

# Comment

## The Teaching of Corporate Law: A Socratic Investigation of Law and Bureaucracy

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### INTRODUCTION

Twenty years ago, when I began teaching at Yale Law School, I became aware of an odd phenomenon. Every so often, a hush would fall over the classroom during my course in introductory corporate law. After a time, I realized that this hush recurred each time one member of the class, Duncan Kennedy, raised his hand. Kennedy was known around the law school for his often brutal assaults on the Socratic method, which he attacked as an abuse of pedagogic authority.<sup>1</sup>

The class no doubt expected fireworks from my attempt to respond to Kennedy's demand that I justify my teaching technique, but no attack ever came. Consequently, I never had the opportunity to justify my teaching of corporate law, and this was probably fortunate, because twenty years ago I would not have been able to articulate a justification. I was torn, at that time, between my belief in the Socratic method and my sense that Kennedy was at least partly right, that legal pedagogy and scholarship had serious problems.

My initial response to this ambivalence was to teach at a variety of law schools, where the faculty and students were less adept at Socratic sparring. I discovered, however, that every law school at which I taught reproduced in its own fashion the sophisticated gamesmanship Kennedy found so objectionable. What I learned, in other words, was that the Yale faculty was different in the sophistication it brought to its task, not in the way it taught the law.

My second reaction to my doubts about legal scholarship and pedagogy was to spend seven years consulting to corporations and other organiza-

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1. See, e.g., Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970).

tions involved in business activities. My hope was that the problems associated with the Socratic method were peculiar to academic life. I discovered that non-academics were verbally less sophisticated than academics and were therefore forced to be more open about their manipulation of reality. Nonetheless, because they could use economic goods to enforce silence, they were considerably more adept than academics at evading questions uncomfortable to contemplate. Non-academic life, in short, made me appreciate once again the valid elements in Kennedy's position.

Today, the student rebellion of which Kennedy was a part has developed into Critical Legal Studies (C.L.S.). Kennedy himself seems more and more willing to treat law as a technique students must learn so that they can lobby effectively for their versions of what would be best for society.<sup>2</sup> Teaching law, on this view, is the chore of freeing students from the illusion that legal technique is anything more than a game. This view, however, sidesteps the question that originally justified criticism of legal pedagogy twenty years ago: How can a technique of teaching be effective in forcing us to look beyond the technical aspects of law, to confront the moral responsibility we face when applying the law?

The teaching of corporate law makes it clear to me that only by immersing ourselves in technical law can we appreciate that there is more to being a lawyer than technical proficiency. My disagreement with Kennedy, then, is not in fact over the Socratic method. It is about our different substantive visions of what it means to be a person who applies law. For Kennedy, legal technicalities are devices used to mask a politics of status-quoism, efforts to legitimate a political system without openly debating hard political and moral choices. I view the relation between law and moral choice somewhat differently. For me, law is the act of using techniques to make and justify moral and political choices. This difference may be slight or great; perhaps the lesson to follow will show us which. To anticipate my own answer: I will conclude from this lesson that although I share Kennedy's dissatisfaction with legal teaching and legal scholarship, I am not drawn into an alliance with C.L.S.

I believe today, as I did 20 years ago, that the Socratic method may be used to force us to face up to the morality involved in applying the law. But today, as then, I find it difficult to articulate with precision how the Socratic method can do this. I can articulate it only by the act of using it in its natural setting: in teaching. Imagine, therefore, that you are a student in my classroom. Do not be surprised if our Socratic investigation carries us from Delaware case law on Voting Trust Agreements, through Socratic suicide, to Martin Luther King Jr.'s vision of reality.

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2. See, e.g., Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 40 (D. Kairys ed. 1982).

### A. *The Process: A Socratic Lesson*

Our lesson seeks to investigate the legitimacy of law, to uncover a satisfying distinction between law and bureaucracy.

The distinction can be formulated in terms of law's reliance on opinions rather than commands, or the attention law gives to equitable considerations, or the careful distinction legal decisionmakers recognize between fact and law. Each of these formulations, however, can be appropriated by a sophisticated bureaucracy. We will learn that the distinction between legal rule and bureaucratic command is, in the end, one of attitude—it lies in law's willingness to admit that the losing party may have been right. We are, I think, not willing to grant the same legitimacy to the errant decisions of a bureaucracy, and it is this difference in our attitude that distinguishes law from bureaucracy.

The cases in our lesson focus on section 218 of the Delaware Code, which contains rules regarding "voting trusts." Voting trusts often become centers of controversy because they allow a person's influence in shaping corporate policy to exceed his or her economic stake in the corporation's performance. They thus run the risk of allowing corporate decisions to be made by persons who have so little at stake that they may not enact policies consistent with the corporation's best interests.

Section 218(a) of the Delaware Code stipulates procedures whereby shareholders may assign their rights to vote on corporate matters to persons who "in voting the stock . . . shall incur no responsibility as stockholder, trustee or otherwise . . ."<sup>3</sup> section 218(b) requires that all such voting trusts be made public.<sup>4</sup> Our study of cases interpreting this statute will concentrate on whether Delaware courts read section 218(a) as requiring a strong relationship between voting power and economic interest, and on the courts' willingness to enforce their interpretation of section 218(a) by means of the seemingly technical publicity provision of section 218(b).

