THE ROLE OF PUBLIC LAW IN PRIVATE DISPUTE RESOLUTION: REFLECTIONS ON *SHEARSON/AMERICAN EXPRESS, INC. V. McMAHON*

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The Supreme Court has recently taken a number of bold steps to alleviate the crush of civil litigation now burdening the courts.[1] One major effort in this regard has been the Court's expansive interpretation of the Federal Arbitration Act (FAA)[2] to cover many types of commercial claims formerly thought to be exclusively within the purview of the judiciary. In a line of pro-arbitration decisions stretching back to 1974, the Court has transformed the FAA from a procedural statute that applied only in certain federal cases into a national charter for alternative dispute resolution. In *Shearson/American Express, Inc. v. McMahon*,[3] one of the

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[1] Among the devices that the Court has utilized to help ease docket pressures are increased use of arbitration, liberalized summary judgment procedures, and claim and issue preclusion. *See, e.g.*, Shearson/Am. Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987) (approving use of commercial arbitration to decide federal statutory claims); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986) (approving use of summary judgment in antitrust case); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (approving use of nonmutual offensive collateral estoppel in commercial context). For more detailed analyses regarding the crisis in the federal courts, see R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274 (1982).

[2] 9 U.S.C. §§ 1-14 (1982). The FAA does not apply to labor arbitration pursuant to collective bargaining agreements. *Id.* § 1. This article is similarly limited to an examination of commercial arbitration.

[3] 107 S. Ct. 2332 (1987). The significance of the *McMahon* decision is testified to, in part, by the amount of commentary the case has generated since it was handed down in June 1987. *See, e.g.*, Bedell, Harrison, & Harvey, *The McMahon Mandate: Compulsory Arbitration of Securities and RICO Claims*, 19 LOY. U. CHI. L.J. 1 (1988); Fletcher, *Learning to Live With the Federal Arbitration Act—Securities Litigation In A Post-McMahon World*,

most prominent business-related decisions of the 1986 Term and perhaps the most important commercial arbitration case in the past thirty-five years, the Court completed its work on the FAA.

In *McMahon*, the Court held that federal statutory claims arising under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act)[4] and the Racketeer Influenced and Corrupt Organizations Act (RICO)[5] are subject to arbitration pursuant to standard arbitration agreements between United States securities customers and their brokers. *McMahon* is significant both because it revolutionizes securities litigation and because the reasoning used by the Court suggests that virtually all existing federal statutory claims that arise in commercial contexts are subject to arbitration. The arbitration of large numbers of federal statutory claims, in turn, means that a new era of commercial arbitration has begun. It will be an era marked by increased responsibilities for arbitration organizations and increased pressures on arbitrators to decide cases with reference to public law as well as private interest. Just how public law is to be accommodated in private dispute resolution is a major policy question that will occupy legislators, regulators, courts, and commentators for years to come.

This article will briefly review the FAA and the historical background

37 EMORY L.J. 99 (1988); Hood, *Arbitration and Litigation of Public Customers' Claims Against Broker-Dealers After McMahon*, 19 ST. MARY'S L.J. 541 (1988); Project, *The Supreme Court—Leading Cases*, 101 HARV. L. REV. 119, 180-90 (1987); Note, *Who's Protecting the Investors? Shearson/American Express v. McMahon, 107 S. Ct. 2332 (1987), Compels Private Claims Under Section 10(b) of the Securities Exchange Act into Arbitration*, 19 ARIZ. ST. L.J. 793 (1987); Note, *The Arbitrability of Federal Securities Claims: Wilko's Swan Song*, 42 U. MIAMI L. REV. 203 (1987) [hereinafter *Swan Song*]; Note, *Enforceability of Predispute Arbitration Agreements Under the Federal Securities Laws: Shearson/American Express, Inc. v. McMahon*, 8 PACE L. REV. 193 (1988) [hereinafter *Enforceability of Predispute Arbitration Agreements*].

[4] 15 U.S.C. § 78j(b) (1982). Section 10(b) is the general anti-fraud provision of the 1934 Act and, in combination with the Securities and Exchange Commission's Rule 10b-5, 17 C.F.R. § 240.10b-5 (1986), prohibits misrepresentations and omissions in connection with the purchase or sale of securities. The private civil remedies for violations of section 10(b) are not expressly stipulated in the 1934 Act, in section 10(b), or in Rule 10b-5 but have been implied by the courts. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983).

[5] 19 U.S.C. §§ 1961-1968 (1982 & Supp. II 1984). Section 1961 of RICO gives individuals a private right of action for violations of the statute. In order to prove violations of section 1961, the plaintiff must show, inter alia, that the defendant conducted an "enterprise" that engaged in a "pattern of racketeering activity." A "pattern" is defined as two occurrences within ten years of certain predicate criminal offenses. *Id.* § 1961. These offenses include intentional fraud in the sale of securities punishable under any law of the United States and indictable violations of the federal mail and wire fraud statutes. In addition, section 1964(c) allows successful plaintiffs to recover treble damages and their attorneys' fees. *Id.* § 1964(c). *See generally* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982).

concerning the arbitration of statutory rights against which the Court decided *McMahon*. The *McMahon* decision will then be reviewed in detail. Next, the article will summarize the immediate implications of *McMahon* for future cases that involve federal statutory claims not addressed in the case, particularly claims under the Securities Act of 1933 (the 1933 Act)[6] and the antitrust laws.[7] The implications of *McMahon* for legislative drafters will also be explored.

Finally, the article will discuss the long range effects of *McMahon* on three interrelated institutions: the commercial arbitration system, the courts, and legislatures. There is a fundamental tension, perhaps even a contradiction, in placing public law claims in the hands of a private system of dispute resolution. In the years ahead, the institutions that control arbitration will feel increasing pressure from litigants, scholars, and constituents to find and establish a more formal role for public law in private commercial adjudication. This search will involve the creation of new arbitration procedures, the elaboration of existing legal doctrines of judicial review, and the passage of new arbitration statutes that place greater emphasis on the role of law in arbitral decision making. When the dust settles, commercial arbitration is likely to be a more complex process than the system endorsed by the Supreme Court in *McMahon*. Whether this new emphasis on law will result in more "justice" for the participants in arbitration is a question that should occupy the next wave of scholarly research in this important area.

BACKGROUND: THE FEDERAL ARBITRATION ACT

The Statute

The FAA was passed by Congress in 1925 to encourage the use of commercial arbitration as an alternative to court adjudication.[8] Prior to the enactment of the FAA, courts routinely refused to enforce agreements to arbitrate disputes on the grounds that such contracts "ousted the

[6] 15 U.S.C. §§ 77a-77aa (1982 & Supp. II 1984).

[7] Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)); Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1982)).

[8] Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 396-97 (1987). A number of states passed arbitration statutes at about the same time that Congress enacted the FAA. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 VAND L. REV. 685, 687 (1957). At present, all fifty states have statutes permitting arbitration pursuant to contractual agreements to arbitrate future disputes. Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 636 n.64 (1988). The FAA applies to commercial arbitration agreements affecting interstate, foreign, or maritime commerce. *Id.* at 636. State arbitration statutes regulate intrastate agreements. *Id.*

jurisdiction" of the courts and thus violated public policy.[9] The FAA was designed to legislatively overrule such decisions.

The centerpiece of the FAA is its section 2, which makes all written agreements to arbitrate existing or future disputes judicially enforceable as long as the underlying contract affects interstate, foreign, or maritime commerce.[10] An arbitration agreement may be attacked under section 2 only on "such grounds as exist at law or in equity for the revocation of any contract."[11] Section 3 provides that courts must stay their proceedings on any issue determined to be within the scope of a valid agreement to arbitrate,[12] and section 4 empowers federal district courts to compel arbitration of arbitrable issues when a party improperly refuses to abide by the agreement to arbitrate.[13]

After an award has been rendered, the FAA provides the mechanism for converting the award into a judgment.[14] The FAA strictly limits judicial review of awards to situations involving fraud in procuring the award, partiality on the part of the arbitrators, gross misconduct by arbitrators, and the failure of the arbitrators to render a final decision.[15] The Supreme Court has added a fifth category to these four grounds: an award is reviewable by a court if the arbitrators have exhibited a "manifest disregard" for applicable law.[16] Curiously, the FAA does not provide any basis for subject matter jurisdiction, and parties who seek to invoke the Act must allege independent grounds for such jurisdiction in an appropriate court.[17]

[9] *See, e.g.*, Cocalis v. Nazlides, 308 Ill. 152, 159-60, 139 N.E. 95, 98-99 (1923); Wood v. Humphrey, 114 Mass. 185 (1873); Hurst v. Litchfield, 39 N.Y. 377, 379 (1868).

[10] 9 U.S.C. § 2 (1982).

[11] *Id.* § 2. A claim that the contract containing the arbitration clause was induced by fraud will not defeat a motion to compel arbitration unless the claimaint can demonstrate specifically that the arbitration clause itself was fraudulently induced. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). Moreover, the Supreme Court has indicated that courts are not permitted to develop special common law rules of unconscionability or adhesion to deal specifically with arbitration clauses. *See* Perry v. Thomas, 107 S. Ct. 2520, 2527 n.9 (1987).

[12] 9 U.S.C. § 3 (1982).

[13] *Id.* § 4.

[14] *Id.* § 9.

[15] *Id.* § 10(a)-(d).

[16] Shearson/Am. Express, Inc. v. McMahon, 107 S. Ct. 2332, 2355 (1987); Wilko v. Swan, 346 U.S. 427, 436 (1953).

