created private causes of action not specifically authorized by Congress. From Powell's perspective, the expansion of securities fraud lawsuits based on implied rights of action was creating a litigation crisis. That perception of crisis would influence the outcome in a number of cases that came to the Supreme Court.

131. Memorandum from Justice Lewis F. Powell, Jr., to Jim Browning 1–2 (Sept. 13, 1982).

132. Powell's clerk failed to turn up any useful empirical work on the topic. Memorandum from Jim [Browning] to Justice Lewis F. Powell, Jr. 1 (Sept. 29, 1982).

133. The SEC and the Solicitor General were arguing for a preponderance of the evidence standard. Bench Memorandum, Herman & MacLean v. Huddleston, to Justice Lewis F. Powell, Jr. 17 (Sept. 9, 1982). Powell agreed with his law clerk that "the SG undervalues a professional's reputation" and the harm to that reputation from a jury finding that the defendant (in this case an accounting firm) acted with deceptive intent. *Id.* (handwritten notes of Justice Lewis F. Powell, Jr.). Powell instead favored the common law "clear and convincing" evidence standard. Memorandum from Justice Lewis F. Powell, Jr., to Jim Browning, *supra* note 131, at 1. Powell's influence was not felt in this particular case. After writing this memorandum, Powell recused himself when he learned that his son-in-law's investment banking firm was a defendant in a similar suit. Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 1 (Nov. 11, 1982). With no one to advocate for the higher standard of proof at the Conference, the Court unanimously upheld the preponderance standard advocated by the SEC. *Huddleston*, 459 U.S. at 390. Deference to agency expertise still had bite when there was not an expert Justice taking the contrary position.

This Part proceeds in four Sections. Section A discusses cases limiting the reach of Rule 10b-5. Section B deals with representative actions, including both class actions and derivative suits. Sections C and D deal with threshold issues: the definition of sale and the judicial implication of private causes of action from regulatory statutes. The consistent theme of Powell's work across these subject areas is the need to rein in lawsuits.

A. The Construction of Rule 10b-5

A trilogy of Rule 10b-5 cases from the mid-1970s—*Blue Chip Stamps*,[134] *Ernst & Ernst*,[135] and *Santa Fe Industries*[136]—established the Supreme Court's intention to reverse the expansion of Rule 10b-5. These cases are the cornerstone of the counterrevolution in the the federal securities law, not only in substance, but perhaps more importantly, in style. That style sent a strong message to the lower courts to reverse their expansive course in interpreting the securities laws.

Blue Chip Stamps marks the rhetorical high point of the Supreme Court's counterrevolution in the federal securities laws. Justice Rehnquist's opinion for the Court holds that a private plaintiff must be a purchaser or seller of securities to state a claim under Rule 10b-5.[137] The Court was wary of the SEC's efforts (as amicus) to change the rule through the courts rather than Congress.[138] Justice Rehnquist's opinion is notable, however, for its skepticism regarding securities fraud class actions. Justice Rehnquist warned that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general" and the risk that the threat of enormous discovery costs could produce "*in terrorem*" settlements.[139] Justice Rehnquist's opinion has

---

134. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

135. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

136. Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

137. *Blue Chip Stamps*, 421 U.S. at 754–55. That rule had been established in the Second Circuit for more than twenty years. Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463–64 (2d Cir. 1952).

138. Powell noted at argument that "Brennan asked if SEC had ever asked Congress to change Rule—it has been with us for 20 yrs. Answer was 'No.'" Handwritten notes of Justice Lewis F. Powell, Jr., from the Argument in Blue Chip Stamps v. Manor Drug Stores 4 (argued Mar. 24, 1975). Despite his skeptical question, Justice Brennan voted against the rule.

139. Justice William H. Rehnquist, First Draft Opinion, Blue Chip Stamps v. Manor Drug Stores 16 (circulated May 5, 1975).

tion litigation; perhaps this reflects changes in attitudes toward class action litigation since *Blue Chip* was decided.

Powell wrote the second case in this trilogy, *Ernst & Ernst v. Hochfelder*,[146] the Court's seminal opinion on the state of mind required for liability under section 10(b) of the Exchange Act.[147] Although Powell's opinion discouraged securities fraud class actions alleging "fraud by hindsight," the question he left unanswered—the state of mind required for fraud under section 10(b)—continues to be the central dispute in securities class actions today. Here Powell's preference for predictability fell short.

Ernst & Ernst arose from a claim against an accounting firm for failing to uncover the long-running fraudulent scheme of a brokerage house's principal.[148] The plaintiffs alleged that Ernst & Ernst had aided and abetted the fraud by its negligence.[149] The question for the Supreme Court was whether negligence would suffice to state a claim under section 10(b), or whether a higher state of mind was required to establish liability.[150]

Powell's view of the case was colored by his concern about a related issue: the liability of third parties for misstatements. Powell observed in his "summer memo," written after reading the briefs during the Court's summer break:

> As we had occasion recently to note in *Blue Chip Stamps v. Manor Drug Stores*, private causes of action for damages under Section 10(b) and Rule 10b-5 have evolved expansively by judicial interpretation. The decision of CA7, if affirmed by us, would advance this process to new frontiers. Damage liability could be imposed for negligence not only upon the contracting party (the brokerage firm in this case), but also upon a "third party" accounting firm.[151]

---

146. 425 U.S. 185 (1976).

147. 15 U.S.C. § 78 (2000).

148. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 189–90 (1976).

149. *Id.* at 190.

150. *Id.* at 193.

151. Memorandum from Justice Lewis F. Powell, Jr., to File, Ernst & Ernst v. Hochfelder 5 (Aug. 21, 1975). Powell returned to his concern with extending third party liability later in the memorandum:

> [A] negligence standard applicable to auditors would invite litigation based on a simple averment of absence of due care, not merely in the recording of the facts as reflected by the company's books but in failing properly to discover mismanagement or fraud. Third party suits of this kind brought years after the occurrence of the alleged

Powell was at least as concerned with the identity of the defendant as he was with the standard of liability. Powell distrusted lawsuits that extended liability "too far."[152]

Powell was assigned the opinion, and in a memorandum to his law clerk reviewing a draft, he noted that "[w]e do not discuss the absence of 'privity' in the common law sense between Ernst & Ernst and respondents. I view this as an important fact, and indeed one that could be controlling with me."[153] Powell recognized, however, that the Court had not granted certiorari on this question and he did not think a majority could be assembled to dismiss on absence of privity. A holding based on lack of privity would have had profound consequences for the law of securities fraud; it suggests that Powell would have had little trouble voting for the Supreme Court's controversial decision in *Central Bank*,[154] written by his successor, Anthony Kennedy, which foreclosed liability for aiders and abettors.[155] Given the case's posture, Powell satisfied himself by drafting a footnote highlighting his "policy concerns."[156]

On the question of the required state of mind, Powell, in a somewhat impatient tone (for him)[157] objected to his clerk's distinction between "'knowing or intentional misconduct', on the one hand, and negligence or 'negligent misfeasance', on the other."[158] Powell preferred the middle ground established by Judge Arlin Adams in a concurrence to a Third Circuit opinion:

> negligence and viewed with "hind-sight" vision, would impose a high risk of liability on accountants.

Id. at 8.

152. This concern also provoked Powell to write his dissent from the denial of certiorari in *John Nuveen & Co. v. Sanders*, 450 U.S. 1005, 1005 (1981) (Powell, J., dissenting from the denial of certiorari). Powell strenuously objected to the Seventh Circuit's holding in that case that reasonable care for an underwriter under section 12(2) required "*independent investigation* such as examination of the accountant's work papers underlying the *certified financial statements*." Memorandum from Paul Cane to Justice Lewis F. Powell, Jr. (Feb. 6, 1981) (handwritten notes of Justice Lewis F. Powell, Jr.).

153. Memorandum from Justice Lewis F. Powell, Jr., to Greg Palm 3 (Feb. 4, 1976).

154. Cent. Bank v. First Interstate Bank, 511 U.S. 164 (1994).

155. *Id.* at 191.

156. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 n.33 (1976); Justice Lewis F. Powell, Jr., Suggested Note to Be Added to the Opinion of the Court, Ernst & Ernst v. Hochfelder 1–2 (Feb. 20, 1976).

157. Telephone Interview with Christine Whitman (former Powell clerk), Apr. 17, 2002.

158. Memorandum from Justice Lewis F. Powell, Jr., to Greg Palm, *supra* note 153, at 2.

> Judge Adams in *Korn* [*sic*] (at p. 287) used language that I like:
>
> > "An intent to deceive, manipulate or defraud."
>
> Adams, p. 285, also referred to Judge Friendly's formulation as including "recklessness" that amounts to fraud. What would you think of our using the term "scienter" and defining it early in the opinion, using the Adams/Friendly terminology?[159]

This discussion suggests that Powell thought that recklessness would satisfy the scienter requirement. The first part of this suggestion was adopted, with the eventual opinion defining scienter as "a mental state embracing intent to deceive, manipulate, or defraud."[160] The final opinion, however, did not incorporate recklessness, specifically reserving the question.[161]

Why not resolve this critical issue? The answer is fairly mundane. Powell, despite his desire to offer guidance to the bar, had a general preference for not addressing questions unnecessary to the decision. Accordingly, he left resolution of this issue to a subsequent case.[162] This preference to leave questions to another day sits in considerable tension with Powell's preference for predictability. Resolution of this critical question would have made the securities laws much easier to apply.

Powell could have settled the law in *Ernst & Ernst*, but held back. The Supreme Court has avoided the question of whether recklessness satisfies section 10(b) for another twenty-five years. Powell can be forgiven for failing to anticipate that the Court would not resolve the issue; the Court's appetite for securities law cases would wane after he left the Court. A sharp conflict has now emerged among the circuits on this issue, but the Court continues to deny certiorari.[163] It seems unlikely that Powell would have ducked the issue if

---

159. *Id.* (citing Kohn v. American Metal Climax, Inc., 458 F.2d 255, 285, 287 (3d Cir. 1972) (Adams, J., concurring in part and dissenting in part) (quoting SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 868 (2d Cir. 1968) (Friendly, J., concurring))).

160. *Ernst & Ernst*, 425 U.S. at 194 n.12.

161. *Id*.

162. Telephone Interview with Greg Palm (former Powell clerk) (June 6, 2002).

163. The appellate courts agreed that allegations of recklessness satisfy the scienter requirement. *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 629, 651 n.78 (2002) (citing cases). Congress, however, put the question back into play when it passed the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as

he were still on the Court. If the Court had resolved the issue before Powell retired, it appears that a majority would have supported recklessness. Powell's memorandum in *Ernst & Ernst* suggests that he favored recklessness,[164] while Justices Brennan, Blackmun,[165] Stevens,[166] and Marshall[167] favored a negligence standard, so they presumably would have voted for recklessness over a knowledge requirement. In this one area where Powell's view might have led to a *more* expansive interpretation of the securities law, he never registered his vote.

The final case in the trilogy, *Santa Fe Industries v. Green*,[168] is the Court's most sweeping defense of state corporate law. The Second Circuit held that a short form merger authorized by Delaware law,[169] which "froze out" the company's minority shareholders, violated Rule 10b-5.[170] That court held that "no allegation or proof of misrepresentation or nondisclosure [was] necessary" to state a violation of Rule 10b-5; a breach of fiduciary duty was sufficient.[171] Moreover, that breach of fiduciary duty arose out of federal, rather than state, common law.[172] The decision was startling enough to Powell that he dictated a nine-page memorandum summarizing it; he spent little time, however, criticizing the decision because it seemed so obviously wrong:

> As the title of § 10b indicates, it is concerned with "manipulative and deceptive devices." I would not have thought, until CA 2's

amended in scattered sections of 15 U.S.C.). The Reform Act requires plaintiffs alleging securities fraud to plead with particularity "facts giving rise to a strong inference that the defendant acted with the *required state of mind*." 15 U.S.C. § 78u-4(b)(2) (2000) (emphasis added). This legislative evasion has produced a diverse array of circuit court interpretations, some courts adhering to their prior holding accepting pleading based on recklessness, with others demanding more, and the Ninth Circuit going so far as to require "deliberate recklessness." *See* Grundfest & Pritchard, *supra*, at 666–77.

164. Memorandum from Lewis F. Powell, Jr., to File, Ernst & Ernst v. Hochfelder 6–8 (Aug. 21, 1975).

165. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Ernst & Ernst v. Hochfelder (Dec. 5, 1975).

166. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Aaron v. SEC (Feb. 27, 1980).

167. Justice Marshall joined Justice Blackmun's dissenting opinion in *Aaron v. SEC*, which favored a negligence standard. *See* 446 U.S. 680, 703–04 (1980) (Blackmun, J., dissenting) (arguing that section 10(b) does not require scienter).

168. 430 U.S. 462 (1977).

169. DEL. CODE ANN. tit. 8, § 253 (1974).

170. Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1299 (2d Cir. 1976).

171. *Id.* at 1287.

172. *Id.* at 1286.

> opinion, that anyone would have deemed a merger to be such a device solely because the price offered dissenters was "grossly" below fair market value so long as there was no misstatement or omission of a material fact. The purpose of § 10b and Rule 10b(5) is to substitute full disclosure for the doctrine of *Caveat Emptor*.
>
> Nor would I have thought that § 10b was intended to create a federal commonlaw [*sic*] of corporations contrary to valid state statutes.[173]

Despite Powell's surprise at the Second Circuit's ruling, four Justices voted for some variant of it. Justices Brennan and Marshall voted to affirm because appraisal was not an adequate remedy, and Justices Stevens and Blackmun voted to reverse only because they thought that the plaintiffs had not demonstrated inadequacy.[174] The lure of a federal common law of corporations had a base of support on the Court, but not a majority.

Justice White's straightforward holding for the Court is that fraud requires a misrepresentation or nondisclosure,[175] but he went out of his way to defend the role of state corporate law:

> The reasoning behind a holding that the complaint in this case alleged fraud under Rule 10b-5 could not be easily contained. . . . The result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation. In addition to posing a danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5, this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law. Federal courts applying a 'federal fiduciary principle' under Rule 10b-5 could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system. Absent a clear indication of con-

173. Memorandum from Lewis F. Powell, Jr., to File, Santa Fe Indus., Inc. v. Green 9 (Dec. 27, 1976) (citations omitted).

174. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Santa Fe Indus., Inc. v. Green 1–2 (Jan. 21, 1977). Justice Marshall later changed his mind and joined Justice White's opinion for the Court. Letter from Justice Thurgood Marshall to Justice Byron R. White 1 (Mar. 11, 1977).

175. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473–74 (1977). The Court dealt with a similar issue under section 14(e) in another case, *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985) (holding that "'manipulative' acts under § 14(e) require misrepresentation or nondisclosure"), but Powell was recovering from complications from surgery and did not participate in the decision. His notes on the preliminary memorandum indicate his agreement with the lower court, which was affirmed. Preliminary Memorandum, Schreiber v. Burlington N., Inc., to Justice Lewis F. Powell, Jr. 1 (Sept. 24, 1984) (handwritten notes of Justice Lewis F. Powell, Jr.).

> gressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.[176]

The Supreme Court was drawing a line in the sand to preserve state corporate law from the development of a "federal corporate law" by the lower courts.[177]

B. *Representative Actions*

Powell appears to have been unnerved by the spread of securities class actions, and he wrote two opinions for the Court slowing the trend. The first is the Court's seminal opinion on class action procedure: *Eisen v. Carlisle & Jacquelin*.[178] The case contains both securities and antitrust allegations, but its implications extend well beyond those core areas of business law. Powell described it as "the major *test* case involving the *contours of a proper class action case under Rule 23* [of the Federal Rules of Civil Procedure], as well as the notice requirements in a class action case compelled by Due Process."[179]

The claim was based on price fixing by New York Stock Exchange member firms in the commissions charged for trading in "odd lots" (trades of less than one hundred shares).[180] The district court held that class members need not be given individual notice because

---

176. *Santa Fe*, 430 U.S. at 478–79 (citations and footnotes omitted).

177. *Santa Fe*'s lesson on the need to preserve state corporate law was reaffirmed in *Burks v. Lasker*, 441 U.S. 471 (1979), in the context of investment companies. *Burks* raised the question of whether the independent directors of an investment company had the authority to dismiss a derivative claim. *Id.* at 473. The Second Circuit held that the directors did not have the authority to dismiss the suit, invoking a federal common law rule based on the policies of the Investment Company Act, which was silent on the issue. Lasker v. Burks, 567 F.2d 1208, 1209 (2d Cir. 1978). The SEC argued that a federal rule should apply, but that rule would not bar the independent directors from dismissing the claim. Brief for the Securities and Exchange Commission as Amicus Curiae, Burks v. Lasker, 441 U.S. 471 (1979) (No. 77-1724). The Supreme Court held that state law controlled. *Burks*, 441 U.S. at 478. The only controversy raised by the case was how emphatic the endorsement of state law would be. The opinion was assigned to Justice Brennan, but Powell and Justice Stewart were "not happy with his grudging approach to authority of the disinterested Board members." Justice William J. Brennan, Jr., First Draft Opinion, Burks v. Lasker 1 (circulated Apr. 18, 1979) (handwritten notes of Justice Lewis F. Powell, Jr.). Justice Stewart wrote a concurrence suggesting blanket deference to state law was appropriate, which Powell joined. Justice Potter Stewart, First Draft Concurring Opinion, Burks v. Lasker 1 (circulated Apr. 30, 1979).

178. 417 U.S. 156 (1974).

179. Preliminary Memorandum, Eisen v. Carlisle & Jacquelin, to Justice Lewis F. Powell, Jr. 1 (Oct. 11, 1973 Conference).

180. *Eisen*, 417 U.S. at 160.

their claims were so small that they would be unlikely to opt out.[181] Powell, however, did not want Rule 23's interpretation to be determined by the facts of a particular case: "we must decide case on principle of general application—not on a *guess* as to what members of class will do."[182] General principles, of course, would limit the discretion of lower courts in subsequent cases. The district court also had imposed ninety percent of the costs of notice on the defendants based on its "preliminary" assessment that the defendants were likely to be found liable.[183] Powell distrusted this procedural innovation: this "requirement that a party pay his *adversary's cost* is unique in the law."[184] This case stands out from many of the cases studied here, however, in that the Second Circuit had also balked at the district court's innovation, reversing both the ruling on notice and the imposition of costs on the defendants.[185] The Second Circuit had reversed on another ground as well, holding that the class was unmanageable because there were no practical means by which any recovery could be paid to the actual class members.[186]

This final holding raised complications. Appellate jurisdiction over the first two issues was clear under the *Cohen* doctrine as an appealable final order.[187] The manageability question was appealable only under the "death knell" doctrine, under which a case can be appealed if the denial of class certification would mean that the case would be abandoned as uneconomical.[188] A majority (Chief Justice Burger and Justices Douglas, Brennan, White, Marshall, Blackmun, and Powell) thought there was jurisdiction over the manageability issue, but Justices Rehnquist and Stewart strongly disagreed.[189]

The opinion was assigned to Powell. With a substantial majority on the notice and costs issues (only Douglas disagreed and his views

181. *Id.* at 166–67.

182. Handwritten notes of Justice Lewis F. Powell, Jr., for the Argument in Eisen v. Carlisle & Jacquelin 2 (Feb. 25, 1974).

183. Eisen v. Carlisle & Jacquelin, 54 F.D.R. 565, 567 (S.D.N.Y. 1972).

184. *Id.* at 6.

185. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563, 569–70 (2d Cir. 1968).

186. *Id.* at 569–70.

187. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949) (holding that an order is appealable where it is a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it").

188. Preliminary Memorandum, Eisen v. Carlisle & Jacquelin 3 (Oct. 1, 1973 Conference).

189. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Eisen v. Carlisle & Jacquelin 1–2 (Feb. 27, 1974).

were tentative),[190] Powell determined to steer clear of the difficult jurisdictional issue posed by the manageability question.[191] Nonetheless, Powell worried about the ability of courts to manage class actions of the size and complexity seen in *Eisen*. He wrote (in a footnote that did not make its way into the opinion):

> This case's history well illustrates the array of intractable problems latent in this type of class action. With competent counsel and in a District and Circuit uniquely experienced in complex civil litigation, this suit—in which appealing policy and legal considerations are implicated on both sides—has defied rational resolution. It suggests the need for thoughtful reexamination of some of the assumptions that underlie the class action rules, with due recognition of the need for some form of class action relief, and also rules which in fact can be administered within the framework of the adversary system with reasonable expedition and fairness to all concerned.[192]

Powell was not the sort to use judicial opinions to advocate reform (although he implemented a few with his opinions), but even this guarded footnote shows his concern, which other members of the Court shared. Chief Justice Burger wrote (in a private note to Powell, not shared with the conference): "I hope this will 'contain' the drift for government-by-class-action. What we need is vigorous action by appropriate regulatory agencies when these brokers get out of line."[193]

---

190. *Id.* at 1.

191. There was a conflict among the circuits, as *Winokur v. Bell Federal Savings and Loan Association*, 560 F.2d 271 (7th Cir. 1977), in which the Seventh Circuit had rejected the "death knell" doctrine, *id.* at 277, was being held for the decision in *Eisen*. Despite the conflict, Powell recommended that certiorari be denied in *Winokur*. Memorandum from Justice Lewis F. Powell, Jr., to the Conference 3 (May 29, 1974). This deferral led to a different outcome, as the Court rejected the doctrine four years later. Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 (1978). Given the majority in favor of the "death knell" doctrine in *Eisen*, this is a surprising result, but Powell's conference notes reflect an 8-1 vote against the doctrine in *Coopers & Lybrand*, with only Justice Brennan disagreeing, and even Justice Brennan ended up joining Justice Stevens's opinion for the Court. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Coopers & Lybrand v. Livesay 1–3 (Mar. 24, 1978). This decision's effect has been ameliorated somewhat by the adoption of Federal Rule of Civil Procedure 23(f), which gives discretion to appellate courts to entertain class action certification questions. *See generally* 15 CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3912 (2d ed. 1992).

192. Justice Lewis F. Powell, Jr., Suggested Note to Be Added to the Opinion of the Court, Eisen v. Carlisle & Jacquelin 1 (Apr. 27, 1974).

193. Letter from Chief Justice Warren E. Burger to Justice Lewis F. Powell, Jr. 1 (May 22, 1974) (handwritten notes of Chief Justice Warren E. Burger).

Powell's opinion was a step toward "containing" class actions,[194] but class actions continue as a threat to the securities industry.[195]

Powell struck another blow against representative actions the same term, although the facts of the case were sufficiently unusual that the effect of the holding was limited. Powell summarized the controlling issue in *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*[196] this way:

> (CA1 seems to be throwing the law books away!) CA1, over-ruling DC, held that a 99% stockholder of corp may bring a derivative stockholders' suit in name of corp vs. the *former* owner of controlling stock in the corp. for mismgt.
>
> CA1 allowed suit on theory that although the Resp. (present 99% owner) alleged no injury or damage to itself (+ no fraud at time it acquired the 99% interest), Resp. was entitled to sue for general benefit of public's interest in railroads. In short, Resp. was *self* appointed Atty-Gen.[197]

The suit—somewhat vaguely—alleged claims under the federal securities laws and antitrust laws, as well as state statutory and common law.

Powell looked to principles of equity to resolve the case. A majority agreed with Powell that the First Circuit should be reversed, although no clear consensus emerged at the conference as to the basis for reversal.[198] Powell's opinion is carefully grounded in "the settled principle of equity that a shareholder may not complain of acts of

---

194. Not surprisingly, Powell's opinion was met with hostility by class action advocates. Powell clipped the article with their reactions, but made no notation of his own. Linda Charlton, *Impact of Ruling by Court Studied: Lawyers See Strong Effect on Class-Action Suits by Consumer Groups*, N.Y. TIMES, May 29, 1974, at 29.

195. That industry has secured greater protection from class actions through an industry-wide practice of arbitration. The Court decided three cases implicating arbitration in the field of securities law during Powell's tenure. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). Powell, while generally favoring arbitration, does not appear to have had a significant influence on the Court in this area.

196. 471 U.S. 703 (1974).

197. Preliminary Memorandum, Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co. 1 (Jan. 4, 1974 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

198. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co. 1–2 (Apr. 17, 1974).

corporate mismanagement if he acquired his shares from those who participated or acquiesced in the allegedly wrongful transactions."[199]

Powell expressed skepticism at the "private attorney general" concept (striking the same note that Chief Justice Burger had shared in his *Eisen* letter): "Quite apart from purely equitable considerations, there is sound reason to leave the safeguarding of the public interest in the soundness of railroads and the quality of their service to the regulatory authorities rather than to encourage some concept of 'private attorney general' litigation."[200] Justice Marshall's invocation of the concept provoked Powell's (private) disdain. Powell recorded Justice Marshall's view at conference as "Party who stole money should give it up."[201] Powell's reaction: "Wow! this sounds like Robin Hood."[202] Justice Marshall's dissent, with its "typical juvenile style" provoked even more scorn.[203] According to Powell (an avid hunter), Justice Marshall

> fired, at random, a load of birdshot—some remotely relevant but most of them irrelevant. He seems to overlook the fact entirely that the parties for whom he sheds tears (the minority stockholders and creditors) may bring suit on their own behalf; nothing precludes them, and they have asserted no injury.[204]

Powell's uncharacteristically exasperated tone may have reflected just end-of-the-term tension (the published responses are more measured),[205] but it also seems plausible that he viewed regulation by class or representative action as an abuse of the litigation process.