*Oceanic Exploration Company v. Grynberg*<sup>5</sup> involved a voting trust agreement governed by section 218. Oceanic Exploration had encountered serious financial difficulties. As part of an agreement in which Oceanic's creditors agreed to discontinue litigation, the shareholders gave voting control over a majority of the corporation's stock to several trustees. When an attempt was made to amend the agreement, the original shareholders sued to void the voting trust. The trial court held the amendment void on the grounds that it violated the provisions of section 218(b).<sup>6</sup> The Supreme

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3. DEL. CODE ANN. tit. 8, § 218(a) (1975).

4. *Id.* § 218(b).

5. 428 A.2d 1 (Del. 1981).

6. *Grynberg v. Burke*, 410 A.2d 169 (Del. Ch. 1979).

Court of Delaware reversed, holding that the purpose of section 218(b) had been met.<sup>7</sup>

The basis for the supreme court's decision was the proposition of law that "our case law makes it clear that the main purpose of a voting trust statute is 'to avoid secret, uncontrolled combinations of stockholders formed to acquire control of the corporation to the possible detriment of non-participating shareholders.'"<sup>8</sup> The court noted that the defendants had alleged, with "some record support," that the arrangement included in the amendment was "open and notorious" to all relevant parties.<sup>9</sup> On that basis the supreme court concluded that "[t]he contract involved in this case . . . may be so far divorced from the purpose [of insuring that all voting trusts are made public] that it makes . . . regulation [of the amendment] unnecessary and irrelevant."<sup>10</sup>

The precedent used in *Grynberg* to justify the court's interpretation of section 218 was *Lehrman v. Cohen*,<sup>11</sup> which involved a remarkable device resorted to by two families, each of whom owned 50% of a corporation. They created a share of stock without economic rights, solely to permit the holder (who elected himself a director) to resolve conflicts between the two families. The families' power to create this new class of stock came before the court when the (non-economic) director, together with the directors elected by one of the families, elected himself president of the company, a status that involved substantial economic reward and that gave him—together with his allies in the family who had voted for him—effective control of the corporation's policies.

The other family, needless to say, objected to their loss of control, and argued in court that "if [this] stock arrangement is allowed . . . to stand, [the] Voting Trust Statute [section 218] will become a dead letter because it will be possible to evade and circumvent its purpose simply by issuing a class of non-participating voting stock, as was done here."<sup>12</sup>

As in *Grynberg*, all the relevant parties in *Lehrman* knew about the voting trust arrangement. The plaintiffs therefore could not win on the technical grounds of publicity explicitly provided by section 218(b). Instead, they asserted that section 218 regulated voting trusts for reasons other than to insure that voting trusts were publicized. They contended that the non-economic stock allowed the holder's voting power to be much larger than his or her economic interest. This result, they said, vitiated Delaware's requirement that a person's voting power be linked to his or

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7. 428 A.2d 1 (Del. 1981).

8. *Id.* at 7 (citation omitted).

9. *Id.* at 5.

10. *Id.* at 7.

11. 43 Del. Ch. 22, 222 A.2d 800 (1966).

12. 222 A.2d at 807.

her economic involvement. The question facing the court, therefore, was whether this was in fact Delaware's policy.

The supreme court held that section 218 did not proclaim a public policy against the separation of voting power and economic interest. After concluding that section 218 was meant only to insure that voting trusts were made public, the court said that even if the plaintiffs were correct that Delaware public policy forbade separation of voting power from economic interest, implementation of that policy fell outside the court's province: "Finally on this point, if we misconceive the legislative intent, and if the . . . stock arrangement in this case reveals a loophole in § 218 which should be plugged, it is for the General Assembly to accomplish—not for us to attempt by interstitial judicial legislation."<sup>13</sup>

The court thus chose to construe the statute narrowly. Not all statutes, however, are interpreted narrowly, especially if they are broad policy directives regulating fields where practices are constantly changing. The question, then, is how the Delaware Supreme Court justified its choice. It neither advanced arguments nor cited precedents on behalf of its choice. Given its view that the legislature bore responsibility for closing any loophole its decision might open, it seems surprising that the court's opinion also omits any reference to the statute's history—for that history might well reveal that the General Assembly did accept the policy urged by the plaintiffs in *Lehrman*. This omission suggests that the *Lehrman* opinion was in fact reacting to a precedent.

The precedent in question, *Abercrombie v. Davies*,<sup>14</sup> involved a corporation formed to develop an oil concession in the Middle East. There were eleven shareholders (nine corporations and two individuals) who elected fifteen directors. No stockholder held a majority of the shares, none was represented by more than four directors, and two of the corporations elected a single director.<sup>15</sup>

Litigation arose from an agreement entered into by six stockholders holding approximately 54½% of the shares. The agreement designated the eight directors representing the shares as Agents, provided that each Agent was subject to the control of the shareholders whose stock he represented, and set up mechanisms such as arbitration to ensure that the Agents would act as a unified group. As a result, the six shareholders controlled eight of the fifteen votes on any matter coming before the Board of Directors. Approximately four and a half years after the agreement was signed, the directors passed a resolution calling for a special directors' meeting to consider bylaw amendments and other matters by a vote of nine to six;

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13. *Id.*

14. 36 Del. Ch. 371, 130 A.2d 338 (1957).