[17] *See* Southland Corp. v. Keating, 465 U.S. 1, 15 n.9 (1984). For example, a party seeking to enforce an agreement to arbitrate in a federal district court must satisfy the requirements of diversity jurisdiction or allege federal subject matter jurisdiction based on some federal statute other than the FAA. *Id.*

The FAA Becomes a National Arbitration Law

Prior to the 1980s, it was widely believed that the FAA applied only when parties sought to enforce arbitration agreements or to confirm arbitration awards in cases involving interstate, foreign, or maritime commerce brought before federal district courts.[18] Section 3 of the FAA refers to "courts of the United States"[19] as being empowered to issue stays, and section 4 expressly mentions only "any United States district court" as being authorized to compel arbitration.[20] State arbitration law was thought to govern the enforcement of arbitration clauses in all state court proceedings and in federal court actions based on diversity jurisdiction and involving intrastate contracts.[21]

The Supreme Court took its first step toward reshaping the FAA into a comprehensive "national arbitration law" in 1983 in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[22] In *Moses H. Cone*, the Court held that a federal district court must compel arbitration of a contract dispute under the FAA even when a prior suit that dealt with the enforceability of the same arbitration clause was pending in a state court.[23] The Court announced that federal courts need not defer to state court actions involving arbitration since the FAA embodies "federal substantive law" and is to be strictly enforced by federal courts in all appropriate cases regardless of interests in comity between the state and federal judicial systems.[24]

The Court took its next step toward establishing a national law for commercial arbitration in *Southland Corp. v. Keating*.[25] In *Southland*, the Court held that the FAA provides the applicable rule of decision regarding the enforcement of an arbitration clause even when the enforcement action is filed in a state court. Thus, state as well as federal courts are required to enforce section 2 of the FAA and must refuse to hear cases that ought to be arbitrated.[26] The Court in *Southland* found that California courts were obliged to order arbitration of a franchisee's claim under a California small business protection statute even though the state

[18] *Id.* at 22-23 (O'Connor, J., dissenting). *See, e.g.*, Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959); American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811 (6th Cir. 1959).

[19] 9 U.S.C. § 3 (1982).

[20] *Id.* § 4.

[21] *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 202 (1956).

[22] 460 U.S. 1 (1983).

[23] *Id.* at 19.

[24] *Id.* at 24.

[25] 465 U.S. 1 (1984).

[26] *Id.* at 10.

legislature had exempted such claims from arbitration. The Court said that Congress, by enacting the FAA, "withdrew the power of the States to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[27] Only Congress, stated the Court, has the power to restrict the application of the FAA.[28]

After *Moses H. Cone* and *Southland*, the FAA is fully enforceable in both state and federal courts and preempts all attempts by state legislatures and courts to restrict the scope of arbitration agreements.[29] The Court has said that the FAA is to be interpreted so as to encourage and favor agreements to arbitrate to the greatest possible extent.[30] Only when arbitration agreements are not in a written contract;[31] when arbitration clauses are voidable for fraud, unconscionability, or other grounds justifying the revocation of "any contract;"[32] and when Congress has exercised its authority to exempt claims from the FAA[33] may a court refuse to order arbitration of a commercial dispute.

Arbitration of Federal Statutory Claims

The question of congressional exemptions to the broad mandate of the FAA has occupied the courts since the Supreme Court first addressed the issue in 1953 in *Wilko v. Swan*.[34] The *McMahon* decision reconsiders both the reasoning and the general thrust of *Wilko*.

Wilko v. Swan: The Origins of Nonarbitrability

In *Wilko*, the Court held that a customer's claims against his securities broker under section 12(2) of the 1933 Act[35] were "nonarbitrable," that is, they were not subject to arbitration pursuant to the customer's contractual agreement to arbitrate all future disputes with his broker. The Court based its decision on an interpretation of certain statutory provisions of the 1933 Act and on basic doubts about the capacity of the arbitral process to adequately enforce the special statutory right that Congress had created in section 12(2).[36]

[27] *Id.*

[28] *Id.* at 10-11.

[29] The Court reiterated this policy in a case decided one week after *McMahon*. *See* Perry v. Thomas, 107 S. Ct. 2520, 2525-27 (1987) (requiring arbitration of an employee's claim for wages despite a California state statute explicitly exempting wage claims from arbitration).

[30] *Moses H. Cone*, 460 U.S. at 24-25.

[31] 9 U.S.C. § 2 (1982).

[32] *Id. See supra* note 11 and accompanying text.

[33] *See Southland*, 465 U.S. at 10-11.

[34] 346 U.S. 427 (1953).

[35] 15 U.S.C. § 771(2) (1982).

[36] *Wilko*, 346 U.S. at 435-37. Under section 12(2), unlike a common law action for

Initially, the *Wilko* Court noted that the 1933 Act has a "nonwaiver" provision—section 14—that bars any stipulation or agreement waiving "compliance with any provision" of the statute.[37] The Court then observed that section 22 of the 1933 Act grants plaintiffs the right to seek enforcement of the civil liability provision—section 12(2)—in any state or federal court having jurisdiction.[38] Because the jurisdictional provision is broad and the statutory right embodied in section 12(2) was specially created by Congress to give securities customers added protection in disputes with sellers of securities,[39] the Court concluded that the 1933 Act's jurisdictional provision was "the kind of 'provision' that cannot be waived under § 14 of the Securities Act."[40]

In the second portion of its opinion, the *Wilko* court elaborated on the reasons why arbitration pursuant to a standard agreement between a customer and broker might result in a waiver of the substantive protection of the Act. First, the Court noted that there was a general inequality of bargaining power between securities customers and economically more powerful sellers of securities. This disparity of economic power cast doubt over the voluntariness of securities arbitration agreements.[41] Second, the Court worried that arbitrators untutored in the law would not understand or properly apply the special features of section 12(2).[42] Finally, the Court found that the procedural characteristics of arbitration, notably the limited judicial review mandated by the FAA, make it unlikely that courts would be able to detect or correct arbitral errors in enforcing the statute.[43] Accordingly, the customer was entitled to have a section 12(2) claim decided by a court despite having signed an agreement to arbitrate.

Wilko inspired two developments in the lower courts. First, courts extended the reasoning of *Wilko* to claims under section 10(b) of the 1934

misrepresentation, the defendant-seller bears the burden of proving that any misrepresentation or omission was innocent and could not have been corrected by the exercise of due care. 15 U.S.C. § 771(2) (1982).

[37] *Wilko*, 346 U.S. at 430. *See* 15 U.S.C. § 77n (1982).

[38] *Wilko*, 346 U.S. at 431. *See* 15 U.S.C. § 77v (1982).

[39] *Wilko*, 346 U.S. at 430-31.

[40] *Id.* at 433-34.

[41] *Id.* at 435.

[42] *Id.* at 435-36.

[43] *Id.* at 436-37. The *Wilko* Court was careful to limit its decision to customer-broker arbitration agreements relating to future disputes. The case did not purport to prohibit agreements to arbitrate a claim that had already matured. *Id.* at 438 (Jackson, J., concurring). The Second Circuit in *Wilko* had ruled that the arbitration clause was enforceable because that court felt that no meaningful distinction could be drawn between arbitration of existing and arbitration of future claims, and the SEC had admitted in an amicus brief that existing customer-broker disputes under the 1933 Act were arbitrable. *See* Wilko v. Swan, 201 F.2d 439 (2d Cir.), *rev'd*, 346 U.S. 427 (1953).

Act.[44] The 1934 Act contains nonwaiver[45] and jurisdictional[46] provisions analogous to the 1933 Act sections relied upon in *Wilko* to prohibit arbitration. The two statutes also share a common purpose: investor protection.[47] These similarities led lower courts to declare that *Wilko* prohibited arbitration of claims under section 10(b).

Second, courts expanded the more general rationale of *Wilko*, the suspicion that statutory rights might get short shrift in arbitration, to cover an open-ended category of statutory claims that were held to be nonarbitrable for reasons of "public policy."[48] Beginning with the Second Circuit's decision in *American Safety Equipment Corp. v. J.P. Maguire & Co.*,[49] federal antitrust disputes, and later claims under RICO,[50] were found by many courts to be nonarbitrable because of the public's interest in properly policing business conduct under such statutes.[51]

The 1960s and early 1970s were the high water mark for the concept of nonarbitrable statutory claims in commercial cases.[52] Beginning in 1974, however, the Supreme Court began to chip away at the exceptions to the FAA that had been recognized by the lower federal courts and to lay the groundwork for its *McMahon* opinion.

Rethinking The *Wilko* Approach

The first signal that the Court was rethinking its approach to arbitra-

[44] *See* Fletcher, *supra* note 8, at 413 n.142 (citing cases).

[45] 15 U.S.C. § 78cc (1982).

[46] *Id.* § 78aa. Jurisdiction of 1934 Act claims is limited to federal courts.

[47] *See* Moran v. Paine, Webber, Jackson & Curtis, Inc. 389 F.2d 242, 245 (3d Cir. 1968); Brown, Shell & Tyson, *Arbitration of Customer-Broker Disputes Arising Under the Federal Securities Laws and RICO*, 15 SEC. REG. L.J. 3, 19 (1987).

[48] *See, e.g.*, Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 492, 503-23 (1981).

[49] 391 F.2d 821 (2d Cir. 1968) (holding that federal antitrust disputes are nonarbitrable).

[50] *See, e.g.*, McMahon v. Shearson/Am. Express, Inc., 788 F.2d 94 (2nd Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987); Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291 (1st Cir. 1986).

[51] In *American Safety*, the Second Circuit held that domestic antitrust claims were nonarbitrable because of the public nature of such disputes, the likelihood of legal and factual complexity in antitrust cases, the possibility of adhesion contracts, and the impropriety of having businesspersons sit as arbitrators. *American Safety*, 391 F.2d at 826-27. The "public policy" rationale has also been applied to claims under the patent laws, ERISA, and bankruptcy law. *See* Sterk, *supra* note 48, at 512-16, 521-23, 533-38. A recent Eighth Circuit opinion, decided after *McMahon*, has held that ERISA claims are now arbitrable. *See* Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475 (8th Cir. 1988).