---

199. *Bangor Punta Operations*, 471 U.S. at 710. One complication was the fact that the claim was not, in fact, a derivative claim, but instead had been brought directly by the affected corporation, which caused Powell and his clerk some difficulty in drafting the opinion. Telephone Interview with John Buckley, *supra* note 93. In the end, they simply relied on the principle that a court of equity should not confer windfall gains on parties who have not suffered damages.

200. Memorandum from Justice Lewis F. Powell, Jr., to John Buckley 3 (May 20, 1974).

201. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., *supra* note 198, at 2.

202. *Id*.

203. Justice Thurgood Marshall, Draft Dissenting Opinion, Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co. 4 (circulated June 13, 1974) (handwritten notes of Justice Lewis F. Powell, Jr.). Powell instructed his clerk to "answer summarily some of the more absurd points." *Id.* at 1 (handwritten notes of Justice Lewis F. Powell, Jr.).

204. Memorandum from Justice Lewis F. Powell, Jr., to John Buckley 2 (June 14, 1974).

205. Powell might vent his frustration with his colleagues in the privacy of his chambers, but he took care to not allow that frustration into his opinions. Powell "preferred understatement in responding to dissents." Telephone Interview with John Buckley (former Powell clerk), *supra* note 93. This restraint no doubt enhanced his influence with his colleagues.

The last case during Powell's tenure affecting procedures in securities fraud class actions is *Parklane Hosiery Co. v. Shore*.[206] *Parklane Hosiery* raised the question whether issues resolved against a defendant in an SEC enforcement action were entitled to collateral estoppel effect in a subsequent private action.[207] The case is significant, not only for the procedural advantage it affords class action plaintiffs, but more importantly for the coercive threat it affords the SEC. Defendants in SEC enforcement actions are loath to contest the agency's charges in court, given the ruinous liability exposure an adverse decision would create for them in a follow-on class action. As a result, the overwhelming majority of SEC enforcement actions are resolved through consent decrees, with defendants agreeing to pay fines and/or have injunctions entered against them, but without any admission of wrongdoing.[208]

Given Powell's suspicion of the SEC, it is a little surprising that he would acquiesce in a decision that affords the agency such leverage.[209] Moreover, Powell's law clerk pointed out (and Powell agreed) that allowing "class action plaintiffs . . . to gain a 'free ride' following a successful government enforcement suit" was inconsistent with the concept of class action plaintiffs serving as "'private attorneys general.'"[210] Powell nonetheless joined Justice Stewart's majority opinion upholding the use of collateral estoppel. Justice Rehnquist, in his dissent, worried that the Court's:

> decision will have the result of coercing defendants to agree to consent orders or settlements in agency enforcement actions in order to preserve their right to jury trial in the private actions. In that event, the Court, for no compelling reason, will have simply added a powerful club to the administrative agencies' arsenals that even Congress was unwilling to provide them.[211]

206. 439 U.S. 322 (1979).

207. *Id.* at 324.

208. *See* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 860 (3d ed. 2001) ("Most SEC enforcement proceedings (over 90 percent) are settled, not litigated.").

209. The issue was highlighted in an *amicus* brief filed by the Washington Legal Foundation. "Bobtail" Bench Memorandum, Parklane Hoisery Co., Inc. v. Shore, from David W[estin] to Justice Lewis F. Powell, Jr. 5 (Oct. 27, 1978).

210. *Id.* at 14.

211. *Parklane*, 439 U.S. at 355–56 (Rehnquist, J., dissenting).

Powell conceded that Justice Rehnquist had written a "good dissent––but I still agree with Stewart's opinion."[212] Whether Powell's close friendship with Justice Stewart influenced his views here is impossible to say.

C. *Definition of Sale*

International Brotherhood of Teamsters v. Daniel[213] presented a sympathetic case for extending the coverage of the securities laws. John Daniel had worked for over twenty years under a collective bargaining agreement between Teamsters Local 705 and a variety of employers. That agreement included a pension fund arrangement under which employees qualified for a pension if employed "for at least 20 consecutive, continuous and uninterrupted years immediately preceding retirement."[214] Daniel could not meet the "continuous" service requirement because he had been laid off for a three-month period at one point during his employment.[215] Daniel claimed that he had been deceived about the continuity requirements for vesting of the pension. More creatively, he asserted that his participation in the pension plan was the sale of a security and therefore subject to the federal securities laws.[216] The district court and Seventh Circuit agreed.[217]

Powell found the lower courts' holdings "close to being absurd" with "far reaching" results.[218] Daniel faced four obstacles to his claim: (1) contributions to the pension plan were made by his employers, not him; (2) he was required to participate in the plan; (3) the scheme at issue was a "defined benefit" plan, under which the benefits did not vary with the fund's performance; and (4) application of the federal securities laws to pension plans threatened to interfere with the separate federal regulatory scheme for pensions.[219] Daniel needed to show

212. Justice William H. Rehnquist, First Draft Dissenting Opinion, Parklane Hosiery Co., Inc. v. Shore 1 (circulated Dec. 22, 1978) (handwritten notes of Justice Lewis F. Powell, Jr.).

213. 439 U.S. 551 (1979).

214. Brief for the Securities and Exchange Commission as Amicus Curiae at 6–7, Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979) (Nos. 77-753, 77-754).

215. *Id.* at 8.

216. *Id.* at 7–8.

217. Daniel v. Int'l Bhd. of Teamsters, 410 F. Supp. 541, 547 (N.D. Ill. 1976), *aff'd*, 561 F.2d 1223, 1231 (7th Cir. 1977).

218. Preliminary Memorandum, Int'l Bhd. of Teamsters v. Daniel, to Justice Lewis F. Powell, Jr., *supra* note 112, at 1 (handwritten notes of Justice Lewis F. Powell, Jr.).

219. Bench Memorandum, Int'l Bhd. of Teamsters v. Daniel, to Justice Lewis F. Powell, Jr. 1, 21–22 (Aug. 21, 1978) (identifying the plan's compulsory, noncontributory, and defined-

both that his interest in the pension plan was a "security" (obstacles (3) and (4) went to this question) and that there had been a "sale" of that interest to him (obstacles (1) and (2) went to this point). The court of appeals found a "security" because the pension fund was similar to a mutual fund or variable annuity, and a "sale" because Daniel had made an investment decision to participate in the pension plan by foregoing alternative employment opportunities.[220] The lower courts distinguished Congress's regulation of pension plans as "concerned with the administration of such funds . . . rather than regulation of circumstances of entry into the plan."[221]

Powell worried that the lower courts' decisions could dramatically expand the scope of the securities laws: "any offer + acceptance of employment might views as an investment [contract]" and, therefore, the sale of a security.[222] He also thought that it could not be squared with the Court's focus upon economic realities in the definition of a "security."[223] Powell's colleagues agreed; the conference vote was 8-0 to reverse, with Powell stunned to find even Justice Blackmun in accord.[224]

Chief Justice Burger's assignment of the opinion to Powell made a narrow opinion unlikely. Powell saw securities law opinions as an opportunity to shape the law, not just resolve conflicts among the lower courts. Powell added to the draft that "[t]he SEC present position with respect to the term 'sale' is quite unsupportable."[225] Specifically, Powell questioned the SEC's position that "it is possible to regard a particular financial transaction as constituting a sale under certain provisions of the Securities Act but not under others."[226] The implicit concern here was that the SEC was trying to extend its reach

---

benefit characteristics as the three primary issues in determining whether the plan was a security, and then examining whether applying the securities laws interfered with ERISA).

220. *Daniel*, 561 F.2d at 1237, 1243.

221. *Daniel*, 410 F. Supp. at 549.

222. Bench Memorandum, Int'l Bhd. of Teamsters v. Daniel, to Justice Lewis F. Powell, Jr., *supra* note 219, at 14 (handwritten notes of Justice Lewis F. Powell, Jr.).

223. J. Mark Fisher, Note, *The Application of the Antifraud Provisions of the Securities Laws to Compulsory, Noncontributory Pension Plans After* Daniel v. International Brotherhood of Teamsters, 64 VA. L. REV. 305, 307–08, 314 (1978) (handwritten notes of Justice Lewis F. Powell, Jr., on the margins of a photocopy).

224. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Int'l Bhd. of Teamsters v. Daniel 2 (Nov. 3, 1978) (revealing that Powell had punctuated Justice Blackmun's vote to reverse with two exclamation points).

225. Justice Lewis F. Powell, Jr., First Draft Opinion, Int'l Bhd. of Teamsters v. Daniel 20 (Dec. 4, 1978) (handwritten notes of Justice Lewis F. Powell, Jr.).

226. *Id.*

by applying the antifraud rules, without risking a backlash from Congress if it applied its burdensome registration requirements to the same transactions.[227] A "sale" is a "sale," Powell thought. Faced with objections from Justice White and Chief Justice Burger,[228] however, Powell eliminated this language and reserved the question.[229] The Court's holding is limited to the conclusion that the pension plan in question was not an investment contract, and therefore, not a security.[230]

The definition of "sale" soon returned to the Court. *Bankers Trust Co. v. Mallis* raised the issue of whether the pledge of stock to secure a loan was a "sale" of that security for purposes of Rule 10b-5.[231] For Powell, the answer was no:

> A pledge is not a transfer of title. It involves neither a purchase nor a sale, and my recollection . . . is that nothing whatever in [the Acts of '33 and '34] suggests or implies that either the pledge or the release of securities from a pledge constitutes a purchase or sale within the meaning of the Securities Acts.[232]

The Second Circuit's contrary conclusion provoked Powell's usual reaction: "the case appears to represent an attempt to extend significantly the reach of § 10(b) far beyond the original intent of the Securities Acts."[233] Powell appears frustrated by the Second Circuit's indifference to the Court's prior rebukes of that court's expansion of the securities laws: "Our cases refute view that 10(b)5 [*sic*] is a license to *federalize* corp. law generally. *Santa Fe*, *Blue Chip*, *Foreman* [*sic*]

---

227. Bench Memorandum, Int'l Bhd. of Teamsters v. Daniel, to Justice Lewis F. Powell, Jr. 18 (Aug. 21, 1978) (citation omitted):

> [T]he SEC has taken the position that almost every form of injustice that results from a failure to disclose information violates § 10(b) of the Securities Exchange Act. That agency has been free to do this in part because it has not enforced a concomitant registration requirement, a burden that would both swamp the agency and engender substantial political pressure to amend the securities laws. A determination that a sale means the same thing for both registration and fraud might encourage the SEC to take a more responsible position in these cases and to husband its resources for those situations where the securities laws were meant to apply.

228. Letter from Justice Byron R. White to Justice Lewis F. Powell, Jr. 1 (Dec. 26, 1978).

229. Letter from Chief Justice Warren E. Burger to Justice Lewis F. Powell, Jr. 1 (Jan. 2, 1979); Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 1 (Jan. 11, 1979).

230. Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 569 n.22 (1979).

231. *Id.* at 382.

232. Memorandum from Justice Lewis F. Powell, Jr., to Nancy Bregstein 2 (Oct. 25, 1977).

233. *Id.* at 3.

(Act of '33). I think CA2 is *dead* wrong!"[234] Powell characterized the Solicitor General's argument supporting that court's position as "absurd in the context of normal commercial transactions."[235]

The vagaries of litigation, however, complicated the case. The plaintiffs changed their theory at oral argument, declining to defend the Second Circuit decision.[236] Worse yet, it turned up that there was no document recording the judgment of the district court, suggesting that the Second Circuit may have lacked jurisdiction.[237] The Court split 4-4 at conference. Powell joined with Chief Justice Burger and Justices Stewart and Rehnquist to reverse, while Justices Brennan, White, Marshall, and Stevens voted to affirm.[238] Justice Blackmun was absent from the conference.[239]

Looking for a way out of the deadlock, Justice Brennan (in the absence of the Chief Justice) assigned Justice Rehnquist the task of sorting out the judgment issue.[240] Justice Rehnquist concluded that the requirement of a separate document memorializing the judgment could be waived and, therefore, that the Second Circuit had jurisdiction.[241] Justice Rehnquist had a majority for this position,[242] thus forcing the Court to address the merits. But the Court was divided equally on the merits and Justice Rehnquist feared an affirmance by an equally divided court. Justice Rehnquist worried that "[w]ith Harry's voting records in 10(b)(5) [*sic*] cases, I think affirmance showing him out would be tantamount to ratifying the CA2 opinion even though we wrote nothing."[243] Justice Rehnquist therefore proposed a strategic retreat, dismissing the petition for certiorari as im-

234. Bench Memorandum, Bankers Trust Co. v. Mallis, to Justice Lewis F. Powell, Jr. 1 (Nov. 18, 1977) (handwritten notes of Justice Lewis F. Powell, Jr.).

235. Bench Memorandum, Bankers Trust Co. v. Mallis, to Justice Lewis F. Powell, Jr. 1 (Nov. 28, 1977) (handwritten notes of Justice Lewis F. Powell, Jr.).

236. Handwritten notes of Justice Lewis F. Powell, Jr., from the Argument in Bankers Trust Co. v. Mallis 3 (Nov. 30, 1977).

237. Memorandum from Bob Comfort to Justice Lewis F. Powell, Jr. 1 (Nov. 30, 1977).

238. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Bankers Trust Co. v. Mallis 1–2 (Dec. 2, 1977).

239. *Id.* at 3

240. Note from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr. 1 (Feb. 28, 1978).

241. Justice William H. Rehnquist, First Draft Opinion, Bankers Trust Co. v. Mallis 1 (circulated Dec. 19, 1977).

242. Justices Brennan, Stewart, Warren, and Stevens joined Justice Rehnquist's position on jurisdiction. Note from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr., *supra* note 240, at 1.

243. *Id.*

providently granted (a "DIG").[244] As two of the votes for affirmance were willing to acquiesce in a dismissal (Justices White and Stevens), Justice Rehnquist got a majority for this course and the petition was dismissed.[245]

This meant that whether a pledge was a sale remained an open question two years later when *Rubin v. United States*[246] made its way to the Court.[247] *Rubin* differed, however, in that it raised the issue under section 17(a) of the 1933 Act, rather than the 1934 Act. Although Section 3(a)(14) of the 1934 Act defines a sale as "any contract to sell or otherwise dispose of" a security,[248] Section 2(3) of the 1933 Act defines "sale" as "every contract of sale or disposition of a security or interest in a security, for value."[249] Congress's inclusion of "every" and "interest" pushed toward a broad definition. Powell was unmoved by this textual distinction—the policy reasons for excluding this transaction from the scope of the securities law were the same. He agreed with his law clerk that "applying § 17(a) to commercial loans seems to extend the scope of the 1933 Act beyond its purposes. Second, there seems to be no practical need for the extension."[250] Powell's concerns were mitigated, however, by the fact that section 17(a) did not give rise to a private cause of action and any interpretation by the Court would not control a 10b-5 case.[251] In any event, Powell's support in *Bankers Trust* evaporated in *Rubin*; Chief Justice Burger and Justices Stewart and Rehnquist all switched sides. Powell bowed to reality and voted to uphold the broad interpretation.[252]

Powell's acquiescence left him in the position of damage control. Powell was disappointed by Chief Justice Burger's "simplistic" opin-

---

244. *Id*.

245. Bankers Trust Co. v. Mallis, 435 U.S. 381, 388 (1978); Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Bankers Trust Co. v. Mallis 1 (Mar. 6, 1978).

246. 449 U.S. 424 (1981).

247. Preliminary Memorandum, Rubin v. United States, to Justice Lewis F. Powell, Jr. 1 (Apr. 11, 1980 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

248. 15 U.S.C. § 77r (2000).

249. 15 U.S.C. § 77b(3) (2000).

250. Bench Memorandum, Rubin v. United States, to Justice Lewis F. Powell, Jr. 13 (Sept. 16, 1980) (handwritten notes of Justice Lewis F. Powell, Jr.) (noting Powell's agreement with his clerk).

251. *Id.* at 16.

252. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Rubin v. United States 3 (Nov. 14, 1980).

ion,[253] but he offered to join it if Chief Justice Burger would refrain from citing

> the 1963 case of *SEC v. Capital Gains Research Bureau*, quoting language to the effect that federal security laws must be construed "not technically and restrictively but flexibly to effectuate [their] remedial purposes."
>
> A number of more recent decisions, for example, *Hochfelder* relied on by your opinion, have looked primarily to the plain language of the securities acts. These are highly technical and well drawn statutes, and as you make clear by the remainder of your opinion this case falls within the explicit language of §§2(3) and 17(a). Thus, the quote from *Capital Gains Research Bureau* is unnecessary and perhaps could be viewed as undercutting to some extent your reliance on the statutory language itself.[254]

The quoted language was a staple of the SEC's briefs, reflecting the interpretive style that Powell was anxious to expunge from the securities laws.[255] Powell also wanted a footnote reserving the status of pledges under the 1934 Act.[256] Chief Justice Burger dropped the offensive language from *Capital Gains*, but he declined to include the footnote explicitly reserving the question under the 1934 Act.[257] Predictably, the lower courts have interpreted the 1934 Act definition of "sale" to include pledges of securities.[258] Powell might have gained more by challenging Chief Justice Burger on the "sale" issue, rather than the inclusion of the cite to *Capital Gains*, which was a matter of style rather than substance.[259]

253. Chief Justice Warren E. Burger, First Draft Opinion, Rubin v. United States 1 (Jan. 7, 1981) (handwritten notes of Justice Lewis F. Powell, Jr.).

254. Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 1 (Jan. 8, 1981) (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)).

255. *See id.* at 1–2 (stating that Chief Justice Burger's opinion was "speaking broadly" and inaccurately).

256. *Id.* at 2.

257. Letter from Chief Justice Warren E. Burger to Justice Lewis F. Powell, Jr. 1 (Jan. 8, 1981).

258. *See, e.g.*, Chem. Bank v. Arthur Andersen & Co., 726 F.2d 930, 939–40 (2d Cir. 1984) (relying upon Chief Justice Burger's analysis in *Rubin v. United States*, that a pledge is an offer or sale under sections 2(3) and 17(a)).

259. Powell's efforts to root out the *Capital Gains* decision were for naught, as the Court's most recent opinion in this area (expanding the reach of the securities laws) invokes the case. SEC v. Zandford, 122 S.Ct. 1899, 1903 (2002). The Court decided one other case during Powell's tenure that touches upon the "offer or sale" language, *United States v. Naftalin*, 441 U.S. 768

D. *Private Rights of Action*

The implication of private rights of action under federal statutes was of paramount importance to Powell. Powell worried that novel causes of action for securities law violations could impose crippling liability. Accordingly, his work in this area is characterized by a consistent effort to curtail causes of action not authorized by statutory text. The Court's 1964 decision in *J.I. Case v. Borak* reflected a liberal attitude toward implying private rights of action.[260] Proponents of implied private rights relied on broad readings of congressional purpose.[261] Powell, by contrast, emphasized the possible interference with regulatory schemes that could result from the judicial creation of private rights of action. In addition, Powell worried about the separation of powers issues raised by courts expanding their own jurisdiction through the creation of private rights of action.

The first securities case during Powell's tenure to generate controversy over implied private causes of action was *Piper v. Chris-Craft Industries*.[262] The facts of the case were convoluted, with two bidders, Chris-Craft and Bangor Punta, vying to take over the Piper Aircraft Corporation (controlled by the Piper family).[263] After many twists, Bangor Punta ultimately prevailed, and Chris-Craft sought damages under section 14(e) and Rule 10b-6 of the Exchange Act, alleging that Bangor Punta, the Piper family, and First Boston (Bangor Punta's

---

(1979), but Powell was absent from argument due to complications from surgery and therefore did not participate in the decision. Justice William Brennan, First Draft Opinion, United States v. Naftalin 1 (May 8, 1979).

260. *See* 377 U.S. 426, 430–31 (1964) ("It appears clear that private parties have a right under § 27 to bring suit for violation of § 14 (a) of the Act.").

261. *See, e.g.*, Fleischer, *supra* note 2, at 1174–75 (stating that one needs to interpret the Securities Act and Exchange Act in a way that does not frustrate their purpose).

262. 430 U.S. 1 (1977). An earlier case raising the question of the implication of a private right of action from a regulatory scheme, *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), had generated no controversy. The Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78ggg(b) (2000), gave the Securities Investor Protection Corporation ("SIPC") the power, in its discretion, to apply for a decree invoking the protections of the SIPA. *Id*. That power was subject to oversight by the SEC, which was authorized, again in its discretion, to apply to the relevant district court for an order requiring the SIPC to cover a particular situation. *Id*. Notwithstanding this regulatory scheme, the Sixth Circuit had held that investors had a private cause of action to enforce the SIPC, despite the absence of any mention of such a cause of action in the statute. SEC v. Guar. Bond & Sec. Corp., 496 F.2d 145, 150 (6th Cir. 1974). The Court unanimously voted to reverse. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Sec. Investor Prot. Corp. v. Barbour 1–2 (Mar. 19, 1975).

263. *Piper*, 430 U.S. at 4–9.

underwriter) had violated the securities laws in gaining control of Piper.[264]

Powell viewed the question of scienter as central to the case:

> the language of Section 10(b) and of Section 14(e) is sufficiently similar to justify the conclusion that the *Ernst and Ernst* holding with respect to § 10(b) will govern § 14(e). My preliminary impression is that CA2 (Judge Timbers) enunciated and applied a standard of liability considerably less severe than the *scienter* standard we adopted in *Ernst and Ernst*.[265]

In addition to the textual similarities between sections 10(b) and 14(e), Powell also identified "identical policy reasons" to those that had driven the decision in *Ernst & Ernst*: "When a *court implies* a cause of action for damages, it should hesitate—even if the first hurdle is cleared (π is within specially protected class)—to impose a low standard (threshold) of liability."[266] On the question of whether a cause of action should be implied at all for defeated tender offerors, Powell doubted that they warranted protection: "Offerors can take care of themselves (always corps. of some size)."[267] Powell was also troubled by the damages award, which had little relation to any economic harm: "The $35 mil. judgment exceeds entire net worth (net equity) of *Piper* . . . ."[268]

The Court sidestepped the scienter issue, instead holding that the Williams Act did not provide a cause of action for damages to a defeated bidder in a takeover contest. The Court applied the four-factor test previously announced in *Cort v. Ash*:[269] (1) whether the plaintiff is a member of the "class for whose *especial* benefit the statute was enacted"; (2) whether there is any expression of legislative intent to create or deny a private cause of action; (3) whether a private remedy would be consistent with the purposes of the legislative scheme; and

264. *Id.* at 4–5.

265. Memorandum from Justice Lewis F. Powell, Jr., to File, Piper v. Chris-Craft Indus., Inc. 2 (Aug. 26, 1976).

266. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Piper v. Chris-Craft Indus., Inc. 2 (Oct. 4, 1976).

267. *Id.* at 3.

268. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Piper v. Chris-Craft Indus., Inc. 1 (Oct. 5, 1976). Powell had previously noted that First Boston faced "the imposition on it of three times the amount of damages that would be imposed under section 11 of the 1933 Act." Memorandum from Justice Lewis F. Powell, Jr., to File, Piper v. Chris-Craft Indus., Inc., *supra* note 265, at 3.

269. 422 U.S. 66 (1975).

(4) whether the cause of action is one "traditionally relegated to state law."[270] The critical factor here was that target shareholders, not rival bidders, were the class that Congress intended to protect by enacting the Williams Act.[271] Powell had no quarrel with this reasoning, although he worried that "there is some incongruity in distinguishing, for standing purposes, between injunctive and damage relief."[272]

Health problems forced Powell to miss the Court's next foray into implied rights of action in securities law.[273] Powell also missed the argument in *Transamerica Mortgage Advisors v. Lewis*,[274] but the Court split 4-4,[275] so it was set for reargument the next term. In his draft dissent from the initial denial of certiorari (the Court subsequently voted to grant), Powell proposed a high threshold for implying a private right of action: "Recent decisions of this Court have reaffirmed that private causes of action will be inferred from securities statutes only if such an inference is consistent with the language and history of the statute and is necessary to avoid subversion of Congress' purpose in passing the statute."[276] Rare will be the case where the implication of a private right of action is "necessary to avoid subversion of Congress' purpose"—if it were "necessary," presumably Congress would have provided for it. Never a proponent of implied rights, Powell was now actively hostile:

> I have come to think that the Court has gone much too far in inferring federal private causes of action where Congress has chosen to remain silent. Principles of federalism, where state courts traditionally have exercised jurisdiction over a particular type claim, should require that Congress confront openly the question whether there

270. *Piper*, 430 U.S. at 37–41 (citing Cort v. Ash, 422 U.S. 66 (1975)).