15. *Id.* at 374-76, 130 A.2d at 340-41.

two of the Agents voted with directors who were not subject to the Agreement.<sup>16</sup>

The trial court held that the Agreement was not a voting trust because title to the stock had not passed from the shareholders to the Agents and because the degree of control exercised by the shareholders made the Agents more like agents than voting trustees.<sup>17</sup> The supreme court disagreed. In its view the voting arrangement was a voting trust. Consequently, the court ruled the agreement invalid on the grounds that the pooled shares had not been transferred on the corporate books and that a copy of the agreement had not been filed in the corporation's principal office in Delaware.<sup>18</sup> The court based its conclusion on a discussion of one case:

In support of their argument that the Agents' Agreement creates only a stockholders' pooling agreement and not a voting trust, defendants lean heavily on the decision of this Court in *Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*. 29 Del. Ch. 610, 53 A.2d 441. That case involved a true pooling agreement, far short of a voting trust. Two stockholders agreed to act jointly in exercising their voting rights. There was no deposit of the stock with irrevocable stock powers conferring upon a group of fiduciaries exclusive voting powers over the pooled stock. Indeed, the Supreme Court (modifying the decision below) held that the agreement did not provide, either expressly or impliedly, for a proxy to either stockholder to vote the other's shares. The Ringling case is clearly distinguishable on the facts.

And although the case recognizes the validity of various forms of pooling agreements, it does not announce, as defendants appear to think, an unrestricted and uncritical approval of all agreements between stockholders relating to the voting of their stock.<sup>19</sup>

The agreement analyzed in *Ringling*<sup>20</sup> governed "any shares of stock or any voting trust certificate" in certain corporations held by either party. The term of the agreement was ten years, which was the maximum term allowed by the Voting Trust Statute. The agreement gave each party a right of first refusal on any sales of shares or certificates by the other and provided that they would "act jointly" in exercising voting rights. In case of disagreement, the parties agreed to submit the disagreement to a named arbitrator or a successor designated by them.<sup>21</sup> The trial court found that the agreement was not a voting trust because "[t]he stockholders under the

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16. *Id.*

17. *Id.* at 383, 130 A.2d at 345.

18. *Id.* at 381, 130 A.2d at 344-45.

19. *Id.* at 384-85, 130 A.2d at 346.

20. 29 Del. Ch. 318, 49 A.2d 603 (1946), *modified*, 29 Del. Ch. 610, 53 A.2d 441 (1947).

21. *Id.* at 333-34, 49 A.2d at 610.

present Agreement vote their own stock at all times which is the antithesis of a voting trust because the latter has for its chief characteristic the severance of the voting rights from the other attributes of ownership."<sup>22</sup> The chancellor found "[t]he only serious question . . . [to be] the defendants' contention that the arbitration provision has the effect of providing for an irrevocable separation of voting power from stock ownership and that such a provision is contrary to the public policy of this state."<sup>23</sup>

The public policy to which the chancellor referred was the separation of the electoral and economic attributes of corporate stock. The issue arose because one of the parties had failed to follow the arbitrator's instructions about whom to elect as director. In framing the problem facing him the chancellor noted that "[t]he cases which strike down agreements on the ground that some public policy prohibits the severance of ownership and voting control argue that there is something very wrong about a person 'who has no beneficial interest or title in or to the stock' directing how it shall be voted. Such a person, according to these cases, has no interest in the general prosperity of the corporation and moreover, the stockholder himself has a duty to vote."<sup>24</sup> The chancellor resolved this difficulty by holding that "[w]hen a party or her representative refuses to comply with the direction of the arbitrator, while he is properly acting under [the Agreement's] provisions . . . then I believe the Agreement constitutes the willing party to the Agreement an implied agent possessing the irrevocable proxy of the recalcitrant party for the purpose of casting the particular vote."<sup>25</sup> The chancellor, in short, saw the case as turning on the fact that the parties had consented, under certain circumstances, to permit the arbitrator to place one of them in a position where her voting power exceeded her economic interest. Because the parties gave the arbitrator the power to compel a party to vote, however, there was in the chancellor's view of the Agreement no separation of voting power from economic interest.

The Supreme Court of Delaware rejected the chancellor's vision. The arbitrator could force a party to vote only against its will, the court reasoned. Hence, the voter under this agreement was the arbitrator, who had no economic interest in the corporation. Allowing the arbitrator to vote would, in effect, sever economic interest from voting power. The validity of the voting arrangement therefore turned on whether the arbitrator had the power to coerce stockholders: "Should the agreement be interpreted as attempting to empower the arbitrator to carry his directions into effect? Certainly there is no express delegation or grant of power to do so, either by authorizing him to vote the shares or to compel either party to vote

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22. *Id.* at 329, 49 A.2d at 608.

23. *Id.* at 330, 49 A.2d at 609.

24. *Id.* at 332, 49 A.2d at 610.

25. *Id.* at 334-35, 49 A.2d at 611.

them in accordance with his directions."<sup>26</sup> Finding no provision which empowered the arbitrator to vote, the supreme court—finding nothing to strike down—allowed the agreement to stand. The arbitrator, however, was held to lack the ability to compel a party to vote in accordance with his decision. As a result, the courts' modification of the trial court's decision left unclear exactly how, if at all, the agreement could be enforced.