[52] The Supreme Court has also found statutory claims in labor cases following collective bargaining arbitration to be nonarbitrable, but those cases are not at issue here. *See* McDonald v. City of West Branch, 466 U.S. 284 (1984) (42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (Fair Labor Standards Act); Alexander v. Gardener-Denver Co., 415 U.S. 36 (1974) (Title VII).

tion came in its 1974 opinion in *Scherk v. Alberto-Culver Co.*[53] In *Scherk*, the Court held that claims under section 10(b) of the 1934 Act arising in the context of international business transactions were subject to arbitration notwithstanding *Wilko*.[54] The *Scherk* Court initially questioned the applicability of *Wilko*'s "semantic" 1933 Act statutory analysis to the "implied" cause of action under section 10(b) of the 1934 Act.[55] But the Court refrained from a broad attack on *Wilko* and rested its holding instead on concerns of international comity and the fact that arbitration is both customary and necessary to international trade.[56] *Scherk* was then followed in 1983 and 1984 by the procedural and jurisdictional decisions in *Moses H. Cone* and *Southland* already discussed.[57]

Early in 1985, the Court added considerable momentum to its policy favoring arbitration by deciding in *Dean Witter Reynolds Inc. v. Byrd*[58] that courts must compel arbitration of arbitrable state law claims even when such claims are intertwined with and arise from the same transaction as nonarbitrable federal claims.[59] *Byrd* involved a securities dispute in which the customer had alleged violations of state common law duties, as well as a claim under section 10(b) of the 1934 Act.[60] The district court ordered the entire case to be tried in court because bifurcation between the arbitral and judicial forums would result in inefficiencies and possible unfairness.[61] The Supreme Court rejected this approach, holding that the FAA requires courts to enforce private agreements to arbitrate "even if the result is 'piecemeal' litigation. . . ."[62] Justice White wrote a concurring opinion in *Byrd* in which he reiterated the *Scherk* Court's dicta regarding the possible inapplicability of *Wilko* to 1934 Act "implied" claims and

[53] 417 U.S. 506 (1974).

[54] *Id.* at 513.

[55] *Id.* at 513-14. The Court in *Scherk* noted that because the cause of action under section 10(b) is implied and lacks some of the special characteristics found in the 1933 Act's section 12(2) cause of action, *Wilko*'s nonwaiver analysis might not be applicable. *Id.*

[56] *Id.* at 515-20.

[57] *See supra* notes 18-33 and accompanying text.

[58] 470 U.S. 213 (1985).

[59] *Id.* at 217.

[60] At the time *Byrd* was decided, most courts held that claims under section 10(b) were nonarbitrable. *See supra* notes 44-47 and accompanying text. The issue of the arbitrability of section 10(b) claims was not addressed by the Court in *Byrd* because the defendant brokerage firm failed to raise the issue as a defense in the district court. *Byrd*, 470 U.S. at 215-16 & n.1.

[61] The district court applied the "intertwining doctrine" under which courts refused to enforce arbitration agreements when arbitrable claims were sufficiently intertwined with the same facts underlying the nonarbitrable claim. Under the "intertwining doctrine," the agreement to arbitrate was ignored and all claims went forward in court to a single resolution. *See id.* at 216-17.

[62] *Id.* at 221.

argued that there was "substantial doubt" about the arbitrability of claims under section 10(b).[63]

The last significant pre-*McMahon* precedent was put in place later in the 1985 Term when the Court held in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[64] that antitrust claims, at least when raised in the context of an international dispute, were arbitrable. The Court rejected the plaintiff's argument that federal statutory claims are presumptively nonarbitrable. Rather, the Court made clear that the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."[65] If Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, stated the Court, "that intention will be deducible from text or legislative history."[66] The Court found no evidence of such an intention in the antitrust laws, but limited its decision, as in *Scherk*, to the special circumstances surrounding international agreements to arbitrate.[67]

In summary, just prior to the Court's decision in *McMahon*, the Supreme Court had held that claims under section 12(2) of the 1933 Act were nonarbitrable and that claims under section 10(b) of the 1934 Act and under the antitrust laws were arbitrable when brought in the context of an international business dispute. The Court had also ruled that, in circumstances when arbitrable and nonarbitrable claims were joined in a single case, courts were obliged under the FAA to order arbitration and litigation to proceed simultaneously. The Court in *Scherk* and Justice White in *Byrd* had raised questions about the application of *Wilko* to claims under section 10(b) of the 1934 Act. The lower courts, meanwhile, had, since *Byrd*, split regarding the arbitrability of claims under both section 10(b) and RICO.[68] Finally, all of the circuits to address the issue had held that domestic antitrust disputes were nonarbitrable.[69]

[63] *Id.* at 224-25 (White, J., concurring).

[64] 473 U.S. 614 (1985).

[65] *Id.* at 627.

[66] *Id.* at 628.

[67] *Id.*

[68] Two circuits, the First and Eighth, had ruled that section 10(b) claims were arbitrable. *See* Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291 (1st Cir. 1986); Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393 (8th Cir. 1986), *vacated*, 107 S. Ct. 3205 (1987). The rest of the circuits followed the Second Circuit in maintaining that section 10(b) claims were nonarbitrable. *See* Brown, Shell & Tyson, *supra* note 47, at 5 & n. 16 (citing cases). With respect to RICO, the courts had variously ruled that RICO claims were always arbitrable, *see* Mayaja, Inc. v. Bodkin, 803 F.2d 157 (5th Cir. 1986), *vacated*, 107 S. Ct. 3205 (1987), were sometimes arbitrable, *see* Tashea v. Bache, Halsey, Stuart, Shields, Inc., 802 F.2d 1337 (11th Cir. 1986) (per curiam); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197 (3d Cir. 1986), *vacated*, 107 S. Ct 3204 (1987), and were never arbitrable, *see* Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291 (1st Cir. 1986).

[69] *See, e.g.*, Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 (9th Cir. 1984); Univer-

THE *McMAHON* DECISION

The *McMahon* case developed out of a dispute between a couple, Eugene and Julia McMahon, and their Shearson broker, Mary Ann McNulty, over allegations that McNulty had "churned" the customers' account, charged excessive commissions, and misrepresented stock information in connection with the handling of some $500,000 in investments.[70] At the outset of the relationship, Julia McMahon signed a standard margin agreement that included an arbitration clause calling for resolution of all disputes that might arise between the parties under securities industry arbitration rules.[71] When the dispute did arise, however, the McMahons sought to litigate the matter in federal district court by alleging that McNulty and Shearson had violated section 10(b) of the 1934 Act and RICO.[72]

The district court, relying on Justice White's concurrence in *Byrd* and the Supreme Court's decisions in *Scherk* and *Mitsubishi*, ordered the section 10(b) claim to arbitration but found that the RICO claim was nonarbitrable under *American Safety*'s "public policy" exception.[73] On appeal, the Second Circuit held that neither the section 10(b) nor the RICO claim was arbitrable.[74] The Supreme Court reversed the Second Circuit, holding that the FAA requires arbitration of both section 10(b) and RICO claims.[75] The Court split five to four in favor of arbitrating section 10(b) claims and was unanimous in its holding regarding RICO. Justice O'Connor wrote the opinion for the Court. Justice Blackmun dissented on the section 10(b) issue, joined by Justices Brennan and Marshall. Justice Stevens wrote a short, separate concurrence and dissent.

Section 10(b)

The Court's opinion began by reiterating that the FAA establishes a federal policy favoring arbitration that demands rigorous judicial enforce-

sity Life Ins. Co. v. Unimarc Ltd., 699 F.2d 846 (7th Cir. 1983); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), *rev'd*, 473 U.S. 614 (1985); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Helfenbein v. International Indus., Inc., 438 F.2d 1068 (8th Cir. 1971), *cert. denied*, 404 U.S. 872 (8th Cir. 1971); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

[70] *See* McMahon v. Shearson/Am. Express, Inc., 788 F.2d 94, 96 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987). "Churning" occurs when a broker engages in an excessive number of trades on behalf of a customer solely to generate commissions and not for the purpose of maximizing the customer's trading profits. *Id.*

[71] Shearson/Am. Express, Inc. v. McMahon, 107 S. Ct. 2332, 2335 (1987).

[72] McMahon v. Shearson/Am.Express, Inc., 618 F. Supp. 384, 389 (S.D.N.Y. 1985), *rev'd in part*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2332 (1987).

[73] *McMahon*, 618 F. Supp. at 389. *See supra* note 49 and accompanying text.

[74] *McMahon*, 788 F.2d at 99.

[75] *McMahon*, 107 S. Ct. at 2343, 2345-46.

ment of agreements to arbitrate.[76] This policy, stated the Court, "is not diminished when a party bound by an arbitration agreement raises a claim founded on statutory rights."[77] Rather, statutory claims may be exempted from the FAA only by Congress, and such an exemption must be " 'deducible from [the statute's] text or legislative history,' . . . or from an inherent conflict between arbitration and the statute's underlying purposes."[78]

Turning to section 10(b) of the 1934 Act, the Court began its analysis with a frontal attack on the method of statutory interpretation used in *Wilko*.[79] The McMahons, relying on *Wilko* and the long line of circuit court cases that had applied *Wilko* to 1934 Act claims, asserted that the 1934 Act's jurisdictional limitations[80] could not be waived through an arbitration clause because section 29(a) of the 1934 Act declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]."[81]

The Court disagreed, pointing out that a jurisdictional requirement does not impose any substantive duties with which a party trading in securities must "comply."[82] This interpretation of the 1934 Act's nonwaiver provision directly contradicted the *Wilko* Court's reading of identical nonwaiver language in the 1933 Act and clearly signaled the result the Court would reach in *McMahon*. But the question remained: would the Court distinguish or overrule *Wilko*?[83] Remarkably, the Court did neither. Instead, it used the remainder of its discussion of the section 10(b) issue to completely undercut *Wilko* while steadfastly refusing to

[76] *Id.* at 2337.