271. *See id.* at 26–36 (discussing the legislative history of the Williams Act).

272. Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 1 (Dec. 30, 1976).

273. Touche Ross & Co. v. Redington, 442 U.S. 560, 568–69 (1979) (finding no private cause of action under section 17(a) of the Exchange Act, which requires broker-dealers to keep books and records as required by the SEC). Powell appears to have agreed with the result: "§ 17(a) is not an anti-fraud statute. It proscribes nothing. It merely requires reports. § 18a provides remedies." Preliminary Memorandum, Touche Ross & Co. v. Redington, to Justice Lewis F. Powell, Jr. 1 (Nov. 22, 1978 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.); JEFFRIES, *supra* note 17, at 536.

274. 444 U.S. 11 (1979).

275. Handwritten notes of Justice Lewis F. Powell, Jr., from the Argument in TransAmerica Mortgage Advisors, Inc. v. Lewis 1 (Oct. 2, 1979) ("*Last Spring Aff.*: WJB, BRW, TM, JPS. *Rev*.: WHR, HAB, PS, CJ"); JEFFRIES, *supra* note 17, at 536.

276. Justice Lewis F. Powell, Jr., First Draft Opinion, Dissenting from Denial of Certiorari, TransAmerica Mortgage Advisors, Inc. v. Lewis 3 (Oct. 12, 1978).

> are sound reasons for also authorizing federal court suits. One even can suspect that the draftsmen and sponsors of legislation, taking note of what can be described as the eagerness of federal courts to enhance their own jurisdiction, deliberately avoid legislative hearings and controversy simply by drafting statutes in what [Deputy Solicitor General Frank] Easterbrook calls a "neutral" fashion.[277]

Powell was ready to rethink implied private rights of action.

Powell fired the first volley in this debate before *TransAmerica* could be reargued. *Cannon v. University of Chicago*[278] involved the question of the implication of a private right of action under Title IX, which prohibits sex discrimination by universities receiving federal aid.[279] Powell dissented, arguing that "[w]hen Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction."[280] *J.I. Case v. Borak*[281] was singled out for special scorn, as a

> decision both unprecedented and incomprehensible as a matter of public policy. The decision's rationale, which lies ultimately in the judgment that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action," ignores the fact that Congress, in determining the degree of regulation to be imposed on companies covered by the Securities Exchange Act, already had decided that private enforcement was unnecessary. More significant for present purposes, however, is the fact that *Borak*, rather than signaling the start of a trend in this Court, constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute.[282]

Justice Powell continued in a footnote, "[a]lthough I do not suggest that we should consider overruling *Borak* at this late date, the lack of precedential support for this decision militates strongly against its extension beyond the facts of the case."[283] The expansion of private rights of action during the 1960s had fueled the expansion of the securities laws and Powell was now ready to tackle head-on the source of the problem.

277. Memorandum from Justice Lewis F. Powell, Jr., to "Clerk" 6–7 (Feb. 20, 1979).
278. 441 U.S. 677 (1979)
279. *Id.* at 681–83.
280. *Id.* at 730–31 (Powell, J., dissenting).
281. 377 U.S. 426 (1964).
282. *Cannon*, 441 U.S. at 735–36 (Powell, J., dissenting) (footnote and citation omitted).
283. *Id.* at 735 n.6 (Powell, J., dissenting) (citation omitted).

When *TransAmerica* was finally reargued, Powell worried that the damages remedy that the plaintiffs were seeking "would allow circumvention of *Ernst + Ernst*, *Blue Stamps* [*sic*], etc."[284] Whether this result was appropriate was a question for Congress; the issue for the Court was what Congress intended.[285] Powell found Congress's intention clear from the text of the statute: the Investment Advisors Act conferred jurisdiction over suits in equity, but unlike the Securities Act and Exchange Act, omitted jurisdiction over suits at law.[286] For Powell, anxious to narrow the reach of the federal securities law, this textual difference was decisive.

The split in the Court that had required putting the case over for reargument reemerged. This time, however, Powell joined Justices Stewart, Blackmun, and Rehnquist in voting against the recognition of the private right of action; Chief Justice Burger, who had agreed with the latter three after the first argument, was now "reserv[ing] judgment."[287] Justice Stewart now said he agreed with Powell's intervening dissent in *Cannon*, but he had voted with the majority only "because of vote in *Bakke*" which Powell notes was also true of Justice Rehnquist.[288] The random intervention of *Bakke* had preserved the private right in *Cannon*, but the consensus supporting private rights of action was eroding.

284. Handwritten notes of Justice Lewis F. Powell, Jr., from the Argument in TransAmerica Mortgage Advisors, Inc. v. Lewis, *supra* note 275, at 3 (discussing Ernst & Ernst v. Hochfelder, 425 U.S.185 (1976) and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)).

285. *Id*.

286. Handwritten notes of Justice Lewis F. Powell, Jr., for the Conference on TransAmerica Mortgage Advisor, Inc. v. Lewis 1 (Oct. 4, 1979).

287. Handwritten notes of Justice Lewis F. Powell, Jr., for the Conference on TransAmerica Mortgage Advisors, Inc. v. Lewis 1 (Oct. 5, 1979).

288. *Id.* at 1, 3 (referring to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)). Justices Stewart and Rehnquist had avoided the constitutional issue in *Bakke* by agreeing with Justice Stevens that the affirmative action plan challenged there was prohibited by Title VI of the Education Amendments, 42 U.S.C. § 2000(d) (2000), which forbids discrimination on the basis of race. *Bakke*, 438 U.S. at 421 (Stevens, J., concurring). That necessarily supposed that Bakke had a private right of action to assert his claim. The two felt obliged to uphold the private right of action in *Cannon*, thus creating a five-vote majority in that case. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Cannon v. Univ. of Chicago 1 (Jan. 12, 1979) (noting in regard to Justice Stewart: "*Reverse* (unhappily) . . . In view of vote last term in *Bakke*, 'I'm stuck.'"); *id.* at 3 (noting in regard to Justice Rehnquist, "*Reverse* reluctantly. Bakke should have won on 14th Amend., + WHR is uncomfortable with his vote on VI. But can't think of principled way to reverse his vote in *Bakke*."). Justice Brennan noted at the time of *Bakke* that there was probably a majority that would have voted against a private right of action under Title VI, but he did not include Justice Stewart in that majority. Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of* Regents of the University of California v. Bakke, 19 YALE L. & POL'Y REV. 341, 358 (2001).

With Chief Justice Burger on the fence, however, *TransAmerica* was not the case for rethinking the Court's private right of action doctrine. Justice Stewart, who undertook the opinion in an effort to get a majority, did not repudiate the four-factor test of *Cort v. Ash*, but he took a step toward Powell's position in emphasizing that "[t]he dispositive question remains whether Congress intended to create any such remedy."[289] Powell was willing to go along with this approach, although he filed a brief concurrence noting that he saw Justice Stewart's opinion as "compatible with my dissent in *Cannon v. University of Chicago*."[290]

He also lobbied Justice Stewart (in a private letter) to define narrowly the equitable action for rescission that the Court was recognizing.[291] At Powell's urging, Justice Stewart added a footnote limiting the restitution available under the Act.[292] Powell also argued (to no avail) against citing "*Borak* at all. An anomaly when decided, and in light of more recent cases (especially *Touche, Ross*, and your opinion in this case), I view *Borak* as a 'dead cock in the pit.'"[293] Powell wanted to eradicate all vestiges of the interpretive attitude that had fueled the expansion of the federal securities laws in the 1960s. In this quest he appears ultimately to have prevailed—the Court now requires that Congress speak in "clear and unambiguous terms" when it creates a private right of action.[294]

Two terms later in *Herman & MacLean v. Huddleston*[295] the Court squarely faced the mechanism responsible for that expansion: the implied private right of action under Rule 10b-5.[296] The question logically preceded the question of whether section 10(b) afforded a private cause of action for conduct that would be actionable under the explicit private cause of action provided by section 11 of the Securities Act. While Powell was "tempted" to vote that there was no private cause of action under section 10(b), he pulled back from repudi-

289. TransAmerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979).

290. *Id.* at 25 (Powell, J., concurring).

291. Letter from Justice Lewis F. Powell, Jr., to Justice Potter Stewart 1 (Oct. 30, 1979).

292. *TransAmerica*, 444 U.S. at 24 n.14.

293. Letter from Justice Lewis F. Powell, Jr., to Justice Potter Stewart, *supra* note 291, at 1; *see also TransAmerica*, 444 U.S. at 15.

294. Gonzaga Univ. v. Doe, 536 U.S. 273, 325–26 (2002).

295. 459 U.S. 375 (1983).

296. *Id.* at 379. The statute of limitations had run on the plaintiffs' section 11 claim at the time they filed suit. Preliminary Memorandum, Herman & MacLean v. Huddleston, to Justice Lewis F. Powell, Jr. 6 (Feb. 19, 1982 Conference).

ating a cause of action that went back more than thirty years.[297] Having conceded the existence of the private right of action under section 10(b), Powell saw no defensible basis for carving out exceptions when the securities laws expressly provided causes of action.[298]

IV. PREDICTABILITY

Determinate legal rules allow lawyers to counsel corporate clients who are trying to stay within the law. Determinate rules, however, also provide a roadmap for those seeking to evade the policies behind those laws. The latter possibility does not appear to have concerned Powell unduly. In a 1967 speech to a conference of financial executives, Powell canvassed the state of antitrust law, fretting that "the trend of merger decisions seems steadily into the smog of uncertainty—rather than toward higher visibility and predictability."[299] Powell was open to amendment of the antitrust laws to clarify their application. A revised antitrust code would allow "economic realism, rather than nebulous and varying legal concepts, . . . [to guide] corporate expansion."[300] Like most corporate lawyers, Powell favored predictability.

Powell's preference for predictability carried over to the interpretation of the securities laws. That preference was generally, but not always, consistent with his desire to limit liability. For example, Powell argued in *Gordon v. NYSE*[301] that

> it would be grossly inequitable to impose liability of this magnitude [a claimed $1.5 billion in damages, plus attorneys fees] upon private parties who have, for nearly 40 years, followed a practice to the knowledge of the government and with the full approval of the agency established by the Congress to regulate this business.[302]

---

297. Bench Memorandum, Herman & MacLean v. Huddleston, from Jim [Browning] to Justice Lewis F. Powell, Jr. 20 (Sept. 9, 1982).

298. *See id.* at 1, 11 (stating that the all-inclusive language made it difficult to carve out exceptions). The Court addressed one additional case raising the question of an implied right of action under the securities laws, but the conclusion that there was no private right was uncontroversial. Daily Income Fund v. Fox, 464 U.S. 523, 541 (1984).

299. Justice Lewis F. Powell, Jr., Trends in Antitrust, Address Before the Conference of Financial Executives, Williamsburg, Virginia 14 (June 17, 1967) (transcript).

300. *Id.* at 17.

301. 422 U.S. 659 (1975).

302. Memorandum to Justice Lewis F. Powell, Jr. 2 (Mar. 27, 1975); *see also Gordon*, 422 U.S. at 691 (holding that SEC oversight renders the NYSE immune from antitrust liability for fixing commission rates among its members); United States v. NASD, 422 U.S. 694, 734–35

Powell could not countenance springing liability on firms for well-settled business practices, particularly when those practices had received the imprimatur of regulatory approval. Powell's aversion to unanticipated liability exposures would be a recurring theme in securities cases.

A. *Short Swing Profits under Section 16(b)*

Kern County Land Co. v. Occidental Petroleum[303] involved the recovery of short swing profits under section 16(b) of the Exchange Act.[304] The facts were somewhat convoluted, but the basic question was a recurring one: when a bidder for a company loses out to a competing bidder, what is the status under section 16(b) of profits derived from the losing bidder's "toehold" acquisition? Occidental Petroleum acquired a twenty percent stake in Kern through a tender offer, thereby making it a statutory insider within the meaning of section 16.[305] Kern then arranged a defensive transaction, in the form of a sale of assets, with Tenneco at a substantial premium above Occidental's offer.[306] This put Occidental in a difficult position. If Kern sold its assets and dissolved within six months of the purchase making Occidental a ten percent holder, the resulting distribution of Tenneco stock to Kern's shareholders could be considered a "sale" of its Kern stock. If so, Occidental's profits on the exchange could be subject to disgorgement under section 16(b). Critically, Occidental could not control the timing of the exchange.[307] Tenneco did not want a large block of its stock in potentially hostile hands, so it entered into an option agreement with Occidental whereby Tenneco could repurchase the Tenneco shares that Occidental would receive after the Kern asset sale.[308] The option could not be exercised, however, until six months and one day after the closing of Occidental's tender offer, thereby

(1975) (holding that certain sales practices of investment companies are immune from antitrust liability because of SEC oversight).

303. 411 U.S. 582 (1973).

304. 15 U.S.C. § 78p(b) (2000). Section 16(b) provides for the disgorgement of trading profits by insiders (defined to include holders of more than ten percent of a company's equity) resulting from purchases and sales, or sales and purchases, within six months of each other. *Id.*

305. *Kern County Land Co.*, 411 U.S. at 585.

306. *Id.* at 586.

307. *See id.* at 587 (noting that if the Kern-Tenneco merger were approved and successfully closed, Occidental would have to exchange its Kern shares for Tenneco stock and would be locked into a minority position in Tenneco).

308. *Id.*

putting that part of the transaction outside section 16(b)'s window.[309] Tenneco exercised the option, but nonetheless caused its acquisition subsidiary, New Kern, to file suit against Occidental for recovery of its profits under section 16(b).[310]

The conference split 4-4, with Justice White passing.[311] With the outcome in doubt, Powell wrote a memorandum to Justice White. There was general consensus that the option agreement was not a sale, but the exchange of shares pursuant to the asset sale posed a closer question.[312] Powell argued that the statutory language itself compelled the conclusion that the exchange of shares was not a sale: "The concept of a purchase or sale necessarily connotes volition, *i.e.*, a willing or conscious act on the part of the 10% owner. There was no such act in this case, and the absence of it seems to me to be dispositive."[313] The sale of assets required only a majority vote of Kern's shareholders and California law did not provide for appraisal.[314] Accordingly, Occidental had no alternative to the exchange: "[T]here may have been a 'shotgun wedding' but there certainly was no sale."[315]

Justice White joined Powell's side to form a majority. The Chief Justice assigned the opinion to Justice White, perhaps to keep a wavering member of the majority on board. Although Powell agreed with Justice White's general approach, Powell felt that the opinion did not emphasize sufficiently that the exchange of shares was involuntary. Powell wrote that he would consider a concurrence because the "[b]ar needs an answer to this question. This opinion is fact oriented [and] gives little guidance."[316] Powell thought Justice White unduly emphasized "whether O[ccidental] could have had insider in-

309. *Id.* at 588.

310. *Id.* at 590. The Exchange Act's antiwaiver provision precluded Tenneco from contractually waiving its rights under section 16(b). *See* 15 U.S.C. § 78cc(a) (2000) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.").

311. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Kern County Land Co. v. Occidental Petroleum Corp. 1 (Dec. 8, 1972) (indicating that Justice Blackmun tentatively voted to reverse, but subsequently switched his vote).

312. *Id*.

313. Memorandum from Justice Lewis F. Powell, Jr., to Justice Byron R. White 2 (Dec. 9, 1972).

314. *Kern County Land Co.*, 411 U.S. at 586 n.9.

315. Memorandum from Justice Lewis F. Powell, Jr., to Justice Byron R. White, *supra* note 313, at 3.

316. Justice Byron R. White, First Draft Opinion, Kern County Land Co. v. Occidental Petroleum Corp. 1 (circulated Mar. 6, 1973) (handwritten notes of Justice Lewis F. Powell, Jr.).

formation,"[317] an "immaterial"[318] concern, because "Occidental could not [and] did not arrange the merger."[319] Powell also disliked Justice White's reference to the fact that appraisal was not available, which Powell considered "not a dispositive fact," and the statement that "[w]e do not suggest that an exchange of stock pursuant to a merger may never result in § 16(b) liability."[320] Powell favored a more sweeping holding offering clearer guidance. He feared that courts and lawyers would struggle to apply Justice White's flexible standard, a concern that has proved to be justified.[321]

Powell joined Justice White's opinion, but drafted a concurrence, noting that "the courts and counsel have been perplexed as to the applicability of § 16(b) to a wide variety of 'unorthodox' transactions. Counsel called upon to advise clients with respect to such transactions have lacked definitive guidance."[322] A "factually oriented 'pragmatic' approach" might be necessary in some cases, even though it risked being "inexact" and "even subjective."[323] But "the Court need not have reached in this merger case the inquiry which is the focus of attention under the 'possibility of abuse' test, with its focus on the defendant's access to inside information."[324] That inquiry was "immaterial" because Occidental "could neither have blocked the merger nor assured its consummation. . . . There was simply no act of volition—indeed no relevant act at all—on the part of respondent with respect to the accomplishment of the merger."[325]

Powell's "volitional" approach would have provided a more determinate test than Justice White's possibility-of-abuse standard. Powell was willing to tolerate private planning to avoid the coverage of section 16(b); he thought that the abuses Congress sought to curb through the statute were remote.[326] Powell noted in his memorandum

---

317. *Id.* at 16 (handwritten notes of Justice Lewis F. Powell, Jr.).

318. *Id.* at 14 (handwritten notes of Justice Lewis F. Powell, Jr.).

319. *Id.* (handwritten notes of Justice Lewis F. Powell, Jr.).

320. *Id.* at 18 (handwritten notes of Justice Lewis F. Powell, Jr.).

321. *See* COX ET AL., *supra* note 208, at 1001 ("Ever since the Supreme Court announced its *Kern County* pragmatic approach, the lower courts have had trouble applying it.").

322. Justice Lewis F. Powell Jr., Draft Concurring Opinion, Kern County Land Co. v. Occidental Petroleum 1 (Mar. 10, 1973).

323. *Id.* at 2.

324. *Id.* at 3.

325. *Id.* at 4–5.

326. In a memorandum to his law clerk in a subsequent section 16(b) case, Powell wrote

> [i]n truth, as you know from our discussions, even one who enjoys the status of a 10% stockholder is not entitled by virtue of that status to *any* inside information. To be

to his clerk asking him to review the concurrence that "I know from professional experience that this is an area which creates considerable doubt and confusion. My concurrence will not help much, but it may put the question which lawyers usually are called upon to answer in a little sharper focus."[327] Powell's file does not reveal why he decided against publishing the concurrence, to which Justice White had "no objection whatsoever."[328] Perhaps Justice White's reminder that Occidental was already a ten percent shareholder when it extended its tender offer caused Powell to rethink the wisdom of his concurrence; getting into this question might require the Court to resolve the issue of "whether these shares obtained by the tender offer should be treated as having been obtained all at one time or at separate times."[329] The majority was fragile enough without taking on this question.[330]

> sure, if such a stockholder is able to place a representative on the board, the stockholder may end up obtaining the information. This would certainly be true if an individual owned 10% and also served as an officer or director. But absent a presence on the board there would be a clear violation of 10b-5 for a corporation (or its officers or directors) to disclose to any stockholder information not available to all holders.

Memorandum from Justice Lewis F. Powell, Jr., to Carl Schenker 4–5 (Nov. 19, 1975).

327. Memorandum from Justice Lewis F. Powell, Jr., to Larry A. Hammond 1 (Mar. 10, 1973).

328. Letter from Justice Byron R. White to Justice Lewis F. Powell, Jr. 1 (Mar. 12, 1973).

329. *Id*.

330. The question of whether the purchase that makes an individual a ten percent holder is subject to section 16(b) subsequently came to the Court in *Foremost-McKesson v. Provident Securities Co.*, 423 U.S. 232 (1976). Provident had sold its assets to Foremost-McKesson in exchange for convertible debentures and cash. *Id.* at 235. If converted, the debentures would have made Provident a 10 percent holder of Foremost's equity. *Id.* at 236. Provident did not convert, but instead promptly sold the debentures to an investment bank pursuant to an underwriting arrangement. *Id*. Foremost-McKesson then filed suit under 16(b) to recover Provident's profits. *Id.* at 237.

In his notes for use at the Court's conference, Powell argued that under the plain language of the proviso, "Provident was not a 10% holder *at time* of *purchase*. At *that time* it was zero holder." Handwritten notes of Justice Lewis F. Powell, Jr., for the Conference on Foremost-McKesson v. Provident Securities Co. 1 (Oct. 10, 1975). Moreover, the purpose of the statute—to prevent the unfair use of information—would not be served by liability in this case because "[u]ntil one becomes 10% holder, Congress has concluded there is little likelihood of obtaining inf[ormation] to use unfairly. 16(b) is directed vs. *insiders*. One is not an insider under statute until he owns 10%. What information can he acquire 'simultaneously' with purchasing 10%?" *Id.* at 2. Powell also argued that a statute requiring "liability w/o fault" such as section 16(b) should be "construed strictly—not expansively." *Id.* at 3. The equities, "altho[ugh] irrelevant" did not favor Foremost-McKesson, which sold the debentures to Provident "with full knowledge . . . that they would be sold." *Id*. Powell's observation that this was "[n]ot a pretty posture for a litigant who is relying on a statute designed to prevent unfairness!" may have resonated with some of his colleagues. *Id*. Powell's final argument was grounded in experience: "*Proviso* distinguishes bet[ween] officers + directors—and 10% owners. There is a reason: Vast

B. Materiality

Materiality arises in virtually every securities lawsuit, whether brought by a private litigant, the SEC, or the Justice Department. The higher the standard for materiality, the lower the risk that corporations will run afoul of the securities laws. The Court addressed this ubiquitous issue in only one case during Powell's tenure, *TSC Industries, Inc. v. Northway, Inc*.[331] The Seventh Circuit had held that certain omissions from a proxy statement were material as a matter of law because they "might have been considered important by a reasonable shareholder."[332]

Powell saw this formulation as an "unrealistic standard,"[333] a view perhaps colored by his perception of the case as a "strike suit."[334] Powell instead argued at conference for his reading of the Second Circuit's standard: a "significant likelihood that a reasonable investor would consider the information important in arriving at his choice of action."[335] Powell characterized this standard as "middle-of-road" and argued that "courts should avoid extreme standards either of laxity or liability" when dealing with a "*judicially created*" remedy.[336] Powell's characterization seems a bit strained here. Although the private right of action under Rule 10b-5 is judicially created, the materiality language is drawn from the statute and applies to both private and SEC actions.

After articulating the standard, Powell then went through a careful explication of the facts in arguing that the Seventh Circuit had erred in holding that the omissions were material as a matter of law, rather than leaving them for the jury.[337] Powell's thorough preparation paid off, as the Chief Justice and Justices Stewart, Marshall, and Rehnquist agreed with him across the board.[338]

---

difference between managerial insiders + stockholders." *Id*. Having served on numerous corporate boards, Powell was well placed to assess the access to information enjoyed by stockholders.

331. 426 U.S. 438 (1976).

332. Preliminary Memorandum, TSC Indus., Inc. v. Northway, Inc., to Justice Lewis F. Powell, Jr. 2 (July 1, 1975).

333. *Id.* at 1 (handwritten notes of Justice Lewis F. Powell, Jr.).

334. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on TSC Indus., Inc. v. Northway, Inc. 1 (n.d.).

335. *Id*.

336. *Id.* at 2.

337. *Id.* at 3–5.

338. Handwritten notes of Justice Lewis F. Powell, Jr., from the Argument in TSC Indus., Inc. v. Northway, Inc. 1–2 (Mar. 5, 1976).

Powell liked Justice Marshall's draft opinion, with two small exceptions. Justice Marshall wrote that "[o]ur cases have not considered, and we have no occasion in this case to consider, what showing of culpability, *if any*, is required to establish the liability under § 14(a)."[339] The "if any" drew Powell's ire—even the suggestion of strict liability was anathema—and Justice Marshall withdrew the offensive language. Powell also objected[340] to a footnote reserving judgment "as to how the standard of materiality and its application might be altered in a case involving a contested election."[341] Powell the corporate lawyer could not have been comfortable with the notion that the supposedly objective standard for materiality might vary with the context in which it was applied. Even Justice Blackmun, no friend of defendants in securities cases, shared this concern.[342] The offending footnote was removed. The standard adopted in *TSC* eventually became the general standard of materiality under the securities laws.[343]

C. *Definition of Security*

The definition of a security is a threshold issue in securities law.[344] Unless a transaction involves a security, the federal securities laws do not apply. Prior to Powell's appointment, the Supreme Court held

339. Justice Thurgood Marshall, Draft Opinion, TSC Indus., Inc. v. Northway, Inc. FN-4 n.7 (circulated June 2, 1976) (emphasis added). Focused as they were on the summary judgment awarded to plaintiffs in this case, none of the Justices appears to have given any thought to the implications that precluding pretrial materiality determinations might have on *defendants* who were seeking dismissal.

340. *See id.* at 1 (handwritten notes of Justice Lewis F. Powell, Jr.) ("Good opinion. I'll join. But I'll write or talk to TM about notes 7 + 11.").