The question of how to set up a voting arrangement that could be enforced obviously perplexed the parties in *Abercrombie*. In drafting their own agreement (three years after *Ringling* was decided by the supreme court), the *Abercrombie* parties postulated that the chancellor in *Ringling* had been correct in ruling that voting arrangements that severed economic interest from voting power were acceptable so long as the stockholders consented to the arrangement. The *Abercrombie* drafters no doubt had noticed that the supreme court in *Ringling* had only modified the chancellor's ruling rather than reversing it. They were gambling that the chancellor's reading was still good law. The justification for this reading, as we saw, was that the supreme court did not describe the kinds of enforcement devices that would be acceptable or unacceptable. Given this vacuum, the agreement in *Abercrombie* was drafted to meet the requirements derived from a close reading of the *Ringling* opinions.

The *Abercrombie* supreme court responded by distinguishing *Ringling* "on the facts";<sup>27</sup> the *Ringling* precedent, however, can plausibly be distinguished only as a matter of law. *Ringling* is consistent with *Abercrombie* only if the supreme court's holding in *Ringling* was not simply a modification of the decree in terms of which the trial court's opinion was to be enforced, but instead rendered nugatory the voting agreement being reviewed. In *Abercrombie*, as in *Ringling*, in other words, the supreme court did not want the agreement to be enforced. This reading, the only reading that reconciles the two decisions, is, however, problematic. *Lehrman*, which had relied on *Abercrombie* in upholding a voting agreement, is reduced (by this reading) to a case whose only plausible rationale is that "[n]on-voting stock is specifically authorized by [a general statutory provision authorizing stock with such voting powers and participation rights as may be stated in the certificate of incorporation]; and in the light thereof, consistency does not permit the conclusion, urged by the plaintiff, that the present public policy of this State condemns the separation of voting rights from beneficial stock ownership."<sup>28</sup> Such a conclusion seems flatly inconsistent with the holding of the *Ringling* chancellor that the separation of voting and economic power could invalidate a voting arrangement.

There might, however, be a way to reconcile *Ringling* and *Lehrman*.

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26. 29 Del. Ch. 610, 618, 53 A.2d 441, 445 (1947).

27. *Abercrombie v. Davies*, 36 Del. Ch. 371, 384, 130 A.2d 338, 346 (1957).

28. *Lehrman v. Cohen*, 222 A.2d. 800, 807 (Del. 1966).



The "non-economic" stock in *Lehrman* was provided for in the certificate of incorporation. It could thus be said to have met the concern embodied in section 218, that voting agreements be made public. The agreement in *Ringling*, conversely, was not announced in the certificate of incorporation, and this technical distinction might therefore save the supreme court from having to say that *Lehrman* in effect overruled the holding of the *Ringling* chancellor that the separation of voting power and economic interest is a "serious contention."

We are left, unfortunately, with *Grynberg*, where the court approved a voting arrangement that allowed voting power to be concentrated in the hands of persons who did not own shares. This arrangement, unlike that in *Lehrman*, was not included in the certificate of incorporation. Its facts, in short, are identical to those in *Ringling*. It is therefore impossible to find even a technical rationalization for *Grynberg's* refusal to acknowledge that it has in fact overruled *Abercrombie* where—as we have just seen—the supreme court struck down a voting agreement on the grounds that it separated voting rights from stock ownership.

The line of Delaware cases just reviewed presents a serious challenge to the distinction between law and bureaucracy. *Abercrombie*, *Lehrman*, and *Grynberg* all reached clear conclusions about what should be done as a result of the decision. But the point of our lesson is to distinguish the opinion as law from the opinion as effective coercion. It is therefore significant that the Delaware Supreme Court found it increasingly difficult to establish that the conclusions of *Abercrombie*, *Lehrman*, and *Grynberg* were consistent, to the point where *Grynberg* overruled a precedent without stating that it had done so.

*Ringling* was in some ways more of a failure. The question of law it put to the supreme court was whether the agreement was a voting trust that had been created in violation of section 218. The supreme court, in deciding only to modify what the chancellor had done, left standing the chancellor's decision that the agreement was not in violation of section 218 but left the victor no way to enforce the agreement. *Ringling*, then, was neither good law nor effective coercion.

That *Ringling*, although it provides little direction, could be seen as precedent in connection with the other three cases, which themselves clash with one another, gives rise to questions about the significance of adherence to precedent. Is the significance of precedent in judicial decisions merely a technical matter,<sup>29</sup> or are there substantive considerations? And, if the importance of precedent involves only technical considerations, the

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29. In using the word "technical," I have in mind what H.L.A. Hart means by "formal." H.L.A. HART, *THE CONCEPT OF LAW* 126 (1961) ("The vice known to legal theory as formalism or conceptualism consists in an attitude toward verbally formulated rules which both seeks to disguise and to minimize the need for [the further exercise of choice in the application of general rules to particular cases], once the general rule has been laid down.").

question arises whether a legal opinion can be distinguished from a bureaucratic command.

It is these questions which underlie my divergence from C.L.S., since that movement takes for granted the notion that the use of precedent is purely a matter of technique. Although (to my knowledge) C.L.S. has never made the claim, its origin in the attack on teaching methods in American law schools is wholly loyal to what we know of the Socratic tradition. We know Socrates through the writings of his pupil, Plato, and Plato's attack on poets and artists in *The Republic* was based on the proposition that good technique should not be confused with knowledge of the right thing to do. Plato assumes that objective knowledge can be attained, and argues that possession of good technique may in fact disguise a reluctance to undertake the arduous search for such knowledge. Thus the Platonic objection to technique is its inadequacy, the fact that possession of good technique is insufficient proof that its holder is engaged in the disciplined pursuit of philosophical truth, a quest structured by the Socratic dialogue.