[77] *Id.*

[78] *Id.* at 2337-38 (quoting in part Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[79] *Id.* at 2338-39.

[80] *See* 15 U.S.C. § 77aa (1982). The statute limits jurisdiction over 1934 Act claims to federal courts.

[81] *Id.* § 78cc. Section 14 of the 1933 Act, like section 29(a) of the 1934 Act, forbids waiver of "compliance with any provision" of the Act. *Id.* § 77n. In *Wilko* the Court held that claims under section 12(2) of the 1933 Act were nonarbitrable because the jurisdictional provision in that statute was "the kind of 'provision' that cannot be waived under § 14 [the nonwaiver section] of the Securities Act." *Wilko*, 346 U.S. at 435. *See supra* notes 41-49 and accompanying text.

[82] *McMahon*, 107 S. Ct. at 2338.

[83] The Court could have distinguished the section 10(b) claim from the claim under section 12(2) of the 1933 Act. The section 10(b) claim is implied, whereas the section 12(2) claim is express. Both the Court's opinion in *Scherk* and Justice White's concurrence in *Byrd* suggested that the implied nature of the section 10(b) cause of action might mean that Congress could not have intended the claim to be exempt from the FAA. *See Scherk*, 417 U.S. at 513; *Byrd*, 470 U.S. at 224-25 (White, J., concurring). The *McMahon* Court chose not to base its holding on this distinction, however. *See McMahon*, 107 S. Ct. at 2346-47 & n. 1 (Blackmun, J., concurring and dissenting).

overrule the case. One of the questions lingering in the wake of *McMahon* is, therefore, the arbitrability of claims under the 1933 Act.[84]

The Court launched its discussion of *Wilko* by declaring that *Wilko*'s reading of the 1933 Act's nonwaiver provision could not be viewed as a simple exercise of interpretating the "plain meaning" of statutory language. Rather, *Wilko*'s interpertation of the 1933 Act's nonwaiver section "can only be understood in the context of the Court's ensuing discussion explaining why arbitration was inadequate" as a means of enforcing the liability provisions of the 1933 Act.[85] The Court thus located the basis for the *Wilko* decision in the *Court*'s suspicion that commercial arbitration was "inadequate to enforce the statutory rights created by § 12(2)" and not in a *congressional* intention to preserve for securities customers access to a judicial forum for the vindication of securities law claims.[86] The Court bolstered its argument by claiming that this reinterpretation of *Wilko* was required by the result in *Scherk*, where the Court had ruled that arbitration of 1934 Act claims by international arbitral tribunals was permitted.[87] The Court declared that the crucial difference between *Scherk* and *Wilko* was not, as had previously been thought, the international character of the dispute in *Scherk*, but rather was the fact that in *Scherk*, but not *Wilko*, arbitration was "an adequate substitute" for a judicial forum.[88]

This revision of *Wilko*—based in part on a revision of *Scherk*—led the Court to declare that the legal test for determining whether section 10(b) claims are arbitrable is whether securities arbitration is "an adequate substitute" for judicial resolution of such claims. The Court found that securities arbitration passed muster.

[84] The Supreme Court recently granted *certiorari* to decide whether 1933 Act claims should be subject to arbitration. *See* Wermeil, *Justices to Mull Stock Fraud Arbitration*, Wall St. J., Nov. 15, 1988, at B12, col.2. *Compare* Chang v. Lin, 824 F.2d 219 (2d Cir. 1987); Ketchum v. Bloodstock, 685 F. Supp. 786 (D. Kan. 1988); McCowan v. Dean Witter Reynolds, Inc., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 93,563 (S.D.N.Y. Dec. 21, 1987); Schultz v. Robinson-Humphrey/Am. Express, Inc., 666 F. Supp. 219 (M.D.Ga. 1987), *rev'd without opinion*, 810 F.2d 207 (11th Cir. 1987); Continental Serv. Life & Health Ins. Co. v. A.G. Edwards & Sons, Inc., 664 F. Supp. 997 (M.D. La. 1987) (holding that *Wilko* is still good law after *McMahon* and requiring that 1933 Act claims be resolved in a judicial forum) *with* Rodriguez De Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296 (5th Cir. 1988) (review granted as described above); Ryan v. Liss, Tenner & Goldberg Sec. Corp., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 93,702 (D.N.J. Apr. 8, 1988); Aronson v. Dean Witter Reynolds, Inc., 675 F. Supp. 1324 (S.D. Fla. 1987); Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 673 F. Supp. 1009 (C.D. Cal. 1987) (holding that, after *McMahon*, 1933 Act claims must be arbitrated).

[85] *McMahon*, 107 S. Ct. at 2338.

[86] *Id.*

[87] *Id.* at 2339.

[88] *Id.*

The Court noted that both securities and antitrust disputes were routinely resolved by international arbitrators and declared that domestic arbitrators are at least as competent as their international counterparts. Domestic arbitrators, the Court pointed out, were able to adjudicate statutory disputes in two circumstances: 1) in all cases between domestic securities exchange members and 2) in those cases between customers and brokers where arbitration is requested by the customer after a dispute has arisen. The Court could thus find no principled reason for barring domestic arbitrators from deciding domestic securities disputes in the typical case involving a "future disputes" arbitration clause.[89]

In addition, the Court found that securities arbitration proceedings "do not entail any consequential restriction on substantive rights."[90] First, judicial review of arbitration awards, however limited, is "sufficient to ensure that arbitrators comply with the requirements of the statute."[91] Second, the Securities and Exchange Commission has authority to regulate the arbitration rules of national securities exchanges and registered securities associations.[92] The Court concluded that "where the prescribed [arbitration] procedures are subject to the Commission's . . . authority, an arbitration agreement does not effect a waiver of the protection of the Act."[93]

And what of *Wilko*? The Court left the case, and its rule of nonarbitrability for claims under section 12(2) of the 1933 Act, hanging by the thinnest of threads. The Court stated that "[w]hile *stare decisis* concerns may counsel against upsetting *Wilko*'s contrary conclusion under the Securities Act, we refuse to extend *Wilko*'s reasoning to the Exchange Act in light of these intervening regulatory developments."[94]

Justice Blackmun's concurrence and dissent focused exclusively on the Court's analysis of the section 10(b) issue. He accused the majority of abandoning the congressional policy of protecting investors from the

[89] *Id.* at 2340-41. The Court's comment regarding the lack of a distinction between arbitration of existing and future statutory disputes brought it full circle with *Wilko*, which rejected the Second Circuit's reliance on this factor as a basis for upholding arbitration of 1933 Act claims. *See supra* note 43. It is clear from the Court's comment in *McMahon* regarding the arbitration of existing disputes that arbitration procedures had not changed between 1953 and 1987 nearly so much as had the Court's attitude about arbitration as a form of alternative dispute resolution.

[90] *McMahon*, 107 S. Ct. at 2340.

[91] *Id.*

[92] *Id.* at 2341. The Court noted that pursuant to this authority the SEC had approved a set of arbitration rules for the securities industry. *Id. See* UNIFORM CODE OF ARBITRATION, *reprinted in* Fifth Report of the Securities Industry Conference on Arbitration, Exhibit C (Apr. 1986) [hereinafter Fifth SICA Report].

[93] *McMahon*, 107 S. Ct. at 2341.

[94] *Id.* at 2341.

"predatory behavior of securities industry personnel,"[95] of placing unwarranted confidence in the SEC's ability to oversee securities arbitration,[96] and of effectively overruling *Wilko*[97]—all "at a time when the industry's abuses towards investors are more apparent than ever."[98]

Justice Blackmun's first and best point was his analysis of Congress's 1975 amendments to the 1934 Act. Congress amended the 1934 Act in 1975 to, among other things, permit arbitration of securities claims between securities professionals. A Conference Report related to these amendments stated that it was the "clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*."[99] These amendments, which were dismissed by the majority because they did not deal directly with a customer's right to sue for violations of the statute, were persuasive evidence to Justice Blackmun of congressional approval of *Wilko*. Blackmun concluded that if Congress did not actually endorse the extension of *Wilko* to section 10(b) claims in 1975, Congress at least evidenced no inclination to arrest the trend favoring such an extension.[100] Such inaction during a wholesale revision of the securities laws pointed to congressional approval of the *Wilko* doctrine and its extension to section 10(b) claims.[101]

Justice Blackmun concluded that *Wilko* was still good law,[102] that the

[95] *Id.* at 2346 (Blackmun, J., concurring and dissenting). In the interests of full disclosure, Justice Blackmun relied at several points in his dissent on an article that the present writer co-authored and that argued on legal grounds that section 10(b) claims should not be arbitrable. *See* Brown, Shell & Tyson, *supra* note 47.

[96] *McMahon*, 107 S. Ct. at 2346 (Blackmun, J., concurring and dissenting).

[97] *Id.*

[98] *Id.*

[99] H.R. REP. No. 229, 94th Cong., 1st Sess. 91, 111 (1975), *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 179, 321.

[100] *McMahon*, 107 S. Ct. at 2347-48 (Blackmun, J., concurring and dissenting).

[101] *Id.* Justice Blackmun also noted that in amendments to section 15B of the 1934 Act permitting arbitration among municipal securities broker-dealers, Congress explicitly stated that a securities customer could not be compelled to submit to industry arbitration "except at his instance and in accordance with section 29 of this title." 89 Stat. 133, 15 U.S.C. § 78o-4(b)(2)(D) (1982); *see also* Brown, Shell & Tyson, *supra* note 47 at 20. The reference to section 29 (the nonwaiver provision) as a limitation on a customer's ability to submit to arbitration strongly supports an inference that Congress approved of the extension of the *Wilko* doctrine to 1934 Act claims.