341. *Id.* at FN-7 n.11.

342. *See* Letter from Justice Harry F. Blackmun to Justice Thurgood Marshall 1 (June 9, 1976) (stating that Justice Blackmun would join the opinion if footnote 11 were dropped).

343. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 231 (1987) (adopting the *TSC* standard of materiality). Powell voted to grant certiorari in *Basic*. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Basic, Inc. v. Levinson 1 (Feb. 20, 1987). Somewhat surprisingly, the second issue in that case, the "fraud-on-the-market" presumption of reliance, went unremarked on by Powell. Reliance does not appear to have been an important issue for Powell. *See* Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on John Nuveen & Co. v. Sanders (Oct. 31, 1980) (noting that Powell would not grant certiorari on the question "whether [a] person who never saw [the] prospectus could sue" under Section 12(2) because the "[m]arket may be affected").

344. COX ET AL., *supra* note 208, at 117.

every instrument it reviewed to be a security.[345] During Powell's tenure, the Court decided five cases raising this question, rejecting the security label in three. Powell wrote four of these five opinions on the definition of "security." His sustained effort in this area confined the securities law to instruments that commonly would be understood as investments.

Powell's evolution in this area is striking. Powell focused on "economic reality" to rein in the definition of security in *United Housing Foundation v. Forman*.[346] That emphasis conflicted with Powell's goal of predictability; looking at economic reality suggested a case-by-case analysis of financial instruments to determine whether they were a security, a less than comforting prospect for corporate lawyers advising clients. When that unpredictability became unmanageable in *Landreth Timber Co. v. Landreth*[347] and *Gould v. Ruefenacht*,[348] Powell pulled back from the full implications of "economic reality."

As Powell saw it, the transaction at issue in *Forman* had none of the characteristics of investment. The plaintiffs had purchased "stock" in a nonprofit housing cooperative subsidized by the State of New York which allowed them to rent apartments in the cooperative.[349] One senses in this passage Powell's exasperation with the Second Circuit's ongoing efforts to expand the securities laws:

> In this case members of Co-op City have not bought stock or real estate for investment purposes but rather have purchased living quarters generously subsidized by the State of New York. Certainly there was no profit motive, as no rational person would purchase an apartment in this nonprofit housing co-op as an investment for profit. . . . Nor can it even be suggested that the promoters of the cooperative, including the State of New York, sold shares in Co-op City as a means of raising venture capital for a profitmaking operation. Indeed, the promoter is a *nonprofit* corporation. Nothing in the

345. Randall W. Quinn & Paul Gonson, *Development of the Securities Law in the Supreme Court: The Definition of "Security" and the Implication of Private Rights of Action*, 35 HOW. L.J. 319, 320–25 (1992).

346. 421 U.S. 837 (1975).

347. 471 U.S. 681 (1985).

348. 471 U.S. 701 (1985).

349. Justice Lewis F. Powell, Jr., Second Draft Opinion Dissenting from Denial of Certiorari, United Hous. Found., Inc. v. Forman 1 (Jan. 16, 1974).

> instant transaction partakes of the kind of investment traditionally found to be within the scope and purpose of the securities laws.[350]

The Second Circuit's "novel" conclusion that this transaction involved a security ignored economic reality. "Novel" was not praise when Powell was describing legal decisions.

The SEC predictably came in on the side of the plaintiffs, arguing for the broadest possible interpretation. In this case, the agency was not arguing for a strained interpretation of statutory text: "[t]he shares issued by Riverbay Corporation are securities because they are stock" and "stock" is specifically enumerated in the Exchange Act's definition of security.[351] Powell, however, was not persuaded by this statutory literalism. He seldom was inclined to defer to the SEC's agency expertise, and that inclination was bolstered in this case by the fact that the SEC had reversed its prior position.[352] In his view, the label "stock" was misapplied to this instrument.

Looking through form to substance became the central theme of Powell's eventual opinion for the Court. "Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."[353] The economic realities reflected expenditures on housing, not investments, and labeling the purchase "stock" could not change that fact.

There is no indication in Powell's papers that he ever considered the possibility that the label "stock" could be dispositive. While it might have been the wrong result on the facts in *Forman*, a holding that the instrument was a security would have been readily sidestepped in the future by simply choosing another label (say, "housing units"). More importantly, it would have made the definition of security considerably more predictable. Perhaps the message was as important as the holding for Powell. As Powell saw it, private plaintiffs and the SEC were attempting to push the securities laws into areas

350. *Id.* at 4.

351. Brief of Amicus Curiae Securities and Exchange Commission at 7, United Hous. Found., Inc. v. Forman, 421 U.S. 837 (1975) (No. 74-157) (citing section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10) (2000)).

352. *See* Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 33-5347, 38 Fed. Reg. 1735 (Jan. 18, 1973) (concluding that condominiums are not securities).

353. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1975).

that Congress had never intended that they reach. His instinct for predictability could not overcome that visceral reaction.[354]

---

354. The Court decided one case involving the definition of a security in which Powell did not write the opinion. *Marine Bank v. Weaver*, 455 U.S. 551 (1982), involved two instruments that potentially could be a security: (1) a certificate of deposit issued by a bank; and (2) a unique contract negotiated between two parties for an investment in a business. *Id.* at 554. The second question particularly worried Powell: "If the agreement here—unique on its facts— is a 'security,' a vast number of business [contracts] will come under Act. (Sad case!)" Handwritten notes of Justice Lewis F. Powell, Jr., from the Argument in Marine Bank v. Weaver 1 (Jan. 8, 1982). Both instruments ultimately were held not to be securities, but the Chief Justice's opinion for the Court further muddied the water on the definition of a security.

On the question of whether a CD is a security, Chief Justice Burger sensibly enough said no. *Marine Bank*, 455 U.S. at 559. Certificates of deposit are not among the enumerated categories in the definition of security. 15 USC § 77b(a)(1) (2000). More importantly, the risk of holding the instrument is virtually eliminated by federal banking regulation and deposit insurance. Chief Justice Burger confused the matter, however, in responding to a concern raised by Justice Stevens. Justice Stevens urged that the Court's holding not preclude later holdings that a CD is a security under the Investment Company Act (despite identical language in the definition) or that a CD might somehow become a security in secondary market trading, even though it was not one at the time of issue. Letter from Justice John Paul Stevens to Chief Justice Warren E. Burger 1 (Mar. 4, 1982). Despite the implausibility of these concerns (and not needing Justice Stevens for a majority), Chief Justice Burger obliged:

> It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a 'security' as defined by the Federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.

Marine Bank, 455 U.S. at 560 n.11. This caveat rendered the Court's holding good for only one case—a CD could reemerge as a security in the next case, making it very difficult for lawyers to advise their clients on the status of the instrument.

Chief Justice Burger got further off track in addressing whether the privately negotiated investment was a security. He notes that the owners of business "distributed no prospectus to the Weavers [plaintiffs] or to other potential investors, and the unique agreement they negotiated was not designed to be traded publicly." Chief Justice Warren E. Burger, First Draft Opinion, Marine Bank v. Weaver 8 (circulated Mar. 1, 1982). Powell objected that these facts were "immaterial," but he did not share his concerns with Chief Justice Burger. *Id.* at 1, 8 (handwritten notes of Justice Lewis F. Powell, Jr.). Powell presumably would have written a cleaner opinion, focusing on the fact that the unique contract, tailored through the negotiations of the parties, was not within the realm that Congress had sought to regulate. Alternatively, the case might have been resolved on a lack of "horizontal commonality," i.e., no "common enterprise" among investors. The Court did not take this tack, leaving unresolved the issue whether horizontal commonality is required to satisfy the "common enterprise" test. Instead, Chief Justice Burger's loose approach raised the possibility that a variety of private placements of instruments commonly thought to be securities (e.g., preferred stock) might be outside the reach of the securities laws. *See* Marc I. Steinberg & William E. Kaulbach, *The Supreme Court and the Definition of "Security": The "Context" Clause, "Investment Contract" Analysis, and Their Ramifications*, 40 VAND. L. REV. 489, 490 (1987) ("[T]he Court's analysis in Weaver has resulted in a great deal of uncertainty about the circumstances under which instruments clearly fitting within the statutory definition should be denied coverage and when other, more unusual, transactions similarly ought to be excluded."). Unless, of course, the Court decided that they

Powell returned the definition of security to the path of predictability in his last two opinions in this area, although it required going against his strongest instinct. *Landreth Timber Co. v. Landreth*[355] and its companion case, *Gould v. Ruefenacht*,[356] involved the "sale of business" doctrine. Under that doctrine, the sale of an entire business, if achieved by the sale of 100 percent of a company's stock (or perhaps just a majority), was outside the securities law.[357] The "sale of business" doctrine was at least questionable given the specific enumeration of stock in the definition of "security." The lower courts, however, had held that common stock was not a security unless it also met the test for an "investment contract."[358] That test, set forth by the Supreme Court in *SEC v. W.J. Howey Co.*,[359] required an expectation of profits from the efforts of others.[360] A purchaser of 100 percent of a company's stock typically could not satisfy this requirement because of the control conferred by majority ownership. The notion that the *Howey* test applied to all financial instruments got support from Powell's opinion in *Forman*, with its focus on "economic realities," and its observation that the *Howey* test "embodies the essential attributes that run through all of the Court's decisions defining a security."[361]

Although this dicta hardly compelled the lower courts' decisions, Powell's instinct again was to cabin the federal securities laws (and their liability exposures) narrowly. The sale of an entire company, whether done by merger, sale of assets, or the sale of stock, typically would be negotiated face-to-face. The potential buyer could demand those disclosures relevant to him; the state common law of fraud would assure the credibility of those disclosures.

Powell had endorsed the "sale of business" doctrine a decade earlier in a draft concurrence in *Scherk v. Alberto-Culver Co.*:[362]

> It is unnecessary to say that no acquisition of an entire business, where the method employed is transfer of stock, is ever convered

---

were securities based on the flabby caveat that Chief Justice Burger had included at Justice Stevens's urging.

355. 471 U.S. 681 (1985).

356. 471 U.S. 701 (1985).

357. *Landreth*, 471 U.S. at 694–95.

358. Brief of Amicus Curiae Securities and Exchange Commission at 4, Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) (No. 83-1961).

359. 328 U.S. 293 (1946).

360. *Id.* at 298.

361. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852–53 (1975).

362. 417 U.S. 506 (1974).

> [*sic*] by 10(b) of the Act. There may be situations where the substance or essence of the transaction is in fact the purchase and sale of securities. But certainly in a case where one large business interest is seeking to acquire the entire business of another large interest for the purpose of operating it, if [*sic*] blinks reality to say that a security's [*sic*] transaction occurs within the language and intent of § 10(b). In this case Alberto-Culver's purpose was to acquire these business entities—their assets and going concern value—in Western Europe. Alberto-Culver desired to operate these businesses itself, and was free from the time of acquisition to convert them into such business forms as best suited its tax and business purposes. It is plain that Alberto-Culver had no interest in merely becoming a shareholder in Scherk's enterprises. In short, the purchase here was not in any realistic sense a security's [*sic*] transaction. It was the 100% acquisition of businesses by a strong, sophisticated purchaser fully capable of making all necessary investigations, and which indeed did make such investigations through American and European and [*sic*] accountants.
>
> There is nothing in the history or language structures of the Securities Acts of 1933 and 1934 which remotely suggest an intent or purpose to apply to transactions such as this or to afford protection to parties such as Alberto-Culver.[363]

Powell objected to bringing the federal securities laws into negotiations between sophisticated commercial parties. The "sale of business" doctrine provided the hook by which Powell could limit the reach of the securities laws. Powell chose not to publish his *Alberto-Culver* concurrence, however, apparently satisfied by Justice Stewart's specific reservation of the question in the majority opinion.[364] So Powell was free to consider the question *de novo*.

At the certiorari stage in *Landreth* and *Gould*, Powell favored the "sale of business" doctrine,[365] a view that he still held the next spring when he reviewed the case prior to argument:

363. Justice Lewis F. Powell, Jr., Rough First Draft Concurring Opinion, Scherk v. Alberto-Culver Co. 5–6 (June 2, 1974).

364. Justice Lewis F. Powell, Jr., Suggested Note to Be Added to the Opinion of the Court, Scherk v. Alberto-Culver Co. 1 (June 6, 1974); Justice Potter Stewart, Fourth Draft Opinion, Scherk v. Alberto-Culver Co. 1 (circulated June 7, 1974) (handwritten notes of Justice Lewis F. Powell, Jr.) ("My suggested note 8 is included.").

365. Powell wrote on the certiorari pool memorandum that he was "inclined to agree" with the Ninth Circuit's application of the doctrine. Preliminary Memorandum, Landreth Timber Co. v. Landreth 1 (Sept. 24, 1984 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

> As I had some familiarity with both of these statutes, I confess to a rather strong bias in favor of CA9's position that one must look to the substance of the transaction, rather than rely solely to the term "stock," to conclude that the anti-fraud provisions of these Acts apply. Although the SG struggles to distinguish my decision in *United Housing Foundation v. Forman*, I am not yet persuaded.
>
> To all intense [*sic*] purposes, both of these transactions involved—in effect —the transfer of assets rather than securities in the normal sense of the term. This is more obvious where 100% of the business was bought than in the case where an individual purchased only 50% of the stock. But both cases involve types of transactions that I doubt anyone, at the times these statutes were enacted, would have believed were covered by any provisions of these two federal laws.[366]

Powell nonetheless conceded that the Solicitor General made "strong arguments."[367] Powell also wondered whether the doctrine should be applied to the sale of a smaller percentage of stock.[368]

Wrestling with this last question evidently changed Powell's mind, with a push from his law clerk. That clerk, Lynda Simpson, advised Powell that "the determination of whether stock is a 'security' in these cases will depend on extensive fact-finding as to whether control has passed and how active in management the purchaser becomes, inquiries that make the 'sale of business' doctrine more than a little elusive to apply."[369] Moreover, she noted, "[i]t doesn't make much sense to me that the same stock is or is not a 'security' depending on how much of it was sold or who bought it."[370] Simpson's invocation of predictability resonated with Powell's preference for clear rules: Powell noted "Linda [*sic*] may be right."[371] He wrote in his notes prepared before argument that he saw this lack of predictability as a "serious weakness" in the "sale of business" doctrine.[372] By the time

366. Memorandum from Justice Lewis F. Powell, Jr., to Lynda [Simpson] 2–3 (Mar. 7, 1985).

367. *Id.* at 3.

368. *See id.* at 4 ("Is *Gould* different because he bought only 50%. What if he had bought 25%?").

369. Bench Memorandum, Gould v. Ruefenacht, to Justice Lewis F. Powell, Jr. 8 (Mar. 5, 1985).

370. Memorandum from Lynda [Simpson] to Justice Lewis F. Powell, Jr. 3 (Mar. 7, 1985).

371. *Id.* at 4 (handwritten notes of Justice Lewis F. Powell, Jr.).

372. Handwritten notes of Justice Lewis F. Powell, Jr., for the Argument in Gould v. Ruefenacht and Landreth Timber Co. v. Landreth 1 (Mar. 21, 1985).

of conference, Powell voted with his colleagues in rejecting the doctrine, after first "express[ing] my doubts at length."[373]

Powell was assigned the opinions for a unanimous Court.[374] In the *Landreth* opinion, he limited *Forman's* "economic reality" test to the definition of "investment contract." The "investment contract" test would not be allowed to swallow specifically enumerated categories of security.[375] Forced to choose between predictability of application and his aversion to expanding the scope of the securities laws, Powell opted for predictability: "uncertainties attending the applicability of the Acts would hardly be in the best interests of either party to a transaction."[376] It helped that the expanded reach of the securities laws easily could be avoided—by structuring a transaction as an asset sale, a corporate lawyer could sidestep the securities laws. There is no evidence that grappling with the sale of business doctrine caused Powell to reconsider *Forman*'s focus on economic realities and the uncertainty that it had engendered.

Powell was afforded one final opportunity to contribute to the interpretation of "security." After retiring from the Supreme Court, Powell sat by designation for a number of years on the Fourth Circuit.[377] His opinion in *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*[378] holds that a general partnership interest is not an "'investment security.'"[379] Powell was wary of turning partnership disputes into a federal case via the securities laws.[380] The decision is notable for Powell's rejection of the notion that "courts must examine [the] business acumen" of an investor found to be a general partner when deciding whether the partnership interest qualifies as an "investment contract."[381] Powell thought that "[u]nless a person is incompetent I have thought that a general partner is bound by the terms and conditions of the partnership agreement. Otherwise, it

373. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Landreth Timber Co. v. Landreth 2 (Mar. 29, 1985).

374. Justice Stevens evidently had a change of heart, as he subsequently dissented. Landreth Timber Co. v. Landreth, 471 U.S. 681, 697 (1985) (Stevens, J., dissenting).

375. *Id.* at 691.

376. *Id.* at 696.

377. JEFFRIES, *supra* note 17, at 560.

378. 840 F.2d 236 (4th Cir. 1988).

379. *Id.* at 241–42.

380. Telephone Interview with Bob Werner (former Powell clerk) (May 22, 2002).

381. Memorandum from Justice Lewis F. Powell, Jr., to Bob [Werner] 2 (Jan. 18, 1988).

seems to me the law would be chaotic."[382] Here, Powell did not have to choose between predictability and his goal of limiting the securities laws.

V. THE TAKEOVER WARS

Powell's efforts to curtail the expansion of the federal securities law are seen most clearly in the conflict with state corporate law. The Supremacy Clause requires that state law must give way when federal and state law conflict,[383] but judges nonetheless have substantial latitude in interpreting the scope of federal law and identifying conflicts. The longstanding clash between state corporate law and federal securities law was exacerbated when a wave of hostile takeovers reached its zenith during Powell's last years on the Court.[384] The states were taking the lead in discouraging takeovers. The SEC was in the opposing corner, attempting to use federal law to head off state efforts to restrict the market for corporate control.[385] In this dispute, the question was not whether one was "for" or "against" business; one had to take sides for or against management. Powell was firmly in the promanagement camp.

The following passage from Powell's concurrence in *Edgar v. MITE Corp.* reflects his concern for protecting management:[386]

> The corporate headquarters of the great national and multi-national corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions

382. *Id.* at 3.

383. U.S. CONST. art. VI, § 1, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

384. PATRICK A. GAUGHAN, MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS 44–49 (3d ed. 2002) (collecting statistics on the incidence of hostile takeovers).

385. Tender Offer Reform Act of 1984, H.R. 5693, 98th Cong. (1984) (proposing, at the SEC's urging, that the Williams Act be expanded to give the SEC jurisdiction over anti-takeover devices); Telephone Interview with Steve Lamb (former SEC attorney) (May 30, 2002).

386. 457 U.S. 624 (1982).

> to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.[387]

Powell's discussion here smacks of small-town protectionism, i.e., preserving the ability of states to extract rents from corporations in exchange for the protection of incumbent management.

Powell would not have labeled himself a protectionist, but simply a conservative anxious to preserve the sort of business community that he had known. In Powell's business world, businessmen like Harvie Wilkinson (and, for that matter, Powell himself) were engaged in building communities as well as businesses. The corporate bottom line was relevant, but it was not the only goal. Powell, having spent so many years in corporate boardrooms, paid scant attention to the interests of shareholders, noticeably absent from his discussion here. Also absent is any attempt to deal with the consequences that this view would have for the goal of preserving a common market among the states, if states are to be allowed to protect their local favorites from takeover by big city firms. Powell's "Chamber of Commerce" perspective ultimately prevailed in the Supreme Court and the market for corporate control was seriously undermined.

A. *Virginia's Anti-Takeover Statute*

Powell had a personal interest in state anti-takeover laws—he had lobbied to enact the first one. Virginia was the first state (predating even the federal Williams Act) to adopt an anti-takeover statute in response to the tender offer wave of the late 1960s.[388] Powell worried that the then-existing regulatory void meant that a tender "offer may be sprung upon unwary management almost overnight."[389] Powell's worries became more acute when one of the great conglomerates of the 1960s, Tenneco, targeted Newport News Shipbuilding for a takeover.[390] Although Newport News was not a regular client, the company came to Powell when it needed legislation to ward off Tenneco.[391]

---

387. *Id.* at 646 (Powell, J., concurring).

388. VA. CODE ANN. §§ 13.1-725 to 13.1-728.9 (Michie 1999).

389. Lewis F. Powell, Jr., Trends in Antitrust, Address at the Conference of Financial Executives, *supra* note 299, at 15.

390. Note from Justice Lewis F. Powell, Jr., to Joe [Carter] 1 (Apr. 18, 1981).

391. Telephone Interview with Joe Carter (former partner, Hunton & Williams) (May 21, 2002).

Powell's connections helped: he was a longtime supporter of Edward Lane, who sponsored the legislation.[392] Lane introduced a bill that would apply to offers for more than ten percent of a company's shares for companies that were both incorporated and doing business in Virginia. Based on a mark-up of a predecessor bill of the Williams Act,[393] the bill's provisions track the federal law.[394] Powell lobbied for the bill on behalf of Newport News, meeting with Virginia's Attorney General (whom Powell had supported in his election campaign)[395] and appearing before both House and Senate Committees of the General Assembly.[396] A member of Powell's "team,"[397] Joe Carter, was sent to "pound[] the halls of the General Assembly with Cootie Holt [Newport's general counsel] begging our friends to save Newport News Ship from being taken over."[398]

The legislation passed the assembly and was signed into law by Governor Mills Godwin (another beneficiary of Powell's support).[399] Powell thanked Lane for his leadership in enacting "a constructive bill in the overall public interest of stockholders and management of

392. Letter from Lewis F. Powell, Jr., to Ed[ward E. Lane] 1 (July 28, 1953) (congratulating Lane on his election); Letter from Lewis F. Powell, Jr., to Ed[ward E. Lane] 1 (May 13, 1957) (pledging to support Lane "in the coming election, as I always have in the past"); Letter from Lewis F. Powell, Jr., to [F.] Carlyle [Tiller] 1 (June 21, 1957) (forwarding "checks for Ed Lane" from Powell and two of his partners); Letter from Lewis F. Powell, Jr., to Ed[ward E. Lane] 1 (Nov. 10, 1965) (congratulating Lane on his reelection).

393. Telephone Interview with Michael Dooley (Professor, University of Virginia School of Law) (Feb. 22, 2002).

394. The Virginia statute includes a specified period for the offering, a requirement that offerors take up shares from oversubscribed offers *pro rata*, a series of disclosure requirements, an antifraud provision, and both criminal and civil liability provisions (including a private right of action). The act was later amended in 1980 to reach so-called "creeping tender offers," i.e., large-scale open-market purchases. The Fourth Circuit struck down the amendment as imposing an undue burden on interstate commerce. Telvest, Inc. v. Bradshaw, 697 F.2d 576, 582 (4th Cir. 1983). A successor statute was upheld by the Fourth Circuit on the basis of Powell's opinion in *CTS*. WLR Foods, Inc. v. Tyson Foods, Inc., 65 F.3d 1172, 1182 (4th Cir. 1995) (holding that, although "the Virginia statutes impose some incidental burden on interstate commerce, we find the burden outweighed by the interest of Virginia in regulating its corporations").

395. Letter from Lewis F. Powell, Jr., to Bob [Y. Button] 1 (Nov. 10, 1965).

396. Lewis F. Powell, Jr., Billing Records (Jan. 22, 1968–Feb. 29, 1968).

397. Telephone Interview with Joe Carter, *supra* note 391.

398. Letter from Joe Carter to Lewis [F. Powell, Jr.] 1 (Apr. 22, 1981).

399. Note from Lewis F. Powell, Jr., to Joe Carter 1 (Apr. 18, 1981) ("As I recall, you and I drafted the Virginia statute for Newport News Shipbuilding Company, and then the company backed down on using it against Tenneco. We 'lobbied' it through the legislature, and persuaded Mills Godwin to sign it."); Letter from Lewis F. Powell, Jr., to Mills [E. Godwin] 1 (Mar. 9, 1968) (congratulating Godwin on "a most successful session of the General Assembly").

Virginia corporations and the communities they serve."[400] Despite Powell's victory for Newport News in the legislature, the company soon abandoned its resistance and agreed to be acquired by Tenneco.[401] Newport News's president was shown the door shortly thereafter.[402]

B. *The Williams Act*

The federal Williams Act,[403] adopted shortly after the Virginia statute in 1968,[404] first made its way to the Supreme Court in 1975. *Rondeau v. Mosinee Paper Corp.*[405] raised the question of remedies under the Act. Rondeau acquired more than five percent of Mosinee Paper's shares, but unwittingly failed to file with the SEC the notices required by the "early warning" provision of the Act.[406] Although Rondeau subsequently filed the required notices, the company filed suit and the Seventh Circuit barred Rondeau from voting the shares he acquired after the filing date for five years.[407]

Powell thought the injunction was "an absurd penalty, where there was no showing of prejudice or injury to [Mosinee]."[408] Powell knew the potential mischief that could result from putting a weapon of this sort into the hands of management: "Suits by mgt. (like this) is a standard tactic to frustrate tender offers."[409] Despite Powell's uneasiness with tender offers, he was not prepared to discard the equitable rule requiring a showing of irreparable harm for an injunction.[410] At conference, only Justice Brennan disagreed, and he offered no jus-

---

400. Letter from Lewis F. Powell, Jr., to Ed[ward E. Lane] 1 (Mar. 9, 1968); *see also* Letter from Lewis F. Powell, Jr., to Mills [E. Godwin], *supra* note 399, at 1 (thanking Godwin for his "full support" of the legislation).