Plato thus shares with C.L.S. the refusal to accept technique alone as validating a work, whether it be an artistic creation or a legal argument. This can be read as an objection to delegating to the small group of persons who are technical experts the authority to determine the value of a given artistic effort (or merit of a legal argument). Socrates' death, in these terms, was a work of art, rendered artistic by the discipline that required him to accept an authority with which he disagreed. That death was not a delegation; Socrates' death was a suicide. The state condemned him, but Socrates executed the judgment, and it is that distinction which permits us to reconcile our feeling that Socrates should not have died with the conclusion that his death was not in vain.

The possibility of such a reconciliation has significant consequences. To feel that precedent is not always followed, for example, does not justify teaching that whether or not it is followed is a technicality. Critical Legal Studies, in other words, whatever the validity of its objection to teaching techniques in American law schools, is inadequate substantively because it confuses feelings with conclusions, because it reduces to an expression of anger its conclusion that legal authority is subject to abuse, that technicalities may be used to reach substantive results. The question, of course, is what all this has to do with the voting trust cases.

The answer is found in the original *Ringling* Chancery decision, as modified by the supreme court, in which the chancellor found it necessary to hold that "the Agreement constitutes the willing party to the Agreement an implied agent possessing the irrevocable proxy of the recalcitrant party for the purpose of casting the particular vote."<sup>30</sup> As the chancellor

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30. 29 Del. Ch. at 335, 49 A.2d at 611.

made clear, his concern was with a public policy that forbade the separation of voting power from the economic attributes of corporate stock. The precedent that serves as the foundation of that policy is *Hunt v. Rousmanier's Administrators*,<sup>31</sup> an opinion written by Chief Justice Marshall of the Supreme Court of the United States. This decision has been accepted by American courts as the justification for placing legal constraints on a person to whom a power is delegated.

Rousmanier had borrowed money from the plaintiff and given him a power of attorney. The power authorized the plaintiff to sell Rousmanier's interest in two ships in the event of any default. Rousmanier died insolvent without paying off the loan, and the plaintiff brought this action to obtain priority status for the payment of his debt from the proceeds of the sale of Rousmanier's interest in the ships. Relief was denied. Marshall noted:

Where a letter of attorney forms a part of a contract . . . for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law . . . Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

. . . The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed. . . . The title [to the interests in the ships] can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself.<sup>32</sup>

At a later point in the opinion, Marshall recognized that his argument appeared to be contradicted by property passing under a will. At that point, however, he had already noted that "[t]his general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death."<sup>33</sup>

In the *Ringling* case, it was clear that the chancellor, unlike the supreme court, sought a rule that would permit the agreement to be enforced. In *Abercrombie*, the supreme court restricted its analysis to the documentary aspects of the case: "Defendants stress the contention that the parties to the Agents' Agreement did not intend to create a voting

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31. 21 U.S. (8 Wheat.) 174 (1823).

32. *Id.* at 201-02.

33. *Id.* at 203.

trust. As above noted, the intent that governs is the intent derived from the instrument itself. A desire to avoid the legal consequences of the language used is immaterial."<sup>34</sup> As organized commercial institutions play an increasing role in everyday life, it is of course true that documents assume increasingly important roles, and that the *Abercrombie* approach becomes increasingly necessary. At that point, however, the "interest" to which Marshall referred may be in the document itself—in the need to ensure that the document means what it says—in which event the rule on which Marshall relied was not in fact dispositive of the case, and the law on which he relied thus becomes indistinguishable from the result he reached. It was this connection that allowed the Legal Realists simultaneously to argue that judges should be acquainted with the commercial realities of transactions but that judges would do whatever they wanted to do. The requisite "interest" exists, in other words, when the judge finds it.

We have arrived, then, at the necessity for confronting the fact of judicial choice in deciding what the law is to be. Adherents of the Critical Legal Studies movement thus can be seen as contemporary Legal Realists, as persons who insist on the political nature of law, on the possibility that precedent may be nothing more than what this particular judge wants to do. The question, however, is whether this far is far enough, whether the description of law as applied politics is the last word.

We must ask, in other words, whether law requires the making of the further decision about the substantive correctness of the judgment, and any answer to that question requires consideration of what it means to be a legal decisionmaker in our society. To be a legal decisionmaker is to exercise power, and law can therefore be weighed for validity only in the scales of thought concerning political reality.

Much of Western political philosophy can be viewed as successive interpretations of what Plato taught in the dialogue known as *The Republic*. The society *The Republic* prescribes contains a small elite subsisting on the labor of a vastly larger number of humans consigned to slavery. *The Republic*, then, is founded on a separation of politics from the economic task of securing a livelihood. On the surface it thus seems that Plato's structure implicates concerns parallel to those which ran through the voting trust cases: How could the society insure that rulers, who had political power, would be responsive to the concerns of the society? Plato's answer, which was implicit in every line of *The Republic*, was that specialization of function did not free decisionmakers from the bonds of society. In interpersonal terms, it was the structure of Greek society which protected against separation, because active political participants could know each other as full human beings rather than solely in their political or economic roles. The division of political power from economic responsibility, in

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34. *Abercrombie v. Davis*, 36 Del. Ch. 371, 384, 130 A.2d 338, 346 (1957).

other words, did not loosen the ties of the political decisionmaker to society. Consequently, just as the Greek gods could be viewed either as a squabbling family or as aspects of a single human being, so *The Republic* can be read as a metaphor either for a single human being or for the political entity as a whole.