[102] Justice Blackmun also criticized the major premise of the majority's reinterpretation of *Wilko*—that *Wilko* was based primarily on the inadequacy of the arbitral forum to handle statutory rights and that arbitration under SEC oversight is now adequate to protect investors. *McMahon*, 107 S. Ct. at 2349-58 (Blackmun, J., concurring and dissenting). Blackmun pointed out that it was Congress' intention, as expressed in the text and legislative purposes of the 1933 Act, that led the *Wilko* Court to its conclusions, not a judicial suspicion of arbitration as it was practiced in 1953. *Id.* at 2351-52. Indeed, in *Mitsubishi*, the Court cited *Wilko* as primary authority for the proposition that, if Congress intended

case stood as authority for an investor-oriented construction of the nonwaiver provision of the 1933 Act, and that *Wilko* should be applied to bar arbitration under the identical nonwaiver language of the 1934 Act. He pointed out that the two statutes have similar purposes and apply, in some cases, to identical conduct.[103] Finally, Blackmun expressed skepticism that arbitration today differs significantly from arbitration practiced in 1953,[104] and openly questioned whether the SEC would provide any kind of meaningful oversight of industry arbitration.[105] Justice Blackmun

to make an exception to the FAA, "that intention will be deducible from text or legislative history." *Id.* at 2350 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). Blackmun argued that, in construing the nonwaiver provision of the 1933 Act, the *Wilko* Court understood that provision to mean that, at least in a predispute context, "an investor could not waive *his* compliance with the [jurisdictional] provision for dispute resolution in the courts." *Id.* at 2351 n.9 (emphasis in original). This construction, argued Justice Blackmun, universally followed in the lower federal courts after *Wilko* and left intact by Congress in 1975, "makes sense in terms of the policy of investor protection." *Id.* Justice Blackmun explained that the result in *Scherk*, where arbitration of section 10(b) claims was permitted, was justified only in the international context, where arbitration in particular and forum selection generally is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 2352 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974)). *Scherk* thus turned not on a perceived difference in arbitration processes as compared with *Wilko* but on "the special nature of agreements to arbitrate in the international context." *Id.*

[103] *McMahon*, 107 S. Ct. at 2353 (Blackmun, J., concurring and dissenting).

[104] *Id.* Blackmun argued that now, as in 1953, no record of arbitration proceedings is required in securities arbitration. *Id.* at 2354. *See* Fifth SICA Report, *supra* note 91, § 25. Arbitrators are still not bound by precedent and do not render written explanations justifying their awards. *McMahon*, 107 S. Ct. at 2354. (Blackmun, J., concurring and dissenting); *see also* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULE 42 (Jan. 1, 1988); Fifth SICA Report, *supra* note 91, § 29(a). The AAA discourages its arbitrators from writing opinions to explain their decisions because such explanations "might open avenues for attack on the award by the losing party." AMERICAN ARBITRATION ASSOCIATION, A GUIDE FOR COMMERCIAL ARBITRATORS 16 ("No written Opinion Required") (undated). Judicial review is still limited to the statutory grounds specified in the FAA and to occasions when arbitrators exhibit "manifest disregard" for the law. *McMahon*, 107 S. Ct. at 2355 (Blackmun, J., concurring and dissenting).

[105] Blackmun pointed to numerous shortcomings in both the current rules and in the SEC's ability to make any real difference in the arbitration process. *Id.* at 2354-55. Justice Blackmun pointed out that lawyers and others who serve the securities industry as advisors may be appointed as "public arbitrators" under the securities arbitration rules and that the SEC has no power to review individual decisions. *Id.* Justice Blackmun thus found that arbitration, even in 1987, places an investor at best on an equal footing with the securities industry and at worst at a substantial disadvantage. *Id.* at 2355. The securities laws, however, were designed by Congress to give investors an advantage in their dealings with securities brokers and should be interpreted, Blackmun argued, to provide that advantage. *Id.*

concluded his opinion by calling for congressional action to rectify the result reached by the majority.[106]

RICO

The Court was unanimous in its decision that RICO claims are subject to arbitration. The Court examined the text and legislative history of RICO and found no evidence of congressional intent to exempt RICO from the broad mandate of the FAA. It then turned to the question of whether there was an "irreconcilable conflict between arbitration and RICO's underlying purposes."[107] The Court found no such conflict and accordingly held that RICO claims are fully arbitrable.

The Court first found that much of the reasoning that supported *Mitsubishi*'s approval of arbitration of international antitrust disputes was "equally applicable" to domestic RICO cases.[108] The Court stated that the "complexity" of factual or legal issues does not disqualify arbitrators from hearing RICO claims any more than antitrust claims.[109] Nor does the "quasi-criminal" nature of the statute affect the arbitrability of claims under RICO.[110] The antitrust laws, like RICO, provide criminal as well as civil penalties for the same conduct.[111] Finally, the Court found that the RICO treble damage provision, like the antitrust treble damage remedy, is primarily remedial and compensatory in nature and does not, for "public policy" reasons, require judicial enforcement.[112]

The Court noted that although RICO was passed by Congress out of concern about organized crime, RICO plaintiffs seldom use the statute in civil litigation against criminals. Instead, plaintiffs typically bring RICO claims in conventional civil cases against legitimate enterprises.[113] In such circumstances, there is no irreconcilable conflict between arbitration and enforcement of RICO. The Court thus concluded that the McMahons had signed a broad arbitration agreement and should be "held to their bargain."[114]

[106] *Id.* at 2357. Justice Stevens' short concurrence and dissent dealt solely with his view that the Court should not disturb the statutory analysis used in *Wilko* even if the case was wrongly decided. Stevens argued that in light of the "longstanding interpretation" of *Wilko* by the circuit courts to preclude arbitration of 1934 Act claims, any mistake of judicial construction "is best remedied by the legislative . . . branch." *Id.* at 2359 (Stevens, J., concurring and dissenting).

[107] *Id.* at 2343-44 (majority opinion).

[108] *Id.* at 2344.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 2344-45.

[114] *Id.* at 2346.

The *McMahon* decision marks the end of an era and the beginning of a new age in the field of commercial arbitration. Prior to *McMahon*, the leading decision defining the arbitrability of statutory rights was *Wilko v. Swan*. In the period following 1953, *Wilko* gave rise to lower federal court decisions making claims under section 10(b) of the 1934 Act, the antitrust laws, and RICO nonarbitrable. State courts also adopted *Wilko*'s interpretation of the 1933 Act's nonwaiver provision in deciding whether various state laws protecting consumers and small businesses were arbitrable.[115] This proliferation of exemptions to arbitration statutes gave rise, in turn, to much legal uncertainty and complexity. Indeed, after the *Byrd* decision, the presence of an arbitration clause often resulted in the litigation of claims arising from single transactions in multiple arbitral and judicial forums. If speed and efficiency were goals of arbitration, these goals were not being met in many cases.

McMahon has now replaced *Wilko* as the new leading case governing the arbitration of statutory rights. In the post-*McMahon* era, legislatures and courts will find themselves in a new, much more certain legal world where arbitration is concerned. Although the precise reach of a case is impossible to predict with certainty, it appears that *McMahon* will have at least five immediate effects on the law.

First, *Wilko* is effectively overruled. True, claims arising under the 1933 Act[116] are still nonarbitrable under the narrow *McMahon* holding. But this state of affairs will last only as long as the securities industry wishes to endure it. *Wilko*'s statutory interpretation of the 1933 Act's nonwaiver provision has been rejected by *McMahon*, and the Court has

[115] *See, e.g.*, Keating v. Superior Court, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), *rev'd sub. nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984); Sandefer v. Reynolds Sec., Inc., 44 Colo. App. 343, 618 P.2d 690 (1980), *overruled*, Sager v. District Court for Second Jud. Dist., 698 P.2d 250 (Colo. 1985); Wineland v. Marketex Int'l, Inc., 28 Wash. App. 830, 627 P.2d 967 (1981), *overruled*, Garmo v. Dean Witter Reynolds, Inc., 101 Wash. 2d 585, 681 P.2d 253 (1984).

[116] This includes both claims under section 12(2) and claims under section 17(a) of the 1933 Act. *See supra* note 84. Section 17(a) does not provide for an express right of action, but some courts have ruled that a private cause of action may be implied under this provision. *See, e.g.*, Kirshner v. United States, 603 F.2d 234, 240-41 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); Fletcher, *supra* note 3, at n.182 (citing cases). Courts that have held that section 12(2) claims are now arbitrable have also ruled that claims under section 17(a) must be arbitrated. *See* Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 673 F. Supp. 1009, 1010 (C.D. Cal. 1987). Because section 17(a) claims are implied, even courts that still honor the letter of *Wilko* may find that *Wilko*'s reasoning does not apply to section 17(a) claims. *See* Rocz v. Drexel Burnham Lambert, Inc., [1987 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,138 (Ariz. Ct. App. Oct. 21, 1987) (holding that section 17(a) claim must be arbitrated since it is an implied cause of action).

expressed confidence in the SEC's post-*Wilko* oversight of securities arbitration procedures.[117] The entire tenor and thrust of *McMahon* leave no doubt that the Court will explicitly overrule *Wilko* in a case now before it; several lower courts have already ruled that *Wilko* is dead and have accordingly ordered 1933 Act claims to arbitration.[118]

Second, Congress will have to be much more explicit in the future if it wishes to exempt statutory claims from the reach of the FAA. *McMahon* rejected *Wilko*'s notion that a jurisdictional provision in a statute, in combination with a nonwaiver provision, may preserve a plaintiff's right to a judicial forum when the plaintiff has signed an arbitration agreement. Henceforth, Congress may not signal that a particular statute is unsuitable for arbitration by merely including general nonwaiver language.