401. *Newport News and Tenneco Discuss a "Consolidation"*, WALL ST. J., Apr. 25, 1968, at 7; *Tenneco Agrees to Buy Biggest U.S. Shipbuilder*, WALL ST. J., May 23, 1968, at 11.

402. *Tenneco's Walker Mfg. and Newport News Units Shift Top Management*, WALL ST. J., Dec. 13, 1968, at 26.

403. Pub. L. No. 90-439, 82 Stat. 454 (1968) (amending the Securities Exchange Act of 1934 § 14(d)–(e), 15 U.S.C. § 78n(d)–(e) (2000)).

404. Pub. L. No. 88-467, 78 Stat. 569 (1968).

405. 422 U.S. 49 (1975).

406. *Id.* at 51–53.

407. Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011, 1017 (7th Cir. 1974).

408. Preliminary Memorandum, Rondeau v. Mosinee Paper Corp., to Justice Lewis F. Powell, Jr. 1 (Dec. 6, 1974 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

409. Handwritten notes of Justice Lewis F. Powell, Jr., for the Argument in Rondeau v. Mosinee Paper Corp. 1 (argued Apr. 15, 1975).

410. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Rondeau v. Mosinee Paper Corp. 2 (Apr. 18, 1975).

tification for his position.[411] The Court voted to reverse seven to one (Justice Douglas was absent).[412]

Chief Justice Burger's opinion for the Court is a straightforward application of well-settled principles of equity. The opinion is notable only for its reading of the legislative history of the Williams Act. Chief Justice Burger argued that the legislative history

> expressly disclaimed an intention to provide a weapon for management to discourage takeovers bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."[413]

This passage did two significant things: (1) it transformed rather transparent denials by Congress of its intent to discourage hostile takeovers into the governing rationale of the Williams Act; and (2) it laid the groundwork for the preemption arguments that the Court would later address and finally reject in *CTS*.[414] None of the Justices—including Powell, who was well-aware of the anti-takeover purpose of legislation of this sort—commented upon the passage at the time.[415]

The Court again interpreted the Williams Act narrowly in *Piper v. Chris-Craft Industries*,[416] holding that the Act did not provide a cause of action for damages to a defeated bidder in a takeover.[417] Powell urged Chief Justice Burger to "imply no view as to liability" in his opinion for the Court because if it

> could be construed as impliedly affirming the CA2 standard of liability, the management of target corporations may well be deterred from interposing a vigorous defense against takeover bids for fear of being sued for relatively trivial inaccuracies or overstatements. A takeover fight resembles an election contest. There must be reason-

411. *Id.* at 1.

412. *Id*. Justice Rehnquist later switched his vote, dissenting without opinion. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 65 (1975) (Marshall, J., dissenting).

413. *Rondeau*, 422 U.S. at 58–59 (quoting S. REP. NO. 550, at 3 (1967)).

414. *See infra* notes 448–479 and accompanying text.

415. Powell's only suggestion, which was ultimately adopted, was that equitable relief should remain available in the face of an ongoing violation. Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 1 (June 5, 1975); Memorandum from Chief Justice Warren E. Burger to the Conference 1 (June 5, 1975) (accepting Powell's suggestion).

416. 430 U.S. 1 (1977). *Piper* is discussed in the Section on private rights of action. *See supra* notes 262–72 and accompanying text.

417. 430 U.S. at 45.

> able latitude for hyperbole, for widely differing opinions as to value, as to management and other relevant facts. There is nothing in the Williams Act that is intended to limit expression of this kind.[418]

Management needed freedom to defend itself against takeovers because "[n]ot infrequently, the tender offeror is a predatory type company that seeks control for the purpose of liquidating (sometimes 'looting') the target company to the disadvantage of minority stockholders."[419] Powell did not want the Williams Act to restrain corporate incumbents from defending their positions.

C. *Preemption*

Rondeau and *Piper* set the stage for a trilogy of cases addressing whether the Williams Act preempted state take anti-takeover laws and the constitutionality of those state laws under the Dormant Commerce Clause. In the first, *Leroy v. Great Western United Corp.*,[420] Great Western had made an unsolicited tender offer to the shareholders of Sunshine Mining Company, a Washington corporation with its principal mining operations in Idaho.[421] The Fifth Circuit had upheld an injunction by a Texas district court barring the director of Idaho's Department of Finance from enforcing Idaho's antitakeover statute against Great Western.[422] The Idaho statute added further delay and disclosure requirements beyond those imposed by the Williams Act.[423] In addition, it required the approval of tender offers by state regulators.[424] The Fifth Circuit concluded that the Idaho statute placed an undue burden on interstate commerce, thus violating the Dormant Commerce Clause. In addition, the statute frustrated the purposes of the Williams Act, and therefore was preempted.[425]

---

418. Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 2 (Dec. 30, 1976).

419. *Id*.

420. 443 U.S. 173 (1979).

421. Preliminary Memorandum, Leroy v. Great W. United Corp., to Justice Lewis F. Powell, Jr. 1–3 (Jan. 5, 1979 Conference).

422. Great W. United Corp. v. Leroy, 577 F.2d 1256, 1286 (5th Cir. 1978) ("[W]e agree with the district court that the Idaho takeover law is invalid.").

423. *See id.* at 1279 ("Idaho's statute is preempted, because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible.").

424. Bench Memorandum, Leroy v. Great W. United Corp., to Justice Lewis F. Powell, Jr. 14 (Apr. 6, 1979).

425. *Great W. United Corp.*, 577 F.2d at 1286.

Powell conceded that "the potential availability of tender offers is valuable to shareholders in almost all corporations as an incentive to efficient management," but he worried that "the Williams Act is a weak statute that does not adequately protect shareholders of a target co."[426] Despite his sympathies for the purposes of Idaho's law, Powell thought that it "may have gone too far, especially by *not* limiting its Act to Idaho corp[oration]s and in requiring *approval* by Idaho commission."[427]

If the Court were to get to the merits, at least eight Justices thought the Idaho statute should be struck down, although they disagreed on the rationale. A majority, however, believed that the Texas district court lacked jurisdiction.[428] Justice Stevens was assigned the opinion; he reversed the Fifth Circuit's ruling that venue was proper in the Texas district court.[429] Despite Justice Stevens's freelancing, he got a majority, perhaps because none of the other Justices wanted to tackle the thorny jurisdictional issues. Justice White (joined by Justices Brennan and Marshall) dissented, but he did not address the merits of Great Western's claim.[430] The constitutional status of state antitakeover provisions remained at sea.

The opportunity for clarification arose soon enough, but once again the Justices were badly splintered. *Edgar v. MITE Corp.*[431] presented a constitutional challenge to Illinois's antitakeover statute, which, like the Idaho statute, applied to corporations that operated in

426. Bench Memorandum, Leroy v. Great W. United Corp., to Justice Lewis F. Powell, Jr., *supra* note 424, at 1 (handwritten notes of Justice Lewis F. Powell, Jr.).

427. *Id*.

428. Justice White, along with Justices Brennan and Marshall, wanted to affirm the Fifth Circuit's decision. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Leroy v. Great W. United Corp. 2 (Apr. 20, 1979). The Chief Justice, along with Justice Rehnquist, agreed that the statute ran afoul of the Dormant Commerce Clause as well as the Williams Act. *Id.* at 1, 3. Justice Stewart favored only preemption and Justice Blackmun thought it only unconstitutional. *Id.* at 1–2. None of these four, however, thought that the Texas district court had jurisdiction over the Idaho securities regulator, either under the Texas long arm statute or the jurisdictional provision of the Exchange Act. *Id.* at 1–3. Powell thought that the Texas long-arm statute, but not the Exchange Act, conferred jurisdiction. *Id.* at 3. The assertion of jurisdiction on these facts, however, would violate the Due Process Clause. He did not offer a view on the merits. *Id*. Finally, Justice Stevens was uncertain on jurisdiction, but felt that the case could be reversed for improper venue. *Id*. If the Court were to reach the merits, Justice Stevens thought the statute was "bad," but Powell's notes do not record Justice Stevens's rationale. *Id*.

429. Leroy v. Great W. United Corp., 443 U.S. 173, 186 (1979).

430. *Id.* at 187.

431. 457 U.S. 624 (1982).

Illinois, whether or not they were incorporated under Illinois law.[432] An additional similarity to the Idaho statute was found in the Illinois provision's requirement that a state regulator approve tender offers.[433] The other similarity to *Great Western* was a procedural complication—the potential acquirer had dropped its offer by the time the case reached the Court. At first glance, the case looked moot. Moreover, the SEC recently had adopted rules which would preempt statutes of this sort.[434] The Justices nonetheless decided to note probable jurisdiction. Having noted jurisdiction, however, a majority voted for mootness, and Justice Marshall was assigned to write the opinion.[435] Powell went along with the majority although he expressed the opinion that he thought—"[i]f we reach merits"—the statute was preempted.[436]

Only after Justice Marshall circulated his draft did things begin to go off track.[437] A series of shifts among the Justices resulted in a majority favoring mootness becoming a majority striking down the Illinois law under the Dormant Commerce Clause.[438] Justice White mustered only a plurality of three, however, for his opinion that the

---

432. *Id.* at 627.

433. *Id*.

434. Preliminary Memorandum, Edgar v. MITE Corp., to Justice Lewis F. Powell, Jr. 6–7 (May 1, 1981 Conference). The SEC preempted the first generation of state antitakeover laws with its Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (2000). This rule was referred to at the SEC as the "kneecap" rule because Chairman Harold Williams had instructed John Huber to cut the state statutes off at the kneecap. Telephone Interview with Steve Lamb, *supra* note 385. *Edgar* provided substantial authority for upholding the rule. *See* Nat'l City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1132 (8th Cir. 1982) (holding that to force National City Lines to comply with both SEC and state rules "[would be] impossible and [would] frustrate[] the purposes of the Williams Act").

435. Memorandum from Justice Thurgood Marshall to the Conference 2 (June 18, 1982).

436. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Edgar v. MITE Corp. 2 (Dec. 2, 1981).

437. Justice Thurgood Marshall, First Draft Opinion, Edgar v. MITE Corp. 1–11 (circulated Feb. 1, 1982).

438. At the end of it all, Justice Rehnquist circulated the following summary of the maneuvering:

> 1) Justice Marshall circulates opinion for the Court. 2) Justice Brennan joins. 3) Justice Rehnquist joins. 4) Justice Powell joins. 5) Justice White circulates a dissent. 6) Justice Stevens circulates a dissent. 7) Justice Blackmun joins Justice White. 8) Justice O'Connor joins Justice Stevens. 9) The Chief Justice joins Justice Marshall. 10) Justice Rehnquist changes vote. 11) The Chief Justice changes vote. 12) Justice White circulates opinion for the Court. 13) Justice Marshall circulates dissent. 14) Justice Brennan joins Justice Marshall. 15) Justice Stevens circulates concurring opinion. 16) Justice Rehnquist circulates dissent. 17) The Chief Justice joins Justice White. 18) Justice O'Connor concurs. 19) Justice Powell concurs. 20) Justice Blackmun concurs.

Memorandum from Justice Thurgood Marshall to the Conference, *supra* note 435, at 2.

Williams Act also preempted the law. Three Justices who had thought that the Idaho statute was preempted in *Great Western* (Justices Brennan, Marshall, and Rehnquist) did not register their votes on the merits in *MITE* (their views appear to have been the same) because they saw the case as moot.[439] Focused on the procedural issue, they appear to have ignored the case's implications for substantive regulation.

Powell also believed that the case was moot and had endorsed preemption at conference.[440] Despite his belief that the case was moot, he had intended to join Justice White's opinion when it was first circulated.[441] He switched course, but nonetheless provided the fifth vote striking down the law under the Dormant Commerce Clause. Powell declined to join Justice White's holding that the statute was preempted by the Williams Act and unconstitutional under the Dormant Commerce Clause because it directly regulated interstate commerce occurring wholly outside Illinois in the shares of public companies.[442] Powell joined only Justice White's more limited holding that the Illinois statute imposed an undue burden on interstate commerce relative to the state interest.[443] The result was to preserve more room for state anti-takeover legislation. Powell noted with interest that the "Virginia Act (that I helped write and 'lobbied' through Va Legisla-

439. Handwritten notes of Justice William J. Brennan, Jr., from the Conference on Edgar v. MITE Corp. 1–3 (n.d.).

440. *Id.* at 3.

441. Handwritten notes of Justice Lewis F. Powell, Jr., *supra* note 436, at 2; Justice Byron R. White, First Draft Opinion, Edgar v. MITE Corp. 1 (circulated May, 28, 1982) (handwritten notes of Justice Lewis F. Powell) ("Though I am not persuaded on 'mootness' issue, if BRW gets a court I'll join it."). Powell switched in spite of the recommendation of his law clerk, John Wiley, who argued that the preemption analysis was the narrowest basis on which to decide the case because it:

> applies only to tender offer laws, and could have no possible application to state blue sky statutes. In addition, I agree with the numerous commentators on this point that Congress sought to preserve a neutrality with which state takeover laws—although completely well intentioned and perhaps of superior wisdom—do *undoubtedly* interfere. This interference is plain from the frequency with which target companies attempt resort to state statute protection.

Memorandum from [John Wiley] to Justice Lewis F. Powell, Jr. 2 (June 16, 1982). Wiley declined to discuss the case with me. My speculation, to some extent confirmed by Powell's concurrence and subsequent opinion in *CTS*, is that Powell preferred the Commerce Clause basis because he was more concerned with preserving some room for state antitakeover laws than he was with blue sky law. In any event, state blue sky laws have now been largely preempted by Congress, Securities Act, 15 U.S.C. § 77r (2000); Exchange Act, 15 U.S.C. § 78bb(f) (2000), while state antitakeover provisions have been left untouched.

442. Edgar v. MITE Corp., 457 U.S. 624, 630–43 (1982).

443. *Id.* at 646–47.

ture) has been followed—in substance—in 36 states."[444] Powell's efforts preserved that legacy. Powell joined Justice White's undue burden reasoning because it

> leaves some room for state regulation of tender offers. In a period in our history marked by conglomerate corporate formations essentially unrestricted by the antitrust laws, it is far from clear to me that the Williams Act's policy of "neutrality" operates fairly or in the public interest. Often the offeror possesses resources, in terms of professional personnel experienced in takeovers as well as in capital, that vastly exceed those of the takeover target. This disparity in resources may seriously disadvantage a relatively small or regional target corporation. The Williams Act provisions seem to assume corporate entities of substantially equal resources. Moreover, in terms of general public interest, when corporate headquarters are moved away from a city and State inevitably there are certain adverse consequences. . . . [T]he Williams Act should not necessarily be read as prohibiting state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management.[445]

The criticism of the Williams Act did not make it into print, but not because Powell had doubts about the substance. He subsequently observed that, "I think the Williams Act has been a *disaster* as it encourages giant corps. to 'take over' smaller corps."[446] Powell here equates Congress's grudging tolerance of tender offers in the Williams Act with encouragement, a reading difficult to square with the legislative history.[447] Perhaps this was a plausible reading in a context in which

---

444. Justice Byron R. White, First Draft Opinion, Edgar v. MITE Corp., *supra* note 441, at 1 (handwritten notes of Justice Lewis F. Powell, Jr.). Powell had considered at the certiorari stage whether his role in drafting the Virginia statute required recusal and had concluded that it did not. Preliminary Memorandum, *supra* note 434, at 2 (handwritten notes of Justice Lewis F. Powell, Jr.) ("I wrote Va Act—I think it was the first state law—but I'll not disqualify[.]").

445. Justice Lewis F. Powell, Jr., Draft Concurring Opinion, Edgar v. MITE Corp. 1–2 (June 21, 1982).

446. Preliminary Memorandum, Schreiber v. Burlington N., Inc., to Justice Lewis F. Powell, Jr. 1 (Sept. 24, 1984 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

447. *See* Mary E. Kostel, Note, *A Public Choice Perspective on the Debate over Federal Versus State Corporate Law*, 79 VA. L. REV. 2129, 2140–46 (1993) (describing the original intent of the Williams Act, the Act's proponents, and evidence presented at the Congressional hearings).

Justice Stevens's objection to Justice White's preemption argument was more substantial:

> I agree with you that when Congress enacted the Williams Act, it took extreme care to avoid tipping the scales of either in favor or management or in favor of possible takeovers. However, it seems to me that there is a significant difference between adopting such a policy of neutrality with respect to federal legislation that Congress was enacting, and requiring states to follow the same policy. As of now, I am not per-

the SEC was relying on the Williams Act to preserve a free market for corporate control (or at least a market controlled by the SEC, not the states).

Powell got his chance to preserve some space for state protection of local corporations five years later in *CTS Corp. v. Dynamics Corp. of America*.[448] States had gone back to the drawing board after the twin setbacks in *MITE* and the SEC's adoption of its preemptive rules. Indiana's effort was typical of the second generation of anti-takeover statutes. It required a potential acquirer (defined as anyone acquiring certain threshold percentages of the company's shares) to obtain the approval of a company's "disinterested" shares (defined as shares not owned by the acquirer or management) before it would be allowed to vote its own shares.[449] Thus, a hostile tender offeror would be precluded from using its voting power to remove incumbent management without the approval of the company's independent shareholders. The Indiana statute was more narrowly cast than the Illinois statute struck down in *MITE*. The Illinois statute applied to corporations with their principal executive offices in Illinois or that were incorporated in Illinois, as long as the corporation had the requisite number of shareholders in Illinois.[450] The Indiana statute was limited to corporations organized under the law of Indiana, with their principal place of business and a substantial shareholder presence in that state.[451] It also lacked the requirement that the offer be approved by a state regulator, which had proved problematic in *MITE* and had been preempted by the SEC.[452]

The Seventh Circuit relied on *MITE* to invalidate the Indiana statute on both Commerce Clause and preemption grounds.[453] Need-

---

> suaded that Congress intended to prevent the states from loading the scales one way or the other. You are, of course, dead right in your analysis of the Illinois statute as being loaded in favor of management.

Letter from Justice John Paul Stevens to Justice Byron R. White 1 (June 1, 1982). Justice O'Connor thought that the "Williams Act did not preempt the state law because Congress had not expressed such an intent." Letter from Justice Sandra Day O'Connor to Justice Byron R. White 1 (April 23, 1982).

448. 481 U.S. 69, 73–74 (1987).

449. *Id*.

450. Edgar v. MITE Corp., 457 U.S. 624, 627 (1982).

451. IND. CODE § 23-1-42-4(a) (1986), *quoted in CTS*, 481 U.S. at 72–73.

452. *MITE*, 457 U.S. at 639 (plurality opinion) (adopting the Seventh Circuit's finding that the statute "allows the Secretary of State of Illinois to pass on the substantive fairness of a tender offer").

453. Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 262–64 (7th Cir. 1986).

less to say, Powell strongly disagreed with Seventh Circuit Judge Richard Posner's enthusiasm for the economic benefits of tender offers.[454] Powell saw the case as an opportunity to cut back on *MITE*'s preemptive reach, but he was pessimistic about his chances of success. He was pleasantly surprised when the votes were there to note probable jurisdiction rather than affirm,[455] but he still doubted that he could muster a majority on the merits. Powell remained anxious to curb the takeover wave that seemed to be sweeping the nation: "I still adhere to my view that the Williams Act has become an economic disaster—a view that increasingly is being held by responsible economists. Indeed, hearings are now pending in the Congress to consider appropriate means of curbing takeover bids, and the bypassing in effect of antitrust laws."[456] Justice White's opinion in *MITE*, however, loomed as a substantial obstacle to tolerating a more mercantilist economic view:

> My brief concurring opinion in *MITE* summarizes my basic objections to the Williams Act and particularly the way it has been applied so expansively. But *MITE* is "the law," and I would find it difficult to sustain the complex Indiana Statute in light of the reasoning of the Court's opinion in *MITE*. If my law clerk has any ideas in this respect, they would be more than a little welcomed![457]

Powell now regretted his vote to give Justice White a majority in *MITE*, but he nonetheless considered it controlling.[458] Powell needed a way around *MITE* to save the "beneficial" Indiana statute.[459]

Powell's clerk found a path out in the internal affairs doctrine. The Court had traditionally deferred to state regulation of corpora-

454. Bench Memorandum, CTS Corp. v. Dynamics Corp. of Am., from Ronald [Mann] to Justice Lewis F. Powell, Jr. 5 (Feb. 11, 1987) (handwritten notes of Justice Lewis F. Powell, Jr.) (Powell's response to Posner's view that "tender offers are uniformly good for the economy" was a resounding "NO!").

455. Preliminary Memorandum, CTS Corp. v. Dynamics Corp. of Am., to Justice Lewis F. Powell, Jr. 1 (Sept. 29, 1986 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.) ("If other Justices show any interest I could *Note* this case, but I expect this will be *affirmed*.").

456. Memorandum from Justice Lewis F. Powell, Jr., to File, CTS Corp. v. Dynamics Corp. of Am. 1 (Feb. 6, 1987).

457. *Id.* at 4.

458. Bench Memorandum, CTS Corp. v. Dynamics Corp. of Am., from Ronald [Mann] to Justice Lewis F. Powell, Jr., *supra* note 454, at 18 (handwritten notes of Justice Lewis F. Powell, Jr.) ("I voted wrongly [in *MITE*]").

459. Handwritten notes of Justice Lewis F. Powell, Jr., to File, CTS Corp. v. Dynamics Corp. of Am. 1 (Feb. 2, 1987) (noting that the district court and the Seventh Circuit found the Indiana statute significantly different from the Illinois statute in *MITE*).

tions established under their laws. Should this deference extend to interstate transactions in shares created under that authority? Powell's clerk identified the "internal affairs" doctrine as the critical issue:

> If you think State corporate governance should be limited strictly to laws that affect the attributes of shares and transactions by the corporation itself, you will find that Indiana has overstepped its bounds. On the other hand, if you think States legitimately can act to protect shareholders from being coerced in ways that effect major corporate changes, you will find the law satisfactory.[460]

The internal affairs doctrine would allow Powell to protect management from the threat of takeover.

Powell found himself with some unexpected allies at conference—Justices Brennan, Marshall, and Rehnquist, who thought the Idaho and Illinois statutes were preempted by the Williams Act,[461] saw no conflict between the Indiana statute and that law.[462] Nor did they see a problem under the Dormant Commerce Clause. Moreover, Justice Scalia who had taken Chief Justice Burger's seat,[463] saw no preemption issue and took a much narrower view of the reach of the Dormant Commerce Clause.[464] Justice O'Connor shared Powell's federalist streak.[465] The result was a 6-3 majority to uphold the Indiana statute, with Justice Rehnquist giving Powell the assignment.

Powell saw the balancing of state interests against the burden on interstate commerce as relatively straightforward. In his view:

> [The Indiana] regulations . . . will be relatively ease [*sic*] for tender offering corporations to comply with if their offers are agruably [*sic*] beneficial to the Indiana corporation and its shareholders. It is not easy to see any "burden" other than possible delay in bringing a

460. Bench Memorandum, CTS Corp. v. Dynamics Corp. of Am., from Ronald [Mann] to Justice Lewis F. Powell, Jr., *supra* note 454, at 22.

461. *See* Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Edgar v. MITE Corp. 1–4 (Dec. 2, 1981) (noting that Justices Brennan, Marshall, and Rehnquist found preemption by the Williams Act); Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Leroy v. Great Western 1–3 (Apr. 20, 1979) (same).

462. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on CTS Corp. v. Dynamics Corp. of Am. 1–2 (Mar. 4, 1987).

463. More precisely, Justice Rehnquist succeeded Chief Justice Burger and Justice Scalia was confirmed as Justice Rehnquist's replacement.

464. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on CTS Corp. v. Dynamics Corp. of Am., *supra* note 462, at 1.

465. *Id.* (noting that Justice O'Connor found no preemption by the Williams Act nor a significant burden on commerce).