It is this absence of the distinction between public and private self that makes the philosopher-king simultaneously a person whose activities are devoted solely to grasping the essence of philosophical concepts and a politician whose leadership is accepted because he is trusted to achieve the life agreed upon as desirable by all. The power of this ideal produced the monarchs who eventually replaced the Roman emperors as governing political authorities. Once political power involved something more than concrete, individual human beings, however—and the Roman Empire was a far different society from that envisaged in *The Republic*—the legitimacy of authority became a matter more abstract than individual responsibility for the nature of one's life. As republics replaced monarchies—as written guidelines and constitutions increasingly competed with personal relationships as sources of power—responsibility gradually became something that required compliance only with the words of the law. This is an entirely different source of coercion than that envisioned in *The Republic*. We have lost the source of the guardians' legitimacy. Are the *forms* of their power enough?

The question, in other words, is the legitimacy of lawful coercion. For example, in *Abercrombie*, the parties intended to follow the law as they understood it. The Delaware Supreme Court invalidated their voting arrangement but in doing so indirectly changed what the law was. To phrase it another way, the parties meant to uphold the law while the court upset the law. Yet we regard the court's decision as legitimate. We do so despite the fact that the court was evasive about the impact of its decision on the law. Why is the intent of the parties in *Abercrombie* to create a voting arrangement that was not a trust insufficient to make the court's treatment of that agreement as a voting trust illegitimate? And conversely, at what point does it become illegitimate for a court not to be straightforward in delineating precisely what impact its decision has on the law as it then exists? The answer, I suggest, requires recognition of the role of morality in our existence.

Morality, in this context, is most easily grasped as the antithesis of social and material reality, as the human response to the awareness of choice, the awareness that our actions might make a difference. Morality is not necessarily religious, since religions are social institutions. Morality as used here is something purely individual, the awareness that one possesses power and that its exercise will affect other humans. Social and material reality—the truths that scientific investigation reveals—is what humans have no choice about accepting. Morality, on the other hand, is a

matter of choice: what people exhibit when they can—and do—behave responsibly.

A judge is thus not behaving morally when her behavior is governed by precedent. A judge may bind herself to follow precedent, and that (meta-)decision may itself be a moral one. But it is a moral decision to remove herself from the field where moral decisions are necessary. It is a decision, in short, to act bureaucratically. Similarly, a responsible judge may find that her moral choice coincides with precedent. But if precedent is followed, not because it is viewed as applicable to the situation being adjudicated, but solely to decrease the chances of being reversed on appeal,<sup>35</sup> then responsibility is being shifted from the judge to the law, and the behavior is bureaucratic in nature.

As *Hunt v. Rousmanier's Administrators* makes clear, Chief Justice Marshall was certain of the distinction between the result he wanted and the law that justified him in decreeing it. Our age, unfortunately, is in this respect a very different one. Judges are uncomfortable "making" law, as lawyers are uncomfortable relying on precedents rather than statutes. Statutes, however, tell clients how to do something but do not specify whether or not it will be permissible under all circumstances. Further, now that the dissent has become a respectable judicial institution, it is increasingly difficult for appellate judges to shift responsibility for their actions to the law. Thus, when confronted with the question clients bring to lawyers—what can or should one do?—the sophisticated modern approach would be a variation on Wittgenstein's "whereof one cannot speak, thereof must one be silent."<sup>36</sup> The message being conveyed would be clear: "I've run out of answers, so please stop this Socratic nonsense."

The Lesson has been that lawyers, like judges, earn their livelihoods by eschewing that response to reality.

### B. *The Substance: Making Power Legitimate*

The United States is remarkable for the extent to which law regulates and, by doing so, legitimates the efforts of private individuals to obtain power. Our economic life is dominated by private entities (known as corporations) which are compelled to accept governmental regulation only insofar as that regulation is embodied in law. To be a democratic capitalist society, in other words, is to be a society governed by law.

I teach law, but it is not easy to be straightforward today about what I am doing as a law teacher. Am I restricted to teaching that part of life which economic theory finds itself unable to explain? Are law teachers

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35. In this case the judge would adopt what Hart calls the "external attitude" to law. See H.L.A. HART, *supra* note 29, at 86-88, 99-102, 112-13.

36. A slightly different translation may be found in L. WITTEGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 74 (D. Pears & B. McGuinness trans. 1961).

limited to upholding the status quo against those with the courage to criticize it? These questions reveal the logical underpinnings of legal pedagogy and scholarship as envisioned by the movements known as Law and Economics and C.L.S. Admittedly, the limited horizons outlined in these questions compass a barren academy, but those movements envision the possibilities of legal pedagogy and scholarship precisely in these constricted ways.