It is tempting to say that Congress need only redraft nonwaiver provisions to refer explicitly to jurisdictional limitations to cure this problem. For example, a nonwaiver section that rendered void any "stipulation or agreement waiving any substantive or jurisdictional provision" of a statute would seem to bar an arbitration agreement that eliminated a plaintiff's right to bring suit in a particular judicial forum. The Court's primary ground of decision in *McMahon*, however, was not statutory construction; it was a judgment that arbitration is "an adequate substitute" for judicial resolution of statutory securities claims. Thus, even if Congress were to rewrite the nonwaiver provisions of the 1933 and 1934 Acts as noted above, the Court might conclude that arbitration is not a "waiver" of the jurisdictional provisions since arbitration is "an adequate substitute" for court litigation. Should Congress wish to make statutory claims nonarbitrable, therefore, it must say specifically that substantive claims under the statute in question are exempted from the FAA and that contracts to arbitrate such claims are unenforceable.

Third, the *McMahon* Court's analysis of the RICO issue leaves little doubt that the FAA exemption for domestic antitrust claims, embodied in the *American Safety* doctrine, is no longer the law. *Mitsubishi* called this exemption into question by permitting arbitration of antitrust disputes in international cases and by systematically questioning the reasoning of the *American Safety* decision.[119] In *McMahon*, a unanimous Court

[117] *McMahon*, 107 S. Ct. at 2341.

[118] *See supra* note 84. The great majority of commentators agree that *McMahon* effectively overrules *Wilko*. *See, e.g.*, Bedell, Harrison & Harvey, *supra* note 3, at 28; Fletcher, *supra* note 3, at 113; Hood, *supra* note 3, at 544 n.13; Project, *supra* note 3, at 286 n.46; Note, *Enforceability of Predispute Arbitration Agreements*, *supra* note 3, at 232; Note, *Swan Song*, *supra* note 3, at 227.

[119] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632-39 (1985).

said that *Mitsubishi*'s analysis applies to domestic arbitration and that domestic arbitrators are every bit as capable as international arbitrators of deciding complex statutory cases involving treble damage remedies.[120]

For purposes of deciding whether antitrust claims are arbitrable, it is important to note that the RICO portion of the *McMahon* decision was not limited to securities disputes. The Court simply found that civil RICO claims are arbitrable because 1) *Mitsubishi* says that antitrust claims are arbitrable, and 2) RICO claims are similar, in most respects relevant to the arbitration question, to claims under the antitrust laws.[121] Given this logic, it seems likely that the lower courts will soon abandon the *American Safety* doctrine and send domestic antitrust cases to arbitration. This process is already underway.[122]

Fourth, arbitration awards of treble damages and attorneys' fees are, after *McMahon*, fully enforceable as necessary parts of the statutory schemes being implemented in arbitration. Prior to *McMahon*, there was some doubt as to whether arbitrators had the authority to grant such extraordinary remedies.[123] Since RICO contains mandatory treble damage and fee provisions[124] and the Court has insisted that RICO claims be arbi-

[120] *McMahon*, 107 S. Ct. at 2344-45. The Court's de-emphasis of the international aspect of its decision in *Scherk* underscores this collapse of the international/domestic arbitration distinction. *Id.* at 2338-39.

[121] *McMahon*, 107 S. Ct. at 2344-45.

[122] *See* Gemco Latinoamerica, Inc. v. Seiko Time Corp., 671 F. Supp. 972, 978-80 (S.D.N.Y. 1987) (ordering domestic antitrust dispute to arbitration). Parties attempting to resist arbitration of antitrust claims will no doubt argue that antitrust arbitration, unlike securities arbitration, is not regulated by an administrative agency. The Court in *McMahon* had the added assurance that the arbitration process to which it was consigning statutory rights is administratively regulated by the SEC. *McMahon*, 107 S. Ct. at 2341. It is doubtful, however, that this aspect of the Court's holding will limit future arbitration cases. *But see* Nicholson v. CPC Int'l Inc., 2 ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) 177-78 (D.N.J. Apr. 18, 1988) (holding that claims under the Age Discrimination in Employment Act, 28 U.S.C. § 621 (1982), are not arbitrable and distinguishing *McMahon*, in part, on the grounds that age discrimination claims are not subject to administrative oversight). The American Arbitration Association, for example, is not regulated by the SEC, but there is little doubt that an arbitration clause calling for the use of the AAA's securities arbitration procedures would be fully enforceable under the Court's holding in *McMahon*. Indeed, the SEC recently urged the securities industry to offer customers the choice of using AAA-sponsored arbitration as an alternative to arbitration sponsored by self-regulatory organizations. 19 SEC. REG. & L. REP. (BNA) 1388 (1987).

[123] *See* Shell, *The Power to Punish: Authority of Arbitrators to Award Multiple Damages and Attorneys' Fees*, 72 MASS. L. REV. 26 (1987); Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U.L. REV. 953 (1986).

[124] *See* 18 U.S.C. § 1964(c) (1982). One lingering question after *McMahon* relating to the arbitration of RICO claims concerns those few RICO cases that do, in fact, involve organized crime. *McMahon*, 107 S. Ct. at 2345 ("[O]nly 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals" (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 506 (1985) (Marshall, J., dissenting)). Must

trated, that doubt is now put to rest in cases arbitrated under the authority of the FAA.[125]

Finally, securities arbitration after *McMahon* will be a more unified, less expensive procedure than it was before the decision. There will be less initial jousting between the parties in federal court to determine what claims are to stay in court and what claims are to be arbitrated. After the courts clarify the current, temporary confusion over 1933 Act claims, all claims will go to arbitration. Nor will there be as many complex questions related to the collateral estoppel effects of arbitrators' findings in parallel court litigation.[126] Since all issues will be resolved by the arbitrators, collateral estoppel will, in most cases, be a moot point.[127]

A LONGER VIEW: THE ROLE OF PUBLIC LAW IN PRIVATE ADJUDICATION

A Little History

McMahon is notable not only for its practical consequences, but also for its historical significance. Since the beginning of the twentieth century, business organizations and the legal profession have been vigorously debating the proper role of law in informal dispute settlement processes.[128]

a party arbitrate with an organized crime syndicate if a contract with a mob-controlled business contains an arbitration clause? Under the Court's analysis in *McMahon* the answer would appear to be "yes." But it is unlikely that any organization controlled by organized crime would reveal its true identity prior to the signing of a contract with an innocent party. The innocent party may therefore have a strong argument that the arbitration clause was itself induced by fraud and that the clause should therefore be void under section 2 of the FAA. *See* 9 U.S.C. § 2 (1982); *supra* note 11.

[125] In intrastate arbitrations, various state laws limiting the power of arbitrators to award extraordinary remedies may still control. *See* Shell, *supra* note 123, at 26 n.3. Curiously, a recent survey by the American Bar Association of attorneys who participate in construction arbitration indicated that lawyers generally oppose awards of punitive damages by arbitrators. *See* Stipanowich, *Rethinking American Arbitration*, 63 IND. L. J. 425, 467 & n.230 (1988). It is thus possible that judicial acceptance of punitive awards will spark legislative efforts to curb this practice.

[126] *See, e.g.*, Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352 (11th Cir. 1985); Schattner v. Girard, Inc., 668 F.2d 1366 (D.C. Cir. 1981); O'Neill v. Merrill Lynch, Pierce, Fenner & Smith, 654 F. Supp. 347 (N.D. Ill. 1987). *See* Shell, *supra* note 8, at 655-57. Collateral estoppel will remain an issue, however, where there are multiparty disputes involving a single transaction and where some of the parties, but not all, are bound by an arbitration agreement. *See, e.g.*, Terra Resources I v. Burgin, 674 F. Supp. 1072 (S.D.N.Y. 1987); Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 480-81, 502 (1987).

[127] The issue of collateral estoppel may still arise when litigation is related to the transaction at issue in the statutory arbitration and when one of the parties in the second case was a party to the arbitration. The *McMahon* case eliminates the collateral estoppel problem that arises when a single securities transaction gives rise to arbitrable and nonarbitrable claims, however, as was the case in *Dean Witter Reynolds Inc. v. Byrd*. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985).

[128] J. AUERBACH, JUSTICE WITHOUT LAW 101-14 (1983).

The business community has tended to see commercial disputes simply as discrete matters to be *resolved*, as unfortunate aberrations in the normal flow of commerce that need efficient settlement.[129] Lawyers, meanwhile, have generally viewed with alarm the informality, lack of need for precedent, and, most pointedly, lack of need for lawyers that characterizes industry-sponsored arbitration.[130] While the business community of the early twentieth century spoke of the need to resolve disputes according to its "ordinary understanding of what is right and wrong," lawyers voiced their fear that such methods of resolving legal disputes would threaten "the magnificent structure of the law . . . which has built up civilization."[131]

In the formative period of commercial arbitration, the debate over the role of law in private adjudication was the stalking horse for a struggle between powerful interest groups. Members of the business community wanted to "elude lawyers and courts and to retain control over disagreements [among themselves]."[132] Lawyers, meanwhile, sought to retain their near-monopoly over commercial dispute resolution. The debate over the role of law was really a dispute over the role of lawyers.

Jerome Auerbach has illustrated how both the Federal Arbitration Act and commercial arbitration's most influential institution, the American Arbitration Association, came into being in the 1920s as the result of compromises between business groups and the law profession. Once it became clear to lawyers that they would have a substantial voice in the operation of the new dispute-processing system, their opposition vanished and modern commercial arbitration was born.[133]

The issues raised by the *McMahon* decision regarding the role of law in private adjudication are categorically different from those voiced in the early debates. The model of arbitration that gained acceptance in the 1920s involved primarily resolution of disputes *between members* of an industry. In such cases, all parties are members of the community that established the arbitration process and all are likely to know and accept the norms and customs that govern the industry. There is no pressing need for legal accountability when the parties share a strong set of legally acceptable values and seek to use arbitration as a means of preserving and enhancing their relationship.