> tender offer to fruition—hardly a significant burden on a reasonable and beneficial tender proposal.[466]

Powell discounts here the significant costs that delay can impose on an offeror, both in terms of financing and time for target management to obstruct bids or seek out a "white knight."[467] These risks increase substantially if a tender offer must be held open for fifty days, rather than the twenty required by the Williams Act. The draft opinion asserted that:

> If a majority of the target company's shareholders think the offer is attractive, it is likely that a majority will tender their shares on the twentieth business day, and that a majority of the target company's shareholders will vote to accord voting rights to the offeror so that the transaction can be consummated. Once the shares are tendered, the opportunities for incumbent management to defeat the tender offer by lobbying its own shareholders are greatly reduced.[468]

Powell seems on shaky ground here; at best his conjecture about shareholder behavior is speculation, at worst it is implausible. Why would a shareholder tender at the earliest point, rather than waiting to see if a better offer from a third party emerged while the vote was pending? An offeror would certainly take into account the risk of losing its target in determining whether to launch a bid at all. Powell's corporate law experience, grounded in the more leisurely dealmaking pace of the 1950s and 1960s (the Ethyl deal, managed under stringent deadlines, nonetheless took nearly three months to close),[469] was badly out of date in the junk-bond-fueled 1980s. This passage was cut before circulation to the other Justices.

Another discarded passage provides further evidence that Powell was out of touch with the contemporary takeover market:

> It may well be that a successful tender offer will result in more effective management or may have such other benefits as providing

466. Memorandum from Justice Lewis F. Powell, Jr., to Ronald [Mann] 3 (Mar. 18, 1987).

467. Powell, of course, was aware of the strategic advantages afforded management by delay. In *MITE*, his law clerk had written that "forcing delay is a known weapon in tender offer battles." Bench Memorandum, Edgar v. MITE Corp., from John Wiley to Justice Lewis F. Powell, Jr. 9 (Nov. 25, 1981). Powell's response? "Of course—but 'tender offers' are not inevitably good." *Id.* (handwritten notes of Justice Lewis F. Powell, Jr.).

468. Justice Lewis F. Powell, Jr., Draft Opinion, CTS Corp. v. Dynamics Corp. of Am. 28 n.7 (Mar. 19, 1987).

469. Lawrence E. Blanchard, Jr., The Albemarle-Ethyl Deal in 1962, *supra* note 53, at 2, 7–8 (describing Powell's role in the deal).

> needed diversification. Yet, we know of no convincing evidence that the type of conglomerates that may result from repetitive take over offers are in fact more efficient or that the owners of shares in the resulting conglomerate are benefited [*sic*].[470]

Powell is responding to the 1960s takeovers wave, in which unrelated businesses were combined into diversified conglomerates. He was rightly skeptical that shareholders would benefit from these transactions. The takeovers of the 1980s, however, were driven by efficiency gains from breaking up these conglomerates, and the evidence that shareholders benefited from this process is simply overwhelming.[471] The note was toned down in the final opinion.[472]

Powell was on stronger ground in emphasizing the analogy between Indiana's voting procedure for tender offers and shareholder votes required by state corporate law for mergers or asset sales.[473] Voting requirements are a traditional means to protect shareholders from expropriation. To be sure, the contexts in which shareholder votes are required have the risk of unfair valuation because they generally lack the market test by which tender offers are judged, but the analogy is at least plausible. Expropriation is a risk only with "two-tier" tender offers, in which a lower back-end price may induce shareholders to tender at the front end even if they deem the offered consideration inadequate. Powell recognized "that the percentage that really are coercive is relatively small."[474] The opinion cloaks the weakness of this point in deference to the "empirical judgments of lawmakers."[475] Nonetheless, distinguishing permissible uses of shareholder voting from impermissible uses would have been difficult.[476]

---

470. Justice Lewis F. Powell, Jr., Rider A, p. 43, CTS Corp. v. Dynamics Corp. of Am. 2 n.* (Mar. 20, 1987).

471. RONALD GILSON & BERNARD BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS (1995); Gregg A. Jarrell et al., *The Market for Corporate Control: The Empirical Evidence Since 1980*, J. ECON. PERSPECTIVES, Winter 1988, at 49.

472. Justice Lewis F. Powell, Jr., Rider A, p. 43, CTS Corp.v. Dynamics Corp. of Am., *supra* note 470, at 21.

473. Memorandum from Justice Lewis F. Powell, Jr., to Ronald [Mann], *supra* note 466, at 4 ("Virginia required, as did many other states, a two-thirds vote on a merger. In addition, the state prescribes the requisite vote on a sale of all corporate assets and a liquidation.").

474. Memorandum from Justice Lewis F. Powell, Jr., to Ronald [Mann] 2 (Mar. 20, 1987).

475. *CTS*, 481 U.S. at 92.

476. Justice Lewis F. Powell, Jr., Draft Rider A, p. 39, CTS Corp. v. Dynamics Corp. of Am. 1 (Mar. 20, 1987).

> [This] beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the laws

Moreover, state authority over voting rights was supported by tradition: "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corps, including the voting rights of shareholders."[477] By implication, the SEC's authority in this area was questionable absent explicit legislative authorization.

CTS proved to be the death knell of the free market for corporate control. Marty Lipton's invention of the "poison pill" proved to be a much more potent defense than any state legislation, and *CTS* made it essentially invulnerable to legal attack. When combined with a staggered board, the poison pill becomes unassailable,[478] a result foreshadowed by Powell in *CTS*.[479] An important tool in harnessing managers to serve the interests of shareholders has been undercut substantially as a result. Whether Powell would have favored this result, or thought that it went "too far," is impossible to say.

VI. THE SEC

Before Powell's confirmation, the SEC had enjoyed phenomenal success in the Supreme Court, winning every case in which it was a party from 1941 through 1971.[480] Powell's arrival coincided with a precipitous decline for the agency in the Court, and the change did not go unnoticed. Shortly after the agency's high-profile loss in *Chiarella*,[481] the Wall Street Journal noted that the Supreme Court was disagreeing with the SEC with much greater frequency and gave "the credit—or blame—for the court's position to Justice Lewis Powell, former corporate lawyer who has written many of the majority opinions in these cases."[482] Powell evidently was anxious for the SEC to

---

> of the state of its incorporation. These law [*sic*] govern the voting rights of shareholders that directly apply to a variety of corporate transactions including takeover bids.

Id.

477. Justice Lewis F. Powell, Jr., Draft Opinion, CTS Corp. v. Dynamics Corp. of Am., *supra* note 468, at 37.

478. *See* Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 891 (2002) (finding that staggered boards double a target's likelihood of remaining independent).

479. *CTS*, 481 U.S. at 85–86 (discussing potential delay in effecting takeovers resulting from classified boards).

480. *See* Conard, *supra* note 6, at 196.

481. *See infra* notes 538–561 and accompanying text.

482. Stephen Wermiel & Stan Crock, *High Court Rulings Are Putting SEC on Shorter Leash*, WALL ST. J., Oct. 2, 1980, at 30.

get the message—he sent his law clerk to discuss the Court's securities cases with the Journal reporter doing the story.[483] What explains Powell's seeming hostility to the agency?

As a corporate lawyer, Powell's relationship with the SEC had not always been smooth. Like most securities lawyers, Powell found the agency to be unreasonable at times. Taking a break from the invasion of North Africa to complain to a colleague about a client's loss before the agency, Powell wrote:

> I had hoped the war . . . would temper the crusading order of SEC [*sic*], and that [the client] would receive moderate and fair treatment. It is extremely disappointing to find that agencies of the Government are still fighting an internal war against capitalism when the unified energies of all should be concentrated on fighting the very urgent and real war for physical survival. Also one of the things I *hope* we are fighting for is the survival of a just and fairly regulated capitalism. Personally, I believe capitalism (i.e.—the right to private property and moderate profit) is an essential component of democracy.[484]

While Powell was far from being an advocate of laissez faire ("fairly regulated capitalism," "moderate profit"), he objected to the SEC's perceived heavy-handedness.

Powell was afforded a chance to rein in the SEC, but he declined. Later, in a memorandum to his children, Powell described his decisionmaking process:

> Walter S. Robertson, a partner in Scott & Stringfellow, and a personal client of mine, became Assistant Secretary of State for the Far

---

> Since 1975, the SEC has made its views known to the Supreme Court in 18 cases. The Justices have ruled against the SEC in 12 of them. The contrast couldn't be sharper with the period from 1934, when the commission was established, to 1974. In 60 appearances as a party or friend of the court, the SEC won 48 Supreme Court cases.

Id.

483. Letter from Stephen Wermiel, Reporter, Wall Street Journal, to Justice Lewis F. Powell, Jr. 1 (July 17, 1980) ("I had a pleasurable chat with John Sallet and wanted to express my thanks to you for your kind assistance."); Telephone Interview with Jonathan Sallet, Clerk for Justice Lewis F. Powell, Jr. (May 21, 2002). When the story did not immediately appear, Powell wrote to Wermiel to inquire. Letter from Justice Lewis F. Powell, Jr., to Stephen Wermiel, Reporter, Wall Street Journal 1 (Aug. 8, 1980).

Other coverage was less favorable. The *New York Times* quoted Arthur Miller: "This is a pro-business Court . . . [and Powell in particular] has a Virginia plantation mentality. I have a hunch that possibly he thinks the Civil War went the wrong way." Louis Kohlmeier, *Justice Powell: For Business, a Friend in Court*, N.Y. TIMES, Mar. 14, 1976, at F5.

484. Letter from Lewis F. Powell, Jr., to George Gibson 1 (Nov. 25, 1942).

> East in the Eisenhower Administration. He called me from the White House early in 1953 and said that the President would appoint me Chairman of the Securities & Exchange Commission if I would accept the position. Again, I conferred with clients, senior partners at Hunton & Williams and—of course—with Jo. Although I had done a good deal of SEC work, and the Chairmanship of the SEC would assure a substantial law practice thereafter, my partners wanted me to stay in Richmond. I had commenced to develop major clients of my own . . . and also—having been away nearly four years during the war—I preferred to remain in my native city and state and concentrate on being a lawyer.[485]

Powell liked being a corporate lawyer, spurning many attractive offers that would have taken him away from his practice.[486] As it turned out, Powell ended up wielding far greater influence over the securities laws as a Justice than he would have exercised as a chairman of the SEC.

Powell objected most to the SEC's efforts to expand its jurisdiction. In a memorandum to a clerk, he wrote:

> My first experience in corporate as distinguished from trial practice was in the representation of Virginia investment banking firms. I therefore have some familiarity with the Securities Acts, and also with the way in which they have been administered. Generally, I think these acts have been among the best of the regulatory statutes. But the SEC always has sought to expand its reach. The history of 10b-5 is an example.[487]

485. Memorandum from Justice Lewis F. Powell, Jr., to Jody, Penny, Molly, and Lewis III [Powell], *supra* note 29, at 10–11; *see also* Letter from Lewis F. Powell, Jr., to Walter S. Robertson, Attorney, Scott & Stringfellow 1 (Feb. 26, 1953) (removing his name from consideration for Chairman of the SEC); Letter from Walter S. Robertson, Attorney, Scott & Stringfellow to Lewis F. Powell, Jr. 1 (Mar. 2, 1953) (expressing his regret as to Powell's decision). Shortly after the offer of the SEC chairmanship, Ralph Demmler, appointed chairman after Powell declined, asked Powell if he would be interested in being a commissioner. Powell again declined (without telling Demmler of the earlier offer). Letter from Lewis F. Powell, Jr., to Ralph H. Demmler, Attorney, Reed, Smith, Shaw & McClay 1 (Apr. 23, 1953); Letter from Ralph H. Demmler, Attorney, Reed, Smith, Shaw & McClay to Lewis F. Powell, Jr. 1 (Apr. 27, 1953).

486. Powell also declined a position teaching law at the University of Virginia. Letter from Lewis F. Powell, Jr., to Dean F.D.G. Ribble, University of Virginia 1 (May 10, 1958). Powell later declined the considerably greater prestige of the presidency of the University, as well as the presidency of his alma mater, Washington & Lee, not to mention seats on the Fourth Circuit and the Virginia Supreme Court. Memorandum from Justice Lewis F. Powell, Jr., to Jody, Penny, Molly, and Lewis III [Powell], *supra* note 29, at 11–13.

487. Memorandum from Justice Lewis F. Powell, Jr., to Jim Browning, *supra* note 131, at 1.

He was also suspicious of the SEC's support for private class actions: the "SEC usually favors *all* π. I can't recall a case in which this was not so."[488] Although he disagreed with the SEC's aggressive interpretations of the securities laws, Powell recognized the need for public enforcement. Shortly after handing the SEC a stinging defeat in *Chiarella*, Powell wrote: "[I] have considered the SEC to be one of the better independent Agencies. It has served its basic purpose well, and the original statutes were—I thought—remarkably well drafted for their intended purposes."[489] It was the SEC's effort to expand its authority—not its existence—that troubled Powell.

This Part explains how Powell translated his skepticism regarding the SEC's efforts to expand its authority into a judicial campaign to rein in the SEC. It first addresses a number of cases in which the SEC was rebuked by the Supreme Court for attempts to expand its reach.[490] It then turns to insider trading, the area in which Powell dealt the agency its most stinging losses.

---

488. Bench Memorandum, Herman & MacLean v. Huddleston, from Jim [Browning] to Justice Lewis F. Powell, Jr., *supra* note 297, at 17 (handwritten notes of Justice Lewis F. Powell, Jr.).

489. Letter from Justice Lewis F. Powell, Jr., to Michael P. Dooley, Professor of Law, University of Virginia 1 (Oct. 25, 1980).

490. The Court did give the SEC one victory based on deference to agency expertise. E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 56–57 (1977). *E.I. du Pont* involved the unwinding of a holding company structure that the DuPont family had created for their holdings in the DuPont company. *Id.* at 48. The holding company, Christiana, was to be merged into DuPont, with the Christiana shareholders to receive DuPont shares in the merger. *Id.* at 49. Christiana fell within the definition of an investment company. 15 U.S.C. § 80a-3(a) (2000). Since Christiana was the Dupont family's personal holding company, it was an affiliate of Dupont, and thus the merger was interested under § 17(a) of the Investment Company Act. *Id.* § 80a-17(a). As an interested merger, SEC approval was required. *Id*. § 80a(17(b). The SEC approved the merger as "fair" because the merger ratio reflected the net asset value of Christiana (its assets were primarily DuPont stock) and the transaction did not dilute the interests of the DuPont shareholders. *Collins*, 432 U.S. at 51. The Eighth Circuit reversed the SEC's decision. Collins v. SEC, 532 F.2d 584, 605 (1977). The Eighth Circuit held that the SEC applied the wrong legal standard to the transaction, which the court held to be fair market value of the Christiana stock. *Id.* at 591. The Christiana stock traded at a substantial discount to net asset value, largely due to tax disadvantages of the holding company structure and embedded capital gains in the DuPont stockholdings. E.I. du Pont de Nemours & Co., 432 U.S. at 49–50. The Eighth Circuit believed that, in an arms-length transaction, the tax benefits of the transaction would have been shared with the DuPont shareholders. Collins, 532 F.2d at 592–93.

The Supreme Court reversed based on deference to agency discretion, *id.* at 56–57, with only Justice Brennan dissenting. *Id.* at 57 (Brennan, J., dissenting). The discussion at conference, however, went to the substance of "fairness" in the context of a merger. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on E.I. du Pont de Nemours & Co. v. Collins 1 (Mar. 4, 1977). No member of the Court expressed the view that "fairness" requires sharing of benefits or the duplication of the result of an arms-length transaction, standards fa-

A. The SEC in the Supreme Court

The most extreme example of the SEC's aggressive litigation strategy appears to have been *International Brotherhood of Teamsters v. Daniel.*[491] The SEC apparently was playing fast and loose regarding its change in position. As recently as 1971, the SEC had taken the position that involuntary pension plans did not involve the sale of security; by 1979, when the case arose, it was taking the opposite position.[492]Judge Tone, concurring in the court of appeals decision, noted that:

> Apparently for the first time ever, [the SEC] takes the position in its brief before us that the employee's interest or expectancy in a plan such as this is subject to the anti-fraud provisions of the securities laws. *The Commission has been not as candid as we might have hoped in acknowledging and explaining its change in position.*[493]

Powell observed that the SEC's lack of candor about its switch was "not unusual."[494] The SEC's brief in the Supreme Court further undermined its credibility. Powell's clerk advised him that "[t]he *SEC has made representations to this Court in its brief* [regarding its change in position] which, put in the most charitable light, *are less than candid*."[495] The SEC's failure to hold to a consistent position was undermining its hopes for deference by the Supreme Court.[496]

---

vored by some state courts in evaluating mergers. *E.g.*, Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985). Instead, the Justices viewed the tax benefits to the Christiana shareholders as irrelevant. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on E.I. du Pont de Nemours & Co. v. Collins, *supra*, at 1. As Powell put it: "What consideration of fairness would entitle *DuPont* to claim a share in tax benefits derived by C[hristiana]'s shareholders?" Handwritten notes of Justice Lewis F. Powell, Jr., for Conference on E.I. du Pont de Nemours & Co. v. Collins 2 (n.d.). Powell appears to have been swayed by the fact that the "SEC consistently has used net asset value." *Id*. Powell's refusal to defer to the SEC in so many cases was based in large part on the SEC's shifts in position.

491. 439 U.S. 551 (1979).

492. Daniel v. Int'l Bhd. of Teamsters, 561 F.2d 1223, 1251 (7th Cir. 1977).

493. Preliminary Memorandum, Int'l Bhd. of Teamsters v. Daniel, to Justice Lewis F. Powell, Jr., *supra* note 112, at 9 (quoting *Daniel*, 561 F.2d at 1251 (Tome, C.J., concurring) (emphasis added by Justice Lewis F. Powell, Jr.)).

494. *Id.* (handwritten notes of Justice Lewis F. Powell, Jr.).

495. Bench Memorandum, Int'l Bhd. of Teamsters v. Daniel, from Paul [B. Stephan] to Justice Lewis F. Powell, Jr., *supra* note 219, at 23 (handwritten notes of Paul B. Stephan) (emphasis added by Lewis F. Powell, Jr.).

496. The Solicitor General also rejected the SEC's newfound position, siding with the Department of Labor in favoring reversal. Brief for the United States as Amicus Curiae at 8–10, Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979) (No. 77-753).

Powell was frustrated with the SEC, but his own norms of professionalism prevented public criticism. His clerk drafted a sharp rebuke of the SEC,[497] but whatever the Court's actual practice, Powell was not prepared to announce a position of no deference to the agency. The final opinion contains much milder language.[498] Powell would not indulge the SEC's enthusiasm for expanding the federal securities laws, which he saw as a profound shift for an agency that historically held a modest view of its power, but he would not characterize the SEC as a rogue agency.

Problems with the SEC were not limited to recent switches in position. Some of the agency's abuses were longstanding practices. *SEC v. Sloan*[499] involved the agency's authority under section 12(k) of the Exchange Act to "summarily . . . suspend trading in any security . . . for a period not exceeding 10 business days" if "in its opinion the public interest and the protection of investors so require."[500] In *Sloan*, the SEC had relied on this authority to issue a series of orders summarily suspending trading in the common stock of Canadian Javelin.[501]

The SEC had been issuing successive orders under this authority since 1944.[502] The agency's interpretation, however, was difficult to square with the statutory scheme. Section 12(j) of the Exchange Act authorizes the SEC to suspend securities from registration (which

---

497. The initial draft explained the Court's refusal to defer to the SEC this way:

> [W]hen it becomes apparent that an agency has shaped its interpretation of a statute solely to determine the outcome of a particular case, without regard to the ongoing problems of policy and purpose that underlie that agency's regulatory function, this deference is forfeited. *Ad hoc*, unprincipled decisionmaking does not draw on developed expertise and constitutes an abuse of accorded flexibility.
>
> On a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various positions of the Securities Acts. In those cases the SEC either had shifted its position, had not previously developed a position, or had developed its position without consideration of the statutory authorization under which it acts. This case falls into the same category. Our review of the SEC's past actions convinces us that until the instant litigation arose that agency never had consider the Securities Acts applicable to non-contributory, involuntary pension plans and that its argument to the contrary here demonstrates an alarming and disheartening lack of candor.

Justice Lewis F. Powell, Jr., First Draft Opinion, Int'l Bhd. of Teamsters v. Daniel, *supra* note 225, at 16–17 (citations omitted).

498. Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 565–66 & n.20 (1979).

499. 436 U.S. 103 (1978).

500. 15 U.S.C. § 78*l*(k)(1)(A) (2000).

501. Preliminary Memorandum, SEC v. Sloan, to Justice Lewis F. Powell, Jr. 2 (Oct. 14, 1977).

502. *Id*.

would have the effect of suspending trading) for up to twelve months, but only after giving the affected company notice and a hearing.[503] By using its summary power, the SEC could avoid the notice and hearing requirements (which would afford the opportunity for judicial review). Powell found it "[d]ifficult to believe Congress intended to allow the notice + hearing requirements of 12(j) to be by-passed by repetitive resort to 12(k)."[504] The situation was exacerbated by the SEC's attempts to evade review by allowing orders to expire after Sloan sued (only to renew them subsequently).[505] This was an easy application of the exception to mootness for cases "capable of repetition yet evading review."[506] The brazenness of the SEC did not sit well with the Justices; even Justice Brennan, usually a dependable ally for the SEC, thought that an "[a]dmin. agency that acts as SEC did is not entitled to usual deference."[507]

The SEC's tendency to overreach hurt its position when the Court was called upon to address procedures applicable to the agency's enforcement actions. The SEC had supported the plaintiff in *Ernst & Ernst* seeking a negligence standard under section 10(b). The SEC's only consolation in *Ernst & Ernst* was that Powell was forced, in order to hold his majority, to reserve the question of whether the scienter standard would apply to an action for injunctive relief brought by the SEC.[508] *Aaron v. SEC*[509] squarely raised that question. Powell's conference notes from *Ernst & Ernst* record Justice Stewart's view that an injunctive suit by the SEC might present a different case,[510] but Powell's heavy reliance on the language of section 10(b) in *Ernst & Ernst* greatly weakened that position. Section 10(b) makes no distinction between government and private litigants, hardly a surprise given that Congress did not anticipate private litigation under section 10(b) when it adopted the Exchange Act in 1934. Nonetheless,

503. 15 U.S.C. § 78*l*(j) (2000).

504. Handwritten notes of Justice Lewis F. Powell, Jr., for the Argument in SEC v. Sloan 1 (Mar. 27, 1978).

505. Preliminary Memorandum, SEC v. Sloan, to Justice Lewis F. Powell, Jr., *supra* note 501, at 2.

506. S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 514–15 (1911).

507. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on SEC v. Sloan 1 (Mar. 3, 1978).

508. Telephone Interview with Greg Palm, *supra* note 162; *see* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

509. 446 U.S. 680 (1980).

510. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Ernst & Ernst v. Hochfelder, *supra* note 165, at 1.

"policy concerns" raised by private litigation played an important role in *Ernst & Ernst*. In *Aaron*, the Second Circuit (in an opinion written by Judge Timbers, former general counsel of the SEC) read *Ernst & Ernst* narrowly in order to hold that the SEC only needed to show negligence when seeking an injunction.[511]

Powell, however, worried about the SEC as well as private litigants: "[A] suit [by the SEC] [and] an injunction are *punitive* [and] *can impose severe stigma* [and] other *penalties*."[512] In Powell's world, the harm to reputation from an injunction was at least as important as a monetary sanction.[513] The SEC could overreach; the scienter standard protected defendants against unwarranted damage to their standing in the business community.[514]

Aaron, however, raised another issue that was not present in *Ernst & Ernst*: the state of mind required for liability under section 17(a) of the Securities Act, which prohibited "any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[515] The Court previously had found that similar language in the Investment Advisers Act did not require the SEC to establish an intent to deceive.[516] Powell agreed with his clerk

511. Preliminary Memorandum, Aaron v. SEC, to Justice Lewis F. Powell, Jr. 1 (Oct. 12, 1979).

512. Bench Memorandum, Aaron v. SEC, to Justice Lewis F. Powell, Jr. 1 (Feb. 15, 1980) (emphasis added by Justice Lewis F. Powell, Jr.).

513. *Id.* at 3 ("Injunctions *are* punitive.") (handwritten notes of Justice Lewis F. Powell, Jr.) (emphasis added by Justice Lewis F. Powell, Jr.).

514. Another example of Powell's efforts to guard against expansions of the SEC's authority is *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985). *Bateman Eichler* raised the issue of whether the *in pari delicto* defense could be raised by corporate insiders and broker-dealers who induce an investor to trade by falsely representing that they are conveying inside information. *Id.* at 301. The *Bateman Eichler* opinion, written by Justice Brennan, is unexceptional, emphasizing that the *in pari delicto* defense can only be invoked when the fault of the parties is substantially equal, and where recognition of the defense would not "significantly interfere with the effective enforcement of the securities laws." *Id.* at 310–11. Powell's only notable contribution was to persuade Justice Brennan to delete a footnote discussing the SEC's "shingle theory." *See* Charles Hughes & Co. v. SEC, 139 F.2d 434, 436–37 (2d Cir. 1943) (holding that broker-dealers make an implied representation of fair dealing by the act of putting out their "shingle" as broker-dealers). Powell feared "the SEC might view [the note] as at least an implicit approval of its theory." Letter from Justice Lewis F. Powell, Jr., to Justice William J. Brennan, Jr. 1 (May 24, 1985).