It was not always so. As little as twenty-five years ago, when I began in this profession, we were clear that what we wanted was meaningful. Legal scholarship was about legitimating a precedent, and the precedent was *Brown v. Board of Education*.<sup>37</sup>

*Brown* was a decision revolutionary in nature because its focus was antithetical to the tradition of individuality; the goal sought was not to obtain a particular benefit for particular plaintiffs, but rather a reconstruction of the environment in which schooling took place. The precise question adjudicated was why separate but equal facilities were insufficient. The answer given was not technical, because *Plessy v. Ferguson*,<sup>38</sup> the decision which had announced the doctrine under attack, was not simply overruled. Nor was the answer moral, in that no mention was made of *Dred Scott v. Sandford*,<sup>39</sup> where the Court had participated in the moral error of treating those who had been slaves as less than human, as beings not entitled to the benefits of citizenship.

The strategy chosen, rather, was to rely on science, to argue that recent social science research had overtaken the sociological premises on which *Plessy* was based. The Court's uneasiness about the strategy it adopted is revealed both by the location of the scientific authority in a footnote<sup>40</sup> and by the fact that deciding how the decision was to be enforced required another round of proceedings.

The *Brown* Court, in other words, like the Legal Realists, was unwilling to ask society to obey the law simply because nine Justices decided that an earlier declaration was no longer law. They distrusted the legitimacy of law sufficiently to appeal to science, but what legal professionals clearly saw—the fact with which legal scholarship had to deal—was that *Brown* was a political decision because the Court refused to rely either on its technical expertise or on its moral status as interpreter of the Constitution. *Brown*, as a result, revolutionized both the teaching and practice of law.

The impact of *Brown* was far wider than the legal community, however. The breadth of that impact owed much to the role religion had played in structuring the life of the slave and the freed black. *Brown* as a

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37. 347 U.S. 483 (1954).

38. 163 U.S. 537 (1896).

39. 60 U.S. (19 How.) 393 (1857).

40. 347 U.S. at 494-95 n.11.

social reality was the promise seen by Martin Luther King, Jr., and the promise King described was spiritual in nature.

King preached, not about another world, but about the truth that was available in this one. That truth was not legal in nature. It was not relevant that grade-a-year-desegregation plans deprived plaintiffs who were a grade behind the plan of an integrated education. What mattered was that separation could no longer be enforced legally, and that freedom was now a possibility. Possibility, however, was not necessarily sufficient, and the value of the structure provided by religion was that it enabled those involved to experience possibility as a spiritual reality, as the promise of a better future rather than a reminder of the existing deprivation.

Martin Luther King, Jr., was peculiarly American, moreover, in the ease with which he collapsed religion into the individual experience of spiritual reality. In theological terms, what is peculiarly American is the ability to ignore the anthropomorphism involved in a view of Deity defined in terms of human aspirations. The Church of Jesus Christ of Latter-Day Saints—the Mormons—worked out the connection between this view of Deity and the law:

We admit that God is the great source and fountain from whence proceeds all good; that He is perfect intelligence, and that His wisdom is alone sufficient to govern and regulate the mighty creations and worlds which shine and blaze with such magnificence and splendor over our heads, as though touched with His finger and moved by His Almighty word. And if so, it is done and regulated by law; for without law all must certainly fall into chaos. If, then, we admit that God is the source of all wisdom and understanding, we must admit that by His direct inspiration He has taught man that law is necessary in order to govern and regulate His own immediate interest and welfare: for this reason, that law is beneficial to promote peace and happiness among men. And as before remarked, God is the source from whence proceeds all good; and if man is benefitted by law, then certainly, law is good; and if law is good, then law, or the principle of it emanated from God; for God is the source of all good; consequently, then, he [sic] was the first Author of law, or the principles of it, to mankind.<sup>41</sup>

The connection is that of order and stability, the longing for a structure unfortunately incompatible with the economic system known as capitalism. Creative destruction is a definition of capitalism made popular by Joseph Schumpeter in *Capitalism, Socialism and Democracy*, a book published during World War II.<sup>42</sup> Creative destruction as a description of

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41. J. SMITH, 2 HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS: PERIOD I 12-3 (2d ed. 1948).

42. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81-86 (1942).



economic processes both ennoble the entrepreneur and makes it possible to meld bureaucratic rigidity with Marxist philosophy when defining the challenge to capitalism represented by China and the Soviet Union.

Because it is an oxymoron, the phrase creative destruction should by definition be suspect as an easily digestible version of the device known as the Hegelian synthesis. Questioning the validity of categories is no easy task, however, especially when the readers involved were the generation of the 1950's, a group described in a book called *The Lonely Crowd*.<sup>43</sup> The view of reality incorporated in the phrase creative destruction, moreover, is daily paraded on the editorial pages of the *Wall Street Journal*. Foreign policy is presented as an apocalyptic struggle against Soviet bureaucracies endowed with unearthly power and sophistication, while entrepreneurs at home periodically overcome the obstacles to progress created by domestic bureaucrats. Texaco's recent filing for bankruptcy, for example, is presented, not as an attempt to evade a final judgment granted to Pennzoil, but as the necessary consequence of the corrupt system of justice in Texas that made the judgment possible.

Texaco was assessed billions of dollars in damages because a jury concluded that the competitive behavior involved in outbidding Pennzoil for the assets of the Getty Oil Company violated the norms of law. Schumpeter would not have been surprised at Texaco's response, since he in effect predicted the prospect of capitalism creatively destroying its own regulatory system. The question, of course, is whether that prospect is an inevitable one.