But arbitration *between an industry and "outsiders"* pursuant to stan-

[129] *Id.* at 102; Stipanowich, *supra* note 125, at 445 ("many in the business community feel that the most significant problem with modern arbitration is the increasing formalization of the process brought about by the legal profession").

[130] J. AUERBACH, *supra* note 128, at 104.

[131] *Id.* at 108 (quoting Minutes of Meeting, Feb. 28, 1923, AAA Archives).

[132] *Id.* at 5.

[133] *Id.* at 104-05, 110.

dard form contracts is quite a different matter. Here, arbitration is being imposed by an industry on another interest group that knows little of the industry's form of arbitration and understands less of the industry's customs. It is this model of arbitration that the *Wilko* Court found troublesome and that the *McMahon* Court has accepted.[134]

Furthermore, the laws called into question in *Wilko* and *McMahon* are interest group statutes—products of the New Deal intended to address perceived imbalances between an industry that had failed to protect the public's welfare and the public itself. Arbitrators deciding such statutory claims are being asked to assume a role in the public regulation of an industry. The contemporary debate over the role of law in arbitration thus triggers concerns over how the law affects the substantive results of cases, not just how lawyers will interact with the arbitration process.

[134] The evolution of the Court's attitude regarding the role of law in private dispute resolution is best illustrated by a direct comparison of *Wilko* and *McMahon*. *Wilko* was a clear victory for the regulatory, "law-centered" view of commercial disputes. The transaction at issue in *Wilko* was a relatively simple matter: a securities customer sustained losses by purchasing a speculative stock recommended by his broker. Wilko v. Swan, 346 U.S. 427 (1953). Two weeks after he purchased the stock, the customer sold his holdings at a loss of just under $4,000 and sued the broker to recover damages. The trial of such a case would be straightforward. Two witnesses would be heard: the customer and the broker. The factfinders would need to assess the credibility of the witnesses and determine if the customer was given sufficient, truthful information regarding the purchase to bear his own risk of loss. But the customer in *Wilko* chose to adjudicate this relatively simple claim under section 12(2) of the 1933 Act, a statutory liability provision passed by Congress specifically to protect public investors like the plaintiff from industry practices like the one at issue by putting the burden of proof on the broker to prove the broker's use of due care. The *Wilko* Court elected to focus on the complexity and importance of this "public" statutory claim rather than on the conventional nature of the underlying dispute. The Court ruled that "arbitrators without judicial instruction on the law," *id.* at 436, were not to be trusted with preserving the plaintiff's statutory rights.

In *McMahon*, the Court adopted precisely the opposite, "dispute-centered" view of commercial adjudication. RICO and section 10(b) claims are at least as complex as the section 12(2) issue at stake in *Wilko*. Nevertheless, the *McMahon* Court did not view such claims as "public" matters suitable for only lawyers to argue and judges to decide. Rather, the Court saw these claims as mere aspects of "run-of-the-mill" litigation between private parties. *McMahon*, 107 S. Ct. at 2345. Interestingly, this aspect of the Court's decision was endorsed by all nine Justices. Justice Blackmun criticized securities industry arbitration when it came to resolving section 10(b) claims, *id.* at 2354 (Blackmun, J., concurring and dissenting), but had no problem consigning much more complicated RICO claims to resolution by arbitrators. The underlying, possibly adhesive nature of the commercial relationship between the parties and importance of the regulatory schemes that were designed to rectify and balance that relationship were ignored. Instead, the Court focused on the routine nature of the underlying transaction and the likelihood that informal dispute settlement would adjudicate the equities of the case "adequately."

The Role of Law in Adjudication

The actual role of law in adjudication is, of course, a profound jurisprudential and empirical question that has long puzzled scholars even in the context of court litigation, let alone arbitration.[135] One model of judicial decision making, favored by "legal formalists" of the late nineteenth and early twentieth centuries, and reflected in contemporary statements by conservative advocates of legal "strict construction," holds that law completely dominates judicial decisions.[136] Judges, according to this view, do nothing more than apply clear legal rules of the facts presented to them. The law, in short, directs judges to their conclusions.

By contrast, Jerome Frank, one of the leading legal "realists" of the 1930s, argued that legal rules play a rather secondary role in judicial decision making.[137] Frank argued that the judge "at his best is an arbitrator, a 'sound man' who strives to do justice to the parties by exercising a wise discretion with reference to the particular circumstances of the case."[138] The real work of judges, according to Frank, was in formulating tentative conclusions or "hunches"[139] based on the facts of cases and then working backwards to "find proper agruments to link up his conclusion to premises which he finds acceptable."[140] The rules and principles of law were but one of many "stimuli" working on the judge's mind to produce a legal decision.[141]

A middle ground between these views was expressed by another "realist," Karl Llewellyn. Llewellyn agreed with Frank that law does not mechanistically determine the results of individual cases, but he argued that law nevertheless plays an important "stabilizing" role in judicial decision making by "molding the judges' notions of what sense, reason, and

[135] *See generally* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372-81 (1978).

[136] J. FRANK, LAW AND THE MODERN MIND 32 (1930) (stating that the "conventional view" is that "judges are not to make or change the law but to apply it"); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 940-41 (1923); Schauer, *Formalism*, 97 YALE L.J. 509, 511-13 (1988) (discussing formalistic reasoning in constitutional cases at the beginning of the twentieth century); Greenhouse, *Precedent for Lower Courts: Tyrant or Teacher?*, N.Y. Times, Jan. 29, 1988, at B7, col. 4 (quoting Bernard H. Siegan, University of San Diego law professor and nominee to the U.S. Court of Appeals for the Ninth Circuit, as stating that his personal views on policy issues were "totally irrelevant" because a judge of a lower federal court has "no discretion whatever," being bound to follow precedents set by the Supreme Court).

[137] J. FRANK, *supra* note 136, at 100-17.

[138] *Id.* at 157.

[139] *Id.* at 104.

[140] *Id.* at 100.

[141] *Id.* at 104.

relevance are."[142] Because the judge is "law-conditioned," his or her interpretation of facts is directed into legally relevant channels that give judicial decisionmaking a distinctive, predictable character.[143]

Arbitral decision making differs significantly from all three of these models in that law does not enjoy the official status in arbitration that it does in court.[144] Nevertheless, law appears to play some role in arbitration. A 1961 study of commercial arbitrators, for example, revealed that, although 90% of the arbitrators surveyed felt that they were free to ignore substantive rules of law in the interests of "doing justice," 80% believed that they ought to render awards in accordance with law.[145] Moreover, the use of legal briefs and references to case authority are common practices in arbitration when lawyers are present as either advocates or arbitrators. Facts such as these suggest that arbitral decision making is, at least in some measure, conducted according to one or more of the judicial models outlined above.

What is conspicuously missing from arbitral decision making that is present in judging, however, is "legal discipline": the discipline imposed by judicial review and the rigor forced upon judges by the requirement that they write opinions. The need for a written opinion requires the judge to connect his or her conclusions to "premises which . . . [are] acceptable,"[146] and means that the soundness of a judgment will be tested on the crucible of relevant legal materials. This test, meanwhile, may lead to a rethinking of the case by the original judge[147] or spur judicial review by an appellate panel. Arbitral decision making, in the interests of promoting speed and efficiency, is designed only to give parties "looser approximations of their rights than those that the law accords them"[148] and simply lacks the legal discipline that characterizes the judicial process.

[142] K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 201 (1960).

[143] *Id.* at 201-03.

[144] Shell, *supra* note 8, at 633.

[145] Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961). This study did not attempt to determine how often arbitrators actually followed the law in practice. *See also* Stipanowich, *supra* note 3, at 473 n.258. A recent ABA survey revealed that roughly 40% of the 476 attorneys polled felt that arbitrators rendered unjustifiable compromise decisions. *Id.* at 458 & n.193. Such a statistic suggests that law plays a secondary role in at least some arbitrations. *See* Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 557 (1960) ("a just result can be achieved by the arbitrator without the observance of legal intricacies").

[146] J. FRANK, *supra* note 136, at 100.

[147] *Id.* ("If [the judge] cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.").

[148] American Almond Prods. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944) (L. Hand, J.).

The concern of many recent critics of alternative dispute resolution in general, and of arbitration in particular, is that, by de-emphasizing law, ADR dilutes special protection legislatively enacted to benefit disadvantaged groups vis a vis a particular industry or economic class.[149] As indicated above, the decision in *McMahon* raises just such issues on behalf of public investors.

For practical reasons having to do with docket congestion and the expense of litigation, we are not likely to see successful attempts to legislatively overrule *McMahon* and return securities disputes to the courts. Rather, attention will center on ways of imposing "legal discipline" on arbitrators to ensure that the law plays a defined role in the resolution of arbitrated disputes. The three institutions that regulate private arbitration—arbitration organizations, the courts, and legislatures—are already beginning to address the issue of legal accountability in commercial arbitration.[150] The subsections below explore the reforms that each of these institutions is likely to undertake in the years ahead.

For Arbitration Organizations: More Procedure

Even before the Supreme Court had spoken in *McMahon*, pressures were beginning to build on arbitration organizations to modify their existing rules. Since *McMahon* was decided, these pressures have grown, and the institutions that govern arbitration are beginning to respond with new, expanded procedures. This trend seems certain to continue until a procedural equilibrium is reached that balances the advantages of arbitral informality with the need to guarantee that statutory rights are not ignored.