515. Aaron v. SEC, 446 U.S. 680, 687 (1980) (quoting 15 U.S.C. § 77q(a)(3)).

516. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963) (construing section 206 of the Investment Advisers Act, Pub. L. No. 76-768, 54 Stat. 789, 852 (1940), which makes it illegal for any investment adviser "(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client").

that a looser interpretation of section 17 would lead the SEC to "pitch much of its enforcement effort toward that statute, but the provision is limited to those *selling* securities . . . As a result, a certain asymmetry of enforcement policy would develop, where negligent fraud by sellers of securities would be punishable while negligent fraud by buyers would not."[517]

Powell uncharacteristically had little to say at the conference in *Aaron.* He discussed the case with Justice Stewart before the conference and they agreed upon a resolution. His discussion with Justice Stewart was not unusual; Justice Stewart was "by a long reach his closest colleague on the Court," and Powell regularly spoke to him about pending cases, which was not Powell's practice with his other colleagues.[518] Powell apparently came round to Justice Stewart's view that section 17(a) could not be interpreted in the same fashion as section 10(b).[519] This time, text prevailed over policy.

At the conference, the Chief Justice led off by voting to affirm the Second Circuit.[520] Justice Stewart came next; he made it easier for Powell to agree when he argued that "injunctions are *fatal*" and proposed that the opinion should say that the "SEC should be cautious about issuing an injunction."[521] Despite the consequences that an injunction had for defendants, Justice Stewart found the language of section 17(a) could not be read to require a finding of scienter, although section 10(b) required a "knowing" violation.[522] Justice White agreed that 10(b) required a "knowing" violation, but section 17(a) did not. Powell and Justice Rehnquist simply expressed their agreement with Justices Stewart and White, while Justices Brennan, Marshall, and Blackmun made no effort to persuade their colleagues, simply voting to affirm.[523] Finally, Justice Stevens gave Justice Stewart and Powell a majority, stating that he "would not have joined

517. Bench Memorandum, Aaron v. SEC, to Justice Lewis F. Powell, Jr., *supra* note 512, at 6.

518. Telephone Interview with David Stewart (former Powell clerk) (Apr. 17, 2002).

519. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Aaron v. SEC, *supra* note 166, at 1. Powell notes on his copy of Justice Stewart's eventual draft that Justice Stewart "reads § 17(a)(3) differently from my tentative view—but P.S. persuades me." Justice Potter Stewart, First Draft Opinion, Aaron v. SEC 1 (circulated Apr. 16, 1980) (handwritten notes of Justice Lewis F. Powell, Jr.).

520. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Aaron v. SEC, *supra* note 519, at 1.

521. *Id*.

522. *Id*.

523. *Id.* at 1–3.

Hochfelder, but will accept it."[524] With a majority for vacatur, the Chief Justice switched to the majority[525] and assigned the opinion to Justice Stewart.

Justice Stewart wrote the opinion, leaning "heavily + properly on *Ernst & Ernst*."[526] Justice Stewart again reserved the question of whether the definition of scienter included reckless behavior.[527] For the SEC, *Aaron* has to be considered a victory, despite the Court's rejection of its argument for a negligence standard under section 10(b). Statutory language and precedent preserved the enforcement tool of section 17(a), despite the misgivings of at least Powell and Justice Stewart about the SEC's use of injunctions. The threat perceived by Powell was confined; Justice Stewart took care to note that the Court did not address whether a private cause of action exists under section 17(a).[528]

Powell's suspicion of the SEC carried over to *Steadman v. SEC*,[529] a remarkable case for one reason: it is the *only* securities case in which Powell dissented.[530] The question raised was the standard of proof to be applied by the SEC in administrative proceedings to bar an investment advise.[531] The SEC had applied a preponderance standard.[532] Powell worried that "[t]o bar a middle aged professional investment adviser from pursuing his vocation for life, and at the same time stigmatize him with a judgment of fraud, is more serious than most criminal penalties."[533] For this reason, Powell favored the "clear

524. *Id.* at 1, 3.

525. *Id.* at 1. Chief Justice Burger eventually ended up concurring. Aaron v. SEC, 446 U.S. 680, 702 (1980) (Burger, C. J., concurring).

526. Justice Potter Stewart, First Draft Opinion, Aaron v. SEC, *supra* note 519, at 1 (handwritten notes of Justice Lewis F. Powell, Jr.).

527. *Aaron*, 446 U.S. at 686 n.5.

528. *Id.* at 689. The combination of a negligence standard for section 17(a), which has subsequently been read not to give rise to a private cause of action, Maldonado v. Dominguez, 137 F.3d 1, 7 (1st Cir. 1998), and a scienter standard for section 10(b), strikes a workable balance. The SEC faces a manageable burden of proof in the case that is the principal concern of the securities law—selling securities through misstatements—while private litigants are not free to impose enormous damages on defendants in open-market fraud cases without a showing that the defendants intended to distort securities prices. The Court got to this result primarily as a matter of precedent and statutory language, but it can be defended on policy grounds as well.

529. 450 U.S. 91 (1981).

530. *Id.* at 104 (Powell, J., dissenting).

531. *Id.* at 92.

532. *Id*.

533. Letter from Justice Lewis F. Powell, Jr., to Justice Potter Stewart 1 (Feb. 12, 1981).

and convincing" evidence standard for common law fraud.[534] Despite his dissent, Powell conceded at conference that his vote to reverse was "very tentative."[535] Without a more vigorous stand from Powell, his colleagues were not inclined to agree with his view on the relative severity of criminal and SEC sanctions. Consequently, the Court adopted the more typical preponderance of the evidence standard.[536] *Steadman* was Powell's only dissent in forty-one securities law cases over a fifteen year period.[537]

B. Insider Trading

Powell wrote two foundational opinions on insider trading: *Chiarella v. United States*[538] and *Dirks v. SEC*.[539] These opinions reflect Powell's unease with the SEC's efforts to expand Rule 10b-5 through aggressive interpretation. Powell thought "that the SEC should have gone to Congress long ago. Rather, it has elected to write expansive Rules (e.g., Rule 10b-5, drafted by Louis Loss one morning), and then undertake to extend the vague language of the Rule to the edge of rationality."[540] Powell saw Rule 10b-5's jurisprudence as a species of "federal common law." The *courts* needed to develop workable rules.[541] This common law perspective gave wide latitude for policy

534. *Steadman*, 450 U.S. at 105.

535. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Steadman v. SEC 1 (Dec. 5, 1980).

536. *Steadman*, 450 U.S. at 101.

537. One final case implicated the SEC's authority. In *O'Brien v. SEC*, 704 F.2d 1065 (1983), the Ninth Circuit required the SEC to provide notice to the targets of its nonpublic investigations that it was serving subpoenas on third parties. *Id.* at 1069. The decision lacked any constitutional or statutory basis, and the Solicitor General argued persuasively that the Ninth Circuit's holding threatened to undermine investigations relating to over one hundred programs that used subpoenas of the type issued by the SEC. Preliminary Memorandum, SEC v. O'Brien, to Justice Lewis F. Powell, Jr. 5 (Jan. 6, 1984 Conference). While Powell worried about conferring too much discretion on the SEC in its enforcement efforts, he did not want to see the agency hobbled. The Court voted unanimously to reverse; Powell's notes suggest that there was virtually no discussion. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on SEC v. O'Brien 1 (Apr. 20, 1984).

538. 445 U.S. 222 (1980).

539. 463 U.S. 646 (1983).

540. Letter from Justice Lewis F. Powell, Jr., to Michael P. Dooley, *supra* note 489, at 1. Powell's assertion that Loss drafted Rule 10b-5 is incorrect. *See Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 922 (1967) (comment by Milton Freeman, Attorney and Assistant Solicitor, SEC, 1934–46) (claiming authorship of Rule 10b-5).

541. Telephone Interview with James Browning (former Powell clerk) (Apr. 3, 2002). On the insider trading prohibition as a species of federal common law, see generally Stephen M.

concerns. Powell worried that prohibitions against insider trading could chill incentives for analysts and other market professionals to uncover information about publicly traded companies.

Chiarella was an unlikely beneficiary of these concerns. He was a "markup man" at Pandick Printers, a printer of financial documents, giving him access to documents relating to confidential takeover plan.[542] He deduced the identity of takeover targets, despite the best efforts of Pandick's clients (the potential tender offerors) to conceal them, from the price histories, par values and the number of letters in the fake names in those documents.[543] Chiarella conceded at trial that he knew he was going "against the SEC."[544] Powell agreed that Chiarella's conduct was "egregiously dishonest," but warned that "we should resist temptation to make bad law."[545] He was more concerned by the Second Circuit's "*major extension* of 10b" to find silence to be fraud even with "no fiduciary duty."[546]

Powell also worried that regulation could impair market efficiency. He saw the SEC's efforts to impose a "parity of information" rule as undermining "incentives to perform market research in order to discover undervalued stocks and thereby bring about a more efficient allocation of resources."[547] Powell agreed with a student author in the *Harvard Law Review*: "[t]he courts must also recognize . . . the importance of preserving incentives for legitimate economic effort, such as gathering new information or perceptively analyzing generally available facts."[548] Powell's understanding of the market mechanisms was an informed one, distinguishing demand theories of price change in the securities markets from informational ones. In response to the government's claim that Chiarella's trading could have harmed the

---

Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189 (1995).

542. Bench Memorandum, Chiarella v. United States, to Justice Lewis F. Powell, Jr. 2 (Sept. 28, 1979).

543. *Id*. Powell was familiar with Pandick's operation, having used their services for the Ethyl deal. Lawrence E. Blanchard, Jr., The Albemarle-Ethyl Deal in 1962, *supra* note 53, at 21.

544. Bench Memorandum, Chiarella v. United States, to Justice Lewis F. Powell, Jr., *supra* note 542, at 17.

545. *Id.* at 27 (handwritten notes of Justice Lewis F. Powell, Jr.).

546. Preliminary Memorandum, Chiarella v. United States, to Justice Lewis F. Powell, Jr. 1 (Apr. 13, 1979 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

547. Bench Memorandum, Chiarella v. United States, to Justice Lewis F. Powell, Jr., *supra* note 542, at 7 (handwritten notes of Justice Lewis F. Powell, Jr.).

548. Case Comment, *The Application of Rule 10b-5 to "Market Insiders":* United States v. Chiarella, 92 HARV. L. REV. 1538, 1543 (1979) (handwritten notes of Justice Lewis F. Powell, Jr., on the margins of a photocopy).

offerors that hired Pandick by driving up the target's stock price, Powell noted that this was unlikely given the small number of shares that Chiarella had purchased.[549] Powell agreed, however, with the proposition that Chiarella's unusual trading patterns might have been decoded by other market participants given that he was "a single investor known to his broker to work in a printing firm [who] shows a pattern of predicting tender offers."[550] Powell's concern with market efficiency would play a larger role in *Dirks*, but he clearly had it in his mind in *Chiarella*.

The Court found itself divided, with five votes to reverse the conviction and three to affirm.[551] The majority was tenuous, however, with Justice Stevens advancing a different rationale. Although Justices Stewart, White, and Rehnquist agreed with Powell that Chiarella's conduct did not violate section 10(b) under any theory, Justice Stevens thought there was a violation, but the government had "tried [the] case on basis of fraud to [the] wrong party."[552] On this theory—the "misappropriation" theory—Chiarella had defrauded Pandick's clients, thought Justice Stevens, not the investors from whom he purchased.

The distance between Justice Stevens and the other members of the majority was eliminated, however, by additional research. Powell's clerk pored over the record and confirmed "the conclusion of Mr. Justice Stevens that the jury was never presented with the theory that now forms the basis of the SG's argument—that petitioner breached a duty to the acquiring corporation that is actionable under section 10(b) and Rule 10b-5."[553] The jury was instead instructed that it could find deceit if Chiarella had failed to disclose material information to the sellers.[554] Accordingly, Powell (after consulting with Justice Stevens)[555] wrote to Justices Stewart, White, and Rehnquist proposing an opinion reversing the Second Circuit on the ground that

549. Bench Memorandum, Chiarella v. United States, to Justice Lewis F. Powell, Jr., *supra* note 542, at 12 (handwritten notes of Justice Lewis F. Powell, Jr.) ("not in amounts purchased").

550. *Id*.

551. Justice Marshall missed the conference, but later communicated his vote to affirm. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Chiarella v. United States 1 (Nov. 7, 1979).

552. *Id*.

553. Memorandum from Jon Sallet to Justice Lewis F. Powell, Jr. 1 (Nov. 25, 1979).

554. *Id.* at 3.

555. Letter from Justice Lewis F. Powell, Jr., to Justice John Paul Stevens (Nov. 28, 1979).

Chiarella owed no duty to the sellers of the securities.[556] Powell proposed that they leave for another day the question of whether Chiarella's breach of duty to Pandick's clients violated section 10(b).[557]

The published opinion reflects Justice Stevens's position. Powell rejects a duty to the sellers because Chiarella owed them no fiduciary duty.[558] The common law of fraud required a duty to the person on the other side of the transaction.[559] Powell used the common law as a guide to congressional intent. In doing so, he was creating a federal fiduciary principle, not incorporating state common law doctrines into the federal law of fraud.[560] Consequently, *Chiarella* sits in considerable tension with Justice White's rejection of a federal fiduciary standard in *Santa Fe*.[561]

The SEC and the Justice Department were attempting to extend section 10(b) beyond Powell's understanding of Congress's intention in 1934, and the Second Circuit was acquiescing in those efforts. As Powell saw it, courts had a responsibility to check such overreaching by the executive branch.[562] *Chiarella* was a conscious attempt to bring precision and rigor to an area of the law in which the lower courts had strayed from Congress's purposes.[563] Hence Powell's reminder that "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud."[564]

While the opinion attempts to ground Rule 10b-5 in the common law of fraud, it does not reject the broader "misappropriation" theory.[565] This concession got Powell a majority, but left the misappropriation theory alive. To make matters worse, Justice Stevens high-

---

556. Letter from Justice Lewis F. Powell, Jr., to Justices Potter Stewart et al. 1 (Nov. 29, 1979).

557. *Id*.

558. Chiarella v. United States, 445 U.S. 222, 232–33 (1980):

> No duty could arise from [Chiarella]'s relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.

559. *Id.* at 228.

560. Telephone Interview with Jonathan Sallet, *supra* note 483.

561. *See supra* notes 168–77. On the tension between *Santa Fe* and *Chiarella*, see Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589 (1999).

562. Telephone Interview with Jonathan Sallet, *supra* note 483.

563. *Id*.

564. *Chiarella*, 445 U.S. at 234–35.

565. *Id.* at 236.

lighted the theory's potential in his concurrence.[566] Powell responded that he would prefer

> not emphasizing that the result may have been different if liability had been premised on a duty to the acquiring company, as I am by no means sure that 10(b) should be extended this far beyond its clear purposes at the time of its enactment in 1934. As we are talking about criminal liability, I am inclined to think we should leave it to Congress to draft a more refined and specific criminal statute. To be sure, you leave the question for another day. But with a five to four vote by the Court, I would prefer—I think—not to invite a judicial rather than a legislative consideration of the question.[567]

This was about as strong an objection as Powell could muster, but Justice Stevens nonetheless published the concurrence. In Powell's estimation, Congress was better placed to specify the conduct to be prohibited.[568] Powell's preference for congressional action went unheeded, as Congress was unable to agree on a definition of insider trading.[569] Powell's successors filled the gap by interpreting section 10(b) flexibly to facilitate the SEC's efforts to crack down on insider trading.[570] That interpretive flexibility carries with it a breadth of application that would have astounded the 1934 Congress that drafted section 10(b).[571]

Powell's opinion in *Dirks v. SEC*[572] addressed more squarely the relation between restrictions on the use of inside information and market efficiency. The SEC censured Dirks, a securities analyst, for

---

566. *Id.* at 237 (Stevens, J., concurring).

567. Letter from Justice Lewis F. Powell, Jr., to Justice John Paul Stevens 1 (Feb. 4, 1980).

568. Powell wrote to Chief Justice Burger:

> If I were in Congress, I probably would support a carefully drawn criminal statute that would make it a crime for one to do what Chiarella did. But it is clear (at least to me) that Congress never had the slightest intention—back in 1933 and 1934—to extend the Securities Acts to this type of situation.
>
> . . . Before criminal liability is imposed by the courts, I think the Congress should face up to this question, and draft a proper criminal statute that puts people on notice.
>
> I add that I do not admire Mr. Chiarella any more than you do.

Letter from Justice Lewis F. Powell, Jr., to Chief Justice Warren E. Burger 1 (Feb. 4, 1980).

569. Steve Thel, *Section 20(d) of the Securities Exchange Act: Congress, the Supreme Court, the SEC, and the Process of Defining Insider Trading*, 69 N.C. L. REV. 1261, 1262 (1991).

570. *See* United States v. O'Hagan, 521 U.S. 642, 665 (1997) (upholding the "misappropriation" theory of insider trading based on fraud on the source of the inside information).

571. On Congress's intent in 1934, see generally Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385 (1990).

572. 463 U.S. 646 (1983).

passing to his customers information about a massive fraud at Equity Funding that he had learned from current and former Equity Funding employees.[573] Dirks's customers relied on that information to sell large quantities of Equity Funding shares before the company's collapse.[574]

On petition for certiorari, the Solicitor General authorized the SEC to file an opposition to the petition, but refused to join the SEC's position. The Solicitor General took the position that information obtained by Dirks could not be considered confidential,[575] highlighting the enormous obstacle that Dirks's role in uncovering the Equity Funding fraud posed for the SEC's argument.[576] The SEC was therefore left to its own devices to defend its censure of Dirks. The agency got no help from the D.C. Circuit, which affirmed the censure on the ground that Dirks "breached his duty to the Commission and to the public not to misuse insider information."[577] This "absurd" holding squarely conflicted with Powell's reasoning in *Chiarella*.[578] Although the lower court issued a more limited opinion on petition for rehearing,[579] the SEC faced an uphill battle to defend the judgment.[580]

The case was of obvious importance to the securities industry: Powell's law clerk, Jim Browning, recalls that there was "a blanket of blue and gray suits in the courtroom" with SEC staff and the local corporate bar taking up all the places in the audience for the argument.[581] Powell had no doubt that the D.C. Circuit's judgment should be reversed, but he wanted to do so in way that would uphold a ban

573. *In re* Raymond L. Dirks, Exchange Act Release No. 17,480, 21 SEC Docket 1401, 1421–13 (Jan. 22, 1981).

574. *Id.* at 1405.

575. Preliminary Memorandum, Dirks v. SEC, to Justice Lewis F. Powell, Jr., *supra* note 112, at 8.

576. Powell noted this point made by the United States in its brief on the merits: "The Commission's erroneous imposition of liability in this case has serious consequences for federal law enforcement, which frequently depends upon private initiative to uncover criminal conduct . . . Petitioner accomplished what regulatory authorities were unable to do." Memorandum from Justice Lewis F. Powell, Jr., to File, Dirks v. SEC 4 (Mar. 21, 1983).

577. "Bobtail" Bench Memorandum to Justice Lewis F. Powell, Jr. 3 (Mar. 21, 1983) (internal quotation marks omitted).

578. *Id.* (handwritten notes of Justice Lewis F. Powell, Jr.).

579. Dirks v. SEC, 681 F.2d 824 (D.C. Cir. 1982).

580. Courts addressing the issue of tippee liability had taken a narrower approach. Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-*Chiarella *Restatement*, 70 CAL. L. REV. 1, 29–32 (1982).

581. Telephone Interview with James Browning, *supra* note 541.

on insider trading and tippee liability. He charged Browning with developing a theory that would achieve this result.

Browning was in some ways an odd choice for this task because he had "considerable doubts that federal securities law should ban any insider trading."[582] Moreover, he felt either the SEC's position prohibiting any use of inside information in trading, or the laissez faire position permitting unconstrained insider trading, were more intellectually defensible than the middle ground sought by Powell.[583] But Powell saw the SEC's approach as unpredictable and unfair; moreover, he thought that analysts were important to the operation of the securities markets. The SEC's prosecution of Dirks was an assault on the analyst industry.[584] On the other hand, Powell's sense of propriety abhorred the abuse of trust that insider trading represented.[585] A prohibition was appropriate, if that prohibition could be applied fairly and predictably.[586]

Despite his skepticism, Browning succeeded in the task set for him by his boss. He found the middle ground in a commentary on the

---

582. Memorandum from Jim [Browning] to Justice Lewis F. Powell, Jr. 1 (Mar. 22, 1983).

583. Telephone Interview with James Browning, *supra* note 541.

584. *Id*.

585. A later case confirms that Powell's position on insider trading was based on ethics, not finance theory. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985), raised the issue of whether corporate insiders and broker-dealers who induce an investor to trade by falsely representing that they are conveying inside information could raise an *in pari delicto* defense. The plaintiffs made the somewhat unusual admission that they had purchased stock on the basis of what they believed was nonpublic information. *Id.* at 302. The information proved to be false, however, and the plaintiffs lost money. *Id.* at 302–03. They sought to recover their losses from the broker-dealer who had communicated the false inside information, as well as an officer of the issuer that was the subject of the rumor, who had tacitly confirmed the information. *Id.* at 301–02.

Powell summarized his view of the case in his notes for the postargument conference:

> I conclude Tippees *did* know that [the corporate officer] had breached his duty by confirming that info. was not public + that broker was trustworthy. Thus tippees were culpable.
>
> But tippees conduct was *not as* culpable as tippers. Duty of tippers was clear.
>
> Disallowing defense of *in pari delicto* furthers policy of Securities Acts. Persons who become tippers present *basic* problem of *insiders* giving out tips. They should not go free because tippees also act unlawfully.

Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Bateman Eichler, Hill Richards, Inc. v. Berner 1 (Apr. 4, 1985). This excerpt confirms that Powell viewed the principal problem with insider trading as the abuse of trust by the corporate insider. The harm to the securities markets stemming from information asymmetry was, at most, a secondary concern. Powell's greater concern with insider trading law was the risk posed by overaggressive enforcement of the prohibition by the SEC.

586. Telephone Interview with James Browning, *supra* note 541.

case in a legal newspaper.[587] Powell showed little interest in Browning's extended analysis of the welfare effects of insider trading prohibitions, but Browning hit the mark with his legal analysis. Browning argued that

> there was no "exploitation" by the insiders. Dirks' informants received no monetary benefit for revealing Equity Funding's secrets, nor did they have any apparent desire to make a gift of valuable information to Dirks. The informants may have had a duty not to trade on inside information without disclosure, but they did not. Therefore, even if Dirks' informants did violate a duty to the company by disclosing, their conduct did not have one of the essential elements of breach of the agency relationship: the exploitation of corporate information by an insider.
>
> We both know *Dirks* is a freak case. The situations we are concerned with are where securities analysts interview employees seeking information: is there liability? If the breach of an employee's duty alone is enough to establish tippee liability, securities analyst [*sic*] will be chilled from using any of the information he gets. If, on the other hand, exploitation of confidential information by insiders is a prerequisite to tippee liability, securities analysts will be encouraged to seek information from corporate employees. I will not emphasize the obvious benefits of protecting the information-gathering duties of a securities analyst.[588]

Powell agreed that "*Dirks* is easy, but is there a general principle?"[589]

Powell found his general principle in Browning's "exploitation" formulation, although he recast it. Powell, in an unusual step, prepared a memorandum for the conference at which the Justices would decide the case,[590] perhaps as a bid for the opinion assignment.[591] Powell wrote:

---

587. Leonard Chazen, "Dirks" *Presents Unique Corporate, Social Issues*, LEGAL TIMES, Mar. 14, 1983, at 14. The author would not receive attribution in the opinion, however, because of Powell's unease with citing a piece that was not in "a scholarly journal." Justice Lewis F. Powell, Jr., Second Draft Opinion, Dirks v. SEC 24 (circulated May 10, 1983) (handwritten notes of Justice Lewis F. Powell, Jr.).

588. Memorandum from Jim [Browning] to Justice Lewis F. Powell, Jr., *supra* note 582, at 6–7.

589. *Id.* (handwritten notes of Justice Lewis F. Powell, Jr.).