At the heart of the question is the structure known as the corporation. A system of law bottomed on concern for individual rights is necessarily handicapped in attempting to deal effectively with a conceptual structure that is itself treated as an individual. The problem first became apparent in the case of *Trustees of Dartmouth College v. Woodward*,<sup>44</sup> which treated the statute by which the legislature delegated a portion of its sovereign authority to the corporation as a contract binding on both parties. Thereafter, incorporation gradually was transformed from a privilege in the legislature's gift to a right any citizen could obtain by complying with the formal requirements of general incorporation acts. The transformation was completed when the Fourteenth Amendment was interpreted as affording to corporations all the rights granted to persons in the various states.

The Fourteenth Amendment, produced by the Civil War, limited the powers of the individual states. The decision extending to corporations those rights the Amendment was designed to protect<sup>45</sup> meant that only the

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43. D. RIESMAN, *THE LONELY CROWD* (1950).

44. 17 U.S. (4 Wheat.) 517 (1819).

45. See, e.g., *Santa Clara Co. v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the

federal government could effectively police corporate activities. The Bill of Rights, however, already limited the power of the central government. This left private decision about corporate activity beyond the scope of governmental control. The result is that control of corporate activity is left to the possibility that the individual shareholder will sue.

Whether or not the suit must be taken seriously depends on whether the shareholder is suing in his or her own right or on behalf of the corporation itself.<sup>46</sup> The significance of this technical distinction is the sort of meaningful technicality that makes corporate law a profession rather than a trade, and it was precisely this sort of technicality that was exploded by *Brown* in connection with the constitutional status of deprived groups in the United States. *Brown* openly protected the group rather than the individual, and it was the Court's shift in focus that required legitimation.

The revolutionary nature of *Brown* is made clear by the case reviewing the congressional act which, in clear violation of the First Amendment, disestablished the Mormon Church. The Congressional action was upheld by the Supreme Court in an opinion which focused attention not on the church but on the individual, arguing that constitutional protections for the free exercise of religion did not permit individuals to practice polygamy.<sup>47</sup> As is indicated by the fact that three Justices dissented in *Latter Day Saints*, legitimation of power is no easy task. And *Brown v. Board* forced into consciousness the fact that judges exercised power.

Alexander Bickel attempted to legitimate *Brown* in political terms by pointing to the court's status as *The Least Dangerous Branch*.<sup>48</sup> Other academics argued about the need to preserve federalism, questioned the neutrality of a decision which focused solely on the deprivations suffered by the plaintiffs, rather than those suffered by others forced into association with them, and warned about a judiciary seizing power to which it was not rightfully entitled. These responses eventually produced acceptance of a view of law as process, a focus on the conscious campaign of litigation that forced the Court to decide *Brown* as a sophisticated use of the legal system. Such a focus emphasizes the significance of jurisdictional rulings and the opportunities for flexible development made possible by the existence of multiple sovereignties in a federal system. An obsession with such technicalities, however, is eventually perceived as a substantive position; for example, a narrow view of federal jurisdiction and an emphasis on federalism would today be characterized as indicating that the judge was a conservative. Scholarship, moreover, either regards "conservative" and "liberal" as too general a set of terms to permit effective dia-

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Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.").

46. FED. R. CIV. P. 23.1.

47. *Latter Day Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890).

48. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-34 (1962) (discussion of *Brown*).

logue, or regards political matters as too highly charged to admit of effective analysis. It was this attitude that underlay the emphasis on law-as-process in terms of which *Brown* was made legitimate, a differentiation of law from politics that permitted *Brown* to be justified as legal rather than political.

Law and Economics took from the law-as-process phenomenon a regard for the formal rigor both made possible and required by a focus on technical analyses.<sup>49</sup> Critical Legal Studies, on the other hand, inherited from the law-as-process phenomenon a concern for context rather than particular result, a focus on the meaning of the decision rather than the question of who won. The question, however, is whether the clarity produced by Critical and Economic analysis can be made compatible with the promise in *Brown* discerned by King. To answer that question, we must cease attempting to distinguish law from politics, and ask instead just what it is that we can reasonably expect to get from the law.

The promise King realized as a result of *Brown* was the possibility that non-violent behavior, combined with sophisticated political use of the legal system, could produce desired social changes. The issue, therefore, is that of violence *vel non*, of whether, once we are convinced what ought to be, we are both willing to wait and even to take the chance that others cannot be persuaded to agree, whether, in other words, the possibilities of rationalization and delay permitted by the processes of law are worth the costs.

The ritual aspect of legal activity means that disputes may well be resolved on technical rather than substantive grounds, that law, like politics, may leave the issue unresolved. It is the discomfort produced by this fact that has resulted in the popularity both of Law and Economics and C.L.S., and the answer I offer—the basis for insisting that neither movement is adequate—is that the realization King achieved remains a possible one.

Commitment to a technique, in short, can be validated only in terms of the context in which it is employed or the goals its use is designed to achieve. An effective commitment creates a situation in which there is no distinction between technicality and substantive issue, when the form and substance of the truth—the Socratic dialogue and the proper reading of the case—are one. It was that commitment which made *Brown* the law of the land, and it is that commitment which, for me, is the Socratic teaching of corporate law.

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49. I discuss Law and Economics to demonstrate that C.L.S. is not alone in propounding a restricted version of what law can be. I recognize that my treatment here is summary. For a study of the impact of economic analysis on legal theory, contained in an essay that attempts to delineate an appropriate role for the American corporation, see my *The Cost of Accidents and The United States Corporation* in 9 *CARDOZO L. REV.* (forthcoming 1988).