The American Arbitration Association was the first to respond to *McMahon* with a new set of rules for securities arbitration proceedings.[151] The new rules, which are based largely on the AAA's Commercial Arbi-

[149] A number of contemporary commentators on the alternative dispute resolution movement, for example, have criticized ADR on the grounds that informal dispute settlement submerges the role of substantive law, denies to the public an output of rules to govern future cases, and works to the disadvantage of minority and ethnic groups. *See, e.g.*, J. AUERBACH, *supra* note 128, at 145; Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671-72 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-90 (1984); Nader, *The Recurrent Dialectic Between Legality and Its Alternatives: The Limitations of Binary Thinking* (Book Review), 132 U. PA. L. REV. 621, 642-45 (1984). Others have questioned whether private arbitrators are institutionally competent to adjudicate statutory claims involving the "public interest." Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TULANE L. REV. 1, 43-45 (1987).

[150] Fletcher, *supra* note 3, at 137; Stipanowich, *supra* note 125, at 477-87.

[151] AMERICAN ARBITRATION ASSOCIATION, SECURITIES ARBITRATION RULES (effective Sept. 1, 1987) [hereinafter AAA SECURITIES ARBITRATION RULES].

tration Rules, provide for appointment of arbitrators mutually agreeable to the parties and informal, orderly proceedings leading to an award.[152] The AAA rules for securities disputes differ from the normal commercial rules in that arbitrators are divided into two categories: those "affiliated with the securities industry" and those not so affiliated. A majority of any panel must be from the "not affiliated" group.[153] In addition, the new AAA rules provide that securities arbitration awards "shall include a statement regarding the disposition of any statutory claims."[154] Written awards of any kind are foreign to the AAA's normal commercial arbitration practice, and the addition of such a requirement for securities disputes is directly responsive to the "legal discipline" problem.

The SEC and the Securities Industry Conference on Arbitration (SICA) have carried on a dialogue since *McMahon* regarding changes to the Uniform Code of Arbitration that governs arbitrations conducted by self-regulatory organizations (SROs).[155] In a September 1987 letter to the SROs, the Director of Market Regulation at the SEC targeted seventeen areas for improvement of industry-sponsored securities arbitration.[156] SICA replied to the SEC in December 1987 and indicated that changes in some, but not all, of the areas of concern to the SEC were being considered.[157]

[152] AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES (Jan. 1, 1988). For a detailed description of the AAA's commercial arbitration process, see Shell, *supra* note 8, at 629-33; Stipanowich, *supra* note 3, at 433-40.

[153] AAA SECURITIES ARBITRATION RULE 13. Under Rule 13, if a panel of three arbitrators is used to decide a case, two must be selected from a list of arbitrators "not affiliated" with the industry, and one is selected from a list of people who are so "affiliated." *Id.* If only one arbitrator is used, as will be the case in most disputes where the amount in controversy does not exceed $20,000, the sole arbitrator comes from the "not affiliated" list. AAA SECURITIES ARBITRATION RULE 54. The meaning of the term "affiliated" has been administratively elaborated by the AAA to include "persons who have, directly or indirectly, within the last five years been employed by or acted as counselors, consultants, advisors, or attorneys to any self-regulatory organization or SRO affiliate" and "partners or employees in law firms that derive substantial income from representing SROs or SRO affiliates." 2 ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) 14 (Jan. 7, 1988).

[154] AAA SECURITIES ARBITRATION RULE 42.

[155] SICA is an informal assembly of representatives from all SROs having active arbitration programs and includes a number of "public" members. *See* Fifth SICA Report, *supra* note 92, at 2-3. SICA is responsible for drafting and modifying the Uniform Code of Arbitration, but the Code must be adopted by each SRO and submitted to the SEC to be legally binding. *Id.* at 4-6. For a detailed description of the Uniform Code, see Shell, *supra* note 8, at 629-33.

[156] *See* 1 ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) 230-31 (Oct. 1, 1987). These recommendations ranged from suggestions regarding the selection and identity of arbitrators to comments on discovery, written awards, and arbitrator disclosure, training and evaluation. *Id.*; 19 SEC. REG. L. REP. (BNA) 1387 (1987); Ingersoll, *SEC Proposes New Rules for Arbitration*, Wall St. J., Sept. 11, 1987, at 29, col. 2.

[157] *See* 19 SEC. REG. L. REP. (BNA) 1926 (1987).

In the spring of 1988, SICA took its first steps toward formalizing some of the rule changes sought by the SEC.[158] It adopted new rules regarding, among other matters, (1) the notice given parties regarding the selection of arbitrators,[159] (2) pre-hearing conferences and discovery,[160] (3) sub-

[158] SICA adopted a number of rule changes at its March 1988 meeting. *See* Salwen, *Investors Swamp Securities-Arbitration System*, Wall St. J., Mar. 15, 1988, at 37, col. 3. It then revised several of these rules in May 1988. 2 ALTERNATIVE DISPUTE RESOLUTION REP. 157 (Apr. 28, 1988). The rules quoted in the next several notes are set forth for illustrative purposes as indicating the direction of reform rather than as final statements of what the new Uniform Code will look like.

[159] As adopted by SICA in May 1988, the new proposed section 9 of the Uniform Code of Arbitration would read as follows:

SECTION 9

NOTICE OF SELECTION OF ARBITRATORS

The Director of Arbitration shall inform the parties of the names and employment histories of the arbitrators for the past ten (10) years, as well as information disclosed pursuant to Section 11, at least eight (8) days prior to the date fixed for the initial hearing session. In the event that any arbitrator, after appointment and prior to the first hearing session, should resign, die, withdraw, be disqualified or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a new member to the panel to fill any vacancy. The Director of Arbitration shall inform the parties of the name and employment history of the arbitrator for the past ten (10) years, as well as information disclosed pursuant to Section 11, as soon as possible. A party may make further inquiry of the Director of Arbitration concerning the background of any arbitrator.

[160] As proposed by SICA, a new section 20 would govern prehearing discovery and conferences as follows:

SECTION 20

GENERAL PROVISION GOVERNING PRE-HEARING PROCEEDINGS

(a) REQUESTS FOR DOCUMENTS AND INFORMATION

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or information should be specific, related to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.

(b) DOCUMENT PRODUCTION AND INFORMATION EXCHANGE

(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.

poenas,[161] (4) disclosures required by arbitrators,[162] and (5) the record of

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections raised by parties to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.

(4) Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a selected arbitrator under paragraph (e) of this section.

(c) PRE-HEARING EXCHANGE

At least ten (10) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession and shall identify witnesses they intend to present at the hearing. The arbitrators may exclude from the arbitration any documents not exchanged or witnesses not identified. This paragraph does not require service of copies of documents or identification of witnesses which the parties may use for cross-examination or rebuttal.

(d) PRE-HEARING CONFERENCE

(1) Upon written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone. The presiding person shall seek to achieve agreement among the parties on any issues that relate to the pre-hearing process or to the hearing, including but not limited to exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulation of facts, identification and briefing of contested issues, and any other matters which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred by the Director of Arbitration to a single member of the Arbitration Panel for decision.

(e) DECISIONS BY SELECTED ARBITRATOR

The Director of Arbitration may appoint a single member of the Arbitration Panel to decide all unresolved issues referred to under this section and section 21. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances and production of documents, and set deadlines. Decisions under this paragraph shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The arbitrator may elect to refer any issue under this paragraph to the full panel.

[161] SICA's proposed rule reads as follows:

SECTION 21

SUBPOENA AND POWER TO DIRECT APPEARANCES

the arbitration proceedings.[163]

SICA and the SEC are also considering the need to revise the manner

(a) SUBPOENAS

The arbitrator(s) and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. All parties shall be given a copy of the subpoena upon its issuance. The parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

(b) POWER TO DIRECT APPEARANCE AND PRODUCTION OF DOCUMENTS

The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the (name of self regulatory organization) and/or the production of any records in the possession or control of such persons, members or member organizations. Unless the arbitrator(s) direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.

[162] As proposed by SICA, new section 23 of the Uniform Code would read as follows:

SECTION 23

DISCLOSURES REQUIRED BY ARBITRATORS

(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners or business associates.

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

(c) The obligation to disclose interests or relationships described in Paragraph (a) above is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which arise, or which are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator who discloses such information. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section if the arbitrator who disclosed the information is not removed.

[163] The new section 25 of the Uniform Code proposed by SICA would read as follows:

in which arbitration clauses are presented for signature to public customers and the desirability of requiring some form of written award. SICA has recommended that the individual SROs examine the disclosures made to customers prior to their signing of arbitration agreements,[164] and the SEC has been requested by its staff to recommend legislation requiring that customer agreements be voluntary.[165] The SEC also recently drafted and sent to SICA a model, one-page, written award statement to be used by the industry.[166]

These developments signal the beginning of a general "legalization" of commercial arbitration procedures that will have far-reaching effects on the way arbitration is conducted. There will be more "law" in the new process, and more lawyers will be needed to negotiate discovery disputes, draft legal briefs, and write awards. Enhanced procedural protection in arbitration should also mean that arbitral findings and rulings will have greater preclusive effects in later, related judicial proceedings.[167]

In the Courts: More Claims of Fraud, Unconscionability, and "Manifest Disregard" of Law

With the advent of widespread arbitration of statutory claims, there is likely to be an increased volume of legal objections to the initial enforcement of arbitration agreements and the enforcement of final arbitration awards. The courts will probably be hostile to the former, but may eventually become more sympathetic to the latter.

The FAA permits courts to refuse enforcement of arbitration agreements on "such grounds as exist at law or in equity for the revocation of any contract"[168] so long as the objection goes specifically to the arbitration clause and not to the contract as a whole.[169] The Supreme Court has repeatedly suggested, but never held, that "fraud or excessive economic power" may constitute grounds for the revocation of a predispute agree-

SECTION 25

RECORD OF PROCEEDINGS

A verbatim record by stenographic reporter or tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have a transcribed record, the cost of such transcription shall be borne by the parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed.

[164] 2 ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) 157 (Apr. 28, 1988).

[165] Ricks, *SEC May