590. Justice Lewis F. Powell, Jr., Memorandum for Conference, Dirks v. SEC 1 (Mar. 23, 1983).

591. Telephone Interview with James Browning, *supra* note 541.

> We made an important point in *Chiarella*. It did not involve a tippee, but it did establish that liability cannot be imposed in the absence of a fiduciary duty to disclose before trading. The only reference in *Chiarella* to tippees is in fn. 12. The critical sentence in this note says:
>
> > "The tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty."
>
> Thus, where the tippee becomes a "participant after the fact," he shares whatever duty the insider breached by conveying the information. This analysis makes Dirks' case easy to decide. His liability depends on a finding that the former Equity Funding employees—of which *Secrist* [Dirks's principal source] was only one—who disclosed the fraud, breached their fiduciary duty to Equity Funding.
>
> But even the SEC concedes there was no such breach of duty. None of these employees profited by disclosing fraud they acted strictly in the public interest. Therefore, Dirks was not a participant after the fact in anyone's breach of duty.[592]

In sum, *Chiarella* required a breach of duty and Dirks's sources had violated no duty. Dirks therefore could not be liable for violating Rule 10b-5. Powell was not satisfied, however, with merely reversing the judgment of the D.C. Circuit. He continued:

> Deciding this case without identifying a general principle would accomplish very little.
>
> Let me make clear the type of situation to which the principle would be applied. This case does not involve a *Texas Gulf Sulfur* situation where an officer or director of a corporation himself trades on inside information for personal gain. Nor do we have an insider—who to benefit a friend—discloses inside information on which the friend profits. The law is fairly well settled with respect to these straightforward cases.
>
> The much broader, underlying problem in this case concerns the necessity of information being made available for the health of the securities markets. In this case, the SEC's opinion stated:

592. Justice Lewis F. Powell, Jr., Memorandum for Conference, Dirks v. SEC, *supra* note 590, at 1.

> In the course of their work, analysts actively seek out bits and pieces of corporate information not generally known to the market for the express purpose of analyzing that information and informing their clients who, in turn, can be expected trade on the basis of the information. The value to the entire market of these efforts cannot be gainsaid: market efficiency in practice is significantly enhanced by such initiatives to ferret out an[d] analyze information, and thus the analysts' works redowns [*sic*] to the benefit of the investors.

> If we sustain its opinion in this case securities analysts will be far less liable to "ferret out" information. They will be concerned constantly with the uncertainty of lawsuits, with juries determining whether the information circulated was confidential and should not have been disclosed.[593]

Powell's proposed principle: "A tippee's liability should depend on the *purpose or intent* of the insider's disclosure." Powell conceded that this was "a subjective rule," but he defended it as "principled and practical."[594] Powell recognized that the "question of 'purpose' (intent) will be determined—as it is so often in the law—by the facts." The relevant facts would include

> (i) The relationship between the insider and the recipient (e.g., the analyst); what were their respective purposes? Particularly, did the insider expect to profit himself or to benefit a friend rather than to inform the market generally?

> (ii) Who initiated the disclosure? Typically, the analyst seeks out the corporate executive—this is commonplace. Equally commonplace, executives brief large meeting of analysts. The circumstances of the disclosure are relevant—as in this case.[595]

This fact-intensive inquiry went against Powell's usual preference for predictability and fairness, which had prevailed in *Chiarella*. But the alternatives—the SEC's blanket ban on the use of inside information, on the one hand, and turning a blind eye to abuses of office by corporate insiders, on the other—were worse.

Powell's diligent preparation was rewarded by the opinion assignment. Holding a court, however, would not be simple. The outra-

593. *Id.* at 2–3.
594. *Id.* at 4.
595. *Id.*

geousness of the SEC's sanctioning Dirks made it easy to find a majority for reversal,[596] but no consensus emerged from the conference on the rationale. Justice White's vote, for example, was "tentative," and seemed to be based on the fact that Dirks "didn't unload," although Justice White thought that "[h]is tippees may be guilty of violating rules."[597] Justice Stevens, by contrast, thought that "Dirks breached no duty. Even if he had owned stock + sold it, but [*sic*] he had no duty. A person who is an outsider has no duty."[598] Justice O'Connor thought that "the ultimate solution is to require fraud to be disclosed first to SEC—+ would like to say this."[599] The risk that the *Dirks* majority would fragment was real.

Powell and Browning struggled through seven drafts of the opinion before it was ready to circulate. After reviewing Browning's first draft, Powell again emphasized the importance of protecting the role of market analysts:

> As you know, it is customary for management of listed companies to convey supplemental information (some people call in [*sic*] "chumming" the market) to analysts. This is done in primarily in two ways: talks to, and questions and answer sessions with, large groups of analysts—in effect, open meetings. Similarly, information not available through required filings with the SEC often is given at stockholders meetings where most of the stock is represented by proxies, and news coverage may be scant and uninforming. The more difficult type of information gathering—difficult in terms of line drawing for our purposes—is where the analysts will visit corporate headquarters and confer with senior officers. The analyst is likely to be a specialist in the particular business. When he returns to his firm, often he will circulate "buy" or "sell" recommendations to clients and person whom the firm would like to have as clients. These recommendations are backed up by a report on the interview. The line drawing problem is one that impacts directly on both the corporate officers and the analysts. Neither can be quite sure when the "line" is crossed.[600]

---

596. Even Justice Brennan, while voting for affirmance, described it as a "very close case." Justice William J. Brennan, Jr., Memorandum for Conference, SEC v. Dirks 1 (Mar. 23, 1983).

597. Handwritten notes of Justice Lewis F. Powell, Jr., from the Conference on Dirks v. SEC 1 (Mar. 23, 1983).

598. *Id.* at 3.

599. *Id.*

600. Memorandum from Justice Lewis F. Powell, Jr., to Jim [Browning] 3 (May 2, 1983).

Powell's years in corporate boardrooms gave him a clear understanding of how corporate disclosure worked on the ground.[601]

The emphasis on "purpose" in determining whether there was a fiduciary breach proved to be a stumbling block in gaining a majority. Powell quickly got three votes for his initial circulation (Justices White, Rehnquist, and Stevens),[602] but Justice O'Connor had reservations. The first was rather idiosyncratic: she wanted to reserve the question of whether information about criminal conduct could be considered material information.[603] While the answer to this question would almost certainly be "Yes," deferring the answer cost Powell nothing.

Justice O'Connor's second concern was more substantial. She worried that focusing on the insider's purpose in disclosing the information would require "the fact-finder . . . to determine the subjective state of mind of the insider," "an inherently difficult determination."[604] She suggested omitting the discussion of purpose, a change that Powell was not willing to make.[605] More promising was her proposed alternative, which looked to

> whether the insider derives a direct or indirect benefit from his disclosure, and that benefit is primarily of a pecuniary nature. An emphasis on benefit differs from your approach only insofar as it establishes a more objective indicia of liability. If, as a factual matter, the insider did not benefit from his disclosure, then I am not inclined to be concerned with a further inquiry into his motivation. I am not sure about what will be gained from an inquiry into intent, but from

601. Powell previously appears to have taken a narrower view of the legality of selective disclosure. In a memorandum to his law clerk in a section 16(b) case, Powell wrote: "absent a presence on the board there would be a clear violation of 10b-5 for a corporation (or its officers or directors) to disclose to any stockholder information not available to all holders." Memorandum from Justice Lewis F. Powell, Jr., to Carl Schenker 5 (Nov. 19, 1975). Powell apparently believed that Rule 10b-5 would cover any selective disclosure to stockholders that led to trading. Powell's considerably narrower position in *Dirks* now has been overturned by the SEC through its Regulation FD. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319, at 83,676, 83,691 (Aug. 15, 2000).

602. Letter from Justice Lewis F. Powell, Jr., to Justice Byron R. White et al. 1 (June 9, 1983).

603. Letter from Justice Sandra Day O'Connor to Justice Lewis F. Powell, Jr. 1–2 (June 7, 1983).

604. *Id.* at 2.

605. *Id.*

> my past experience on the bench, I know that a great deal of time will be lost![606]

Justice O'Connor shrewdly couched her suggested change as "more objective" and based on her "past experience on the bench." These factors were well calculated to persuade Powell, who favored predictability and respected the practical wisdom of experience. The opinion accordingly was revised to reflect Justice O'Connor's "quite constructive" suggestions.[607] These changes narrowed the scope of improper purposes that the SEC could argue constituted breaches of fiduciary duty under Rule 10b-5. Garden variety breaches of the duty of care were clearly out; tipping required a breach of the duty of loyalty. As a result, the federal common law of insider trading was brought into line with the traditional distinction in state corporate law between breaches of care and loyalty. Powell achieved his goal of protecting the analyst community from being swamped by the prohibition against insider trading; Justice O'Connor helped him achieve this goal within a predictable framework.

---

606. *Id.*

607. Letter from Justice Lewis F. Powell, Jr., to Justice Sandra Day O'Connor 1 (June 9, 1983). The changes:

Before: both the insider and the analyst will act in good faith

After: the insider will act consistently with his fiduciary duty

Before: Whether disclosure is a breach of duty therefore depends in large part on the purpose or good faith of the insider who made the disclosure.

After: Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure, *i.e.*, whether the insider personally expects to benefit, directly or indirectly, from his disclosure.

Added: The SEC argues that, if inside-trading liability does not exist when the information is transmitted for a proper purpose but is used for trading, it would be a rare situation when the parties could not fabricate some ostensibly legitimate business justification for transmitting the information. We think the SEC is unduly concerned. In determining whether the insider's purpose in making a particular disclosure is fraudulent, the SEC and the courts are not required to read the parties minds. Scienter may be relevant in some case in determining whether the tipper has violated his *Cady, Roberts* duty, but to determine whether the disclosure itself "deceive[s], manipulate[s], or defraud[s]" shareholders, *Aaron* v. *SEC*, 446 U.S. 680 (1980), courts should focus on whether the insider expects to receive a direct or indirect personal benefit from the disclosure, such as—for example—a pecuniary gain or a reputational benefit that may translate into future earnings.

Before: Determining the purpose of any one disclosure, a question of fact, will not always be easy for the courts.

After: Determining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts.

Compare Justice Lewis F. Powell, Jr., First Draft Opinion, Dirks v. SEC 14–15 (May 28, 1983) *with* Justice Lewis F. Powell, Jr., Second Draft Opinion, Dirks v. SEC 14–15 (June 9, 1983).

Powell wrote a third insider trading opinion, but it never made it to the United States Reports.[608] *Carpenter v. United States*[609] came on certiorari to the Court during Powell's last term. The case raised the issue that *Chiarella* had left unresolved: Was a breach of duty to the *owner* of inside information, rather than the counterparty to the trade, sufficient for Rule 10b-5 liability?[610] Powell saw the Second Circuit's affirmative response to this question as a direct challenge to the doctrine that he had developed in *Chiarella* and *Dirks*.

Carpenter involved unusual facts. Defendant R. Foster Winans was a reporter for the Wall Street Journal and one of the writers of the "Heard on the Street" column; defendant David Carpenter was a news clerk at the Journal.[611] Defendant Kenneth Felis was a stockbroker.[612] Winans would pass securities-related information scheduled to appear in the next day's column through Carpenter to Felis, who would then, depending upon the tenor of the article, buy or sell the subject securities.[613] Wall Street Journal policy deemed all news information to be company property and required nonpublic information to be treated as confidential.[614] Ignoring this policy, the conspirators netted nearly $690,000 from the scheme.[615] The stress of an SEC inquiry caused the conspirators to turn on each other,[616] and an indictment followed. The Second Circuit affirmed the conspirators' convictions for mail, wire, and securities fraud.[617] With respect to the securities fraud counts, the Second Circuit upheld the convictions under the misappropriation theory based on its earlier cases.[618]

The conspirators petitioned for certiorari, which the Court initially voted to deny. Powell's draft dissent from the denial made it clear that he would have rejected the misappropriation theory alto-

608. The discussion here draws from my earlier article, A.C. Pritchard, United States v. O'Hagan*: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. REV. 13 (1998).

609. 484 U.S. 19 (1987).

610. *Id.* at 24.

611. 791 F.2d 1024, 1026 (2d Cir. 1986).

612. *Id*.

613. *Id*.

614. *Id*.

615. *Id.* at 1027.

616. *Id*.

617. *Id.* at 1036.

618. *Id.* at 1034–35. The Second Circuit also rejected the argument that the misappropriation theory did not apply because the victim of the misappropriation was the Wall Street Journal and not the companies whose shares were traded. *Id.* at 1032–34.

gether.[619] He argued that "the Second Circuit has resolved an important question of securities law in a way that appears to conflict with recent opinions of this Court."[620] The first of these opinions was *Chiarella*, which began with the premise that

> parties to a business transaction generally do not have an affirmative duty to disclose information about the transaction. The court noted, however, that a failure to disclose material information could be fraudulent in certain circumstances. "But such liability is premised upon a duty to disclose arising from a relationship of trust and confidence *between parties to a transaction*."[621]

Powell tied his reading of *Chiarella* closely to the common law of deceit, which requires that "[o]ne party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . . matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them."[622] Thus, deceit requires that one party to a transaction owe a duty of disclosure to the other. Powell argued that *Chiarella* had incorporated this common law requirement into section 10(b),[623] notwithstanding the concessions he had made to Justice Stevens in that case to secure a majority.

Powell then turned to *Dirks*, which "established that when outsiders have a fiduciary duty to the shareholders, they cannot purchase securities from those shareholders without first informing them of material information that might influence the decision to purchase or sell the securities."[624] Again, the relevant disclosure duty was between the parties to the securities transaction. By contrast, in *Carpenter*, there was no fiduciary relationship between the defendants and those who had sold them securities.[625] The only fiduciary relationship at is-

---

619. Justice Lewis F. Powell, Jr., Draft Dissent from Denial of Certiorari, Carpenter v. United States, *supra* note 113, at 1. Powell had noted his plan to write in the event of a denial even before conference. Preliminary Memorandum, Carpenter v. United States, from Justice Lewis F. Powell, Jr. 1 (Dec. 5, 1986 Conference) (handwritten notes of Justice Lewis F. Powell, Jr.).

620. Justice Lewis F. Powell, Jr., Draft Dissent from Denial of Certiorari, Carpenter v. United States, *supra* note 113, at 1.

621. *Id.* at 3 (quoting Chiarella v. United States, 445 U.S. 222, 230 (1980)).

622. RESTATEMENT (SECOND) OF TORTS § 551(2) (1977).

623. Justice Lewis F. Powell, Jr., Draft Dissent from Denial of Certiorari, Carpenter v. United States, *supra* note 113, at 4.

624. *Id.*

625. *See id.* ("The Court of Appeals found no fiduciary relationship between any of the petitioners and the parties from whom they purchased securities.").

sue was Winans's duty to the Journal.[626] Powell noted, however, that previous cases did not support the proposition that the fiduciary duty an individual owes to his employee was sufficient to support an action under Rule 10b-5.[627] Rather, the inquiry under Rule 10b-5 "must focus on the petitioner's relationship with the sellers of . . . securities."[628] Because there was no such relationship, Powell concluded that the petitioners' conduct did not violate Rule 10b-5.[629]

Justices O'Connor and Rehnquist, both of whom had initially voted to grant certiorari, joined Powell's draft dissent.[630] The dissent was never published, however, because Justices Brennan and Scalia switched their votes.[631] Before *Carpenter* was argued, Powell retired.[632] His successor, Anthony Kennedy, was not confirmed until after the argument.[633] The Court split 4-4 on the misappropriation theory and consequently upheld the conviction without opinion.[634] Given Powell's rejection of the misappropriation theory in his draft dissent, it is reasonable to conclude that if Powell had not retired when he did, the Supreme Court would have rejected the misappropriation theory in 1987. As it turned out, the Court did not decide the issue for another decade, upholding the theory by a 6-3 vote in *United States v. O'Hagan*.[635] In this case Powell's influence did not survive his retirement, with even Justice O'Connor voting to uphold the theory.[636]

---

626. *Id.* at 4–5.

627. *Id.* at 5.

628. *Id.* (internal quotation marks and citations omitted).

629. *Id.*

630. Letter from Chief Justice William H. Rehnquist to Justice Lewis F. Powell, Jr. 1 (Dec. 11, 1986); Letter from Justice Sandra Day O'Connor to Justice Lewis F. Powell, Jr. 1 (Dec. 11, 1986).

631. *See* Bench Memorandum, Carpenter v. United States (No. 86-422) (Oct. 7, 1987) (copy on file with Library of Congress, Manuscript Division, Box 427 of Thurgood Marshall Papers). Certiorari was granted on December 15, 1986. United States v. Carpenter, 479 U. S. 1016, 1016 (1986). Justice Brennan had been willing to endorse a much broader theory in *Chiarella*, so it seems unlikely that Powell had persuaded him on the merits; more likely he saw the issue as one that required resolution. Justice Scalia ultimately voted against the theory. *See* United States v. O'Hagan, 521 U.S. 642, 679 (1997).

632. *See* Al Kamen, *Justice Powell Resigns, Was Supreme Court's Pivotal Vote*, WASH. POST, June 27, 1987, at A1. Powell retired on June 26, 1987. *Id.*

633. Stuart Taylor, Jr., *Kennedy Sworn in as 104th Justice on High Court*, N.Y. TIMES, Feb. 19, 1988, at A10. Kennedy was sworn in on February 18, 1988. *Id.*

634. Carpenter v. United States, 484 U.S. 19, 24 (1987).

635. 521 U.S. 642, 675–76 (1997).

636. *Id.* at 646.

CONCLUSION

Powell worried that his experience as a corporate lawyer would generate controversy when he was nominated to the Supreme Court. Powell wrote to Attorney General John Mitchell in 1969, when his name was first mentioned as a possible nominee:

> My own practice, both in litigation and office work over the years, has been largely for corporate and business clients. I also serve on the boards of directors of several corporations of fairly substantial size. In view of the opposition of organized labor to Judge [Clement] Haynsworth because of his alleged "antilabor bias," it must be assumed that there would be similar opposition to any lawyer whose professional career has been devoted primarily to business representations.[637]

As it happened, Powell faced no significant opposition from labor groups,[638] and his views on business received little attention during his confirmation hearings.[639] Only after Powell's confirmation did his somewhat strident views on defending free enterprise come under media scrutiny, but by then it was too late.[640]

Powell's judicial career shows the important role those views played in the development of the securities law. Most of the issues presented to the Court in the cases discussed here were nominally questions of statutory interpretation. The Court's opinions emphasize statutory language, with Powell's opinions in particular grounded in careful statutory readings. Nonetheless, Powell's reading of those texts and their legislative purposes was colored by his experience in corporate boardrooms, consistently leading him favor to narrower readings.

---

637. Letter from Lewis F. Powell, Jr., to John N. Mitchell, Attorney General, U.S. Department of Justice 1 (Dec. 12, 1969).

638. Powell may have benefitted from having his nomination coupled with Justice Rehnquist's. JEFFRIES, *supra* note 17, at 10 ("Labor, liberals, and civil rights leaders who tried to defeat Rehnquist were willing to accept Powell, if only to emphasize the contrast between the two.").

Powell did have an "antilabor bias" as conventionally understood, having lobbied to strengthen Virginia's "Right to Work" law. Letter from Lewis F. Powell, Jr., to Edward Emerson Lane 1 (Mar. 4, 1954). He also favored extending the antitrust laws to unions. *See* Lewis F. Powell, Jr., Trends in Antitrust, Address at the Conference of Financial Executives, *supra* note 299, at 17 ("When the antitrust laws were enacted there was perhaps good reason for exclusion of fledgling unions from their anti-monopoly provisions. Today, under vastly different social, economic and political conditions, the great monopolists in this country are the major unions.").

639. Fred P. Graham, *Powell Proposed Business Defense*, N.Y. TIMES, Sept. 29, 1972, at 31.

640. Jack Anderson, *Powell's Lesson to Business Aired*, WASH. POST, Sept. 28, 1972, at F7.

Powell's conservative stance in securities cases was not the product of grand theory; he and his colleagues decided securities cases one at a time, not as part of an overarching agenda. Powell did not subscribe to the normative libertarianism or economic analysis that enchants some corporate and securities law academics. Rather, Powell's nearly forty years of experience in corporate boardrooms led him to trust the character of the average American businessman. That trust was reinforced by working alongside those clients in civic affairs. In Powell's world, free enterprise and the businessmen who made it work were the foundation of strong communities. Free enterprise was a resource to be preserved, not a menace to be tamed. Character, not the threat of lawsuits, was the safeguard of the integrity of American capitalism. That trust in American business led Powell to read the securities laws—in all good faith—as setting down predictable rules that would allow business to proceed without undue interference or liability risk. These narrow readings reversed the trend in the Second Circuit and other lower courts to expand the securities laws. The securities laws experienced a counterrevolution, not as the result of a coup, but because of the commitments and intuitions derived from one person's experience before becoming a Justice.

Powell's experience as a corporate lawyer gave him credibility when he urged his colleagues to disagree with the position taken by the SEC, as he so often did. Having worked with the SEC from its earliest days, Powell recognized the departure in the agency's aggressively expansionist tack. Agency expertise carried no weight when the SEC came into court with newly developed positions that conflicted with Powell's understanding of well-established practice. The deference that the SEC had enjoyed in the Supreme Court before Powell's confirmation evaporated. If the Court deferred to anyone in securities cases, it was to Powell and his experience, not the SEC and its efforts to reshape the securities markets. As a result, the SEC's winning percentage plummeted, particularly in the highest profile cases.

Powell's experience did not always push him to oppose regulation. Powell was not naïve; he recognized that there were abuses in American business. His distaste for the abuse of trust of insider trading led him to read the common law of fraud broadly in *Chiarella* to make room for a prohibition under section 10(b). The SEC's "parity of information" position would have cracked down on this abuse more completely, but it went "too far" beyond any possible intention of Congress. While regulation of insider trading was warranted, it could not come at the expense of the law's predictability.

A more significant departure from free market dogma was Powell's profound suspicion of takeovers. Federal preemption, pushed by the SEC, was the most promising avenue for preserving a free market in corporate control. Powell's distrust of that market led him to tolerate state regulation of takeovers, which invariably protected management. Here, too, his instincts were grounded in experience. Powell wanted to preserve space for local businesses and businessmen to contribute to the community in the way that he and his clients, people like Harvie Wilkinson, had done. Powell's support for state efforts to discourage takeovers was consistent with his federalist principles, making Powell's position that much easier to defend. Powell shut the door to a free market in corporate control in *CTS* and corporate managers sleep better as a result.

Was Lewis Powell's influence on securities law a good thing? One can disagree with the normative perspective that Powell brought to the interpretation of the federal securities law. Powell's experience gave him expertise, but that expertise was infused with attitudes gained through nearly forty years of practice as a corporate lawyer. It seems unlikely that many Justices consider the corporate bar the relevant audience for his or her work, as Powell did.[641] The close connection between Powell's attitudes and his readings of statutory text will trouble those who subscribe to formalist theories of statutory interpretation which require judges to be neutral readers. Realism seems to capture better the interpretive practice of the Supreme Court in the field of securities law. Powell's emphasis on statutory text and structure in his opinions may have been a strategic device, intended to cabin the interpretive latitude of the lower courts rather than the Supreme Court. Perhaps another Justice with a greater faith in formalism would better separate his own views from his statutory readings.

The deference that Powell got from his colleagues due to his experience (and perhaps, their lesser interest) will trouble those who are sanguine about the role of private litigation in protecting investors and who are less troubled by the risk of SEC overreaching. Perhaps he trusted the character of the American businessman too much and the plaintiffs' bar and the staff of the SEC too little. As Powell recognized, the reputation of business and businessmen has waxed and waned throughout American history. The public's regard for the

641. The SEC was also apparently part of the relevant audience. *See* Memorandum from Justice Lewis F. Powell, Jr., to Paul Cane 1 (Mar. 17, 1981) ("The SEC's staff—and perhaps members of the Commission—will be interested in our opinion [in *Nuveen*].").

business community is at a low ebb today due to events that would have appalled Powell. Enron and the accounting scandals that have followed it might well have shaken his confidence in the character of American businessmen, a central premise underlying his efforts to cabin the securities law.

Powell's securities law legacy, however, does not rest solely on the attitudes that he brought to that work. Powell's presence ensured that the Court would avoid the temptation to neglect the highly technical field of securities law, as it has done since his retirement. More importantly, his influence ensured that the Court's work in the area would at least be sensible, if not invulnerable to criticism. Since Powell's retirement, the Court's forays into this area have been occasionally impenetrable[642] and sometimes bizarre.[643] On other occasions the Court simply regurgitates the party line offered by the SEC.[644] Overall, "scholars and learned practitioners are giving the Court's securities law opinions low grades for logic, clarity, and usefulness in future cases."[645]

Criticisms of this sort cannot be leveled at Powell's work in securities law. Although practitioners and scholars can quarrel with particular outcomes, the cases decided under Powell's guidance cannot be described as incompatible with the basic structure of the securities laws and corporate practice. Powell ensured that the revolution in the securities laws that the Second Circuit had launched in the 1960s (with the Supreme Court's encouragement) would not stifle the free enterprise in which Powell so fervently believed. Powell would take pride in his success as a counterrevolutionary in the field of securities law.

---

642. *See* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1109 (1991) (Scalia, J., concurring) (describing the court's opinion as a "psychic thicket").

643. Gustafson v. Alloyd Co., 513 U.S. 561 (1995); *see also* Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 WASH. L. REV. 429, 456 (2000) (collecting commentary critical of *Gustafson*).

644. United States v. O'Hagan, 521 U.S. 642 (1997). Full disclosure: the author, as Senior Counsel to the SEC, helped the government develop that line in this case.

645. Donald C. Langevoort, *Words from on High About Rule 10b-5:* Chiarella*'s History,* Central Bank*'s Future*, 20 DEL. J. CORP. L. 865, 868 (1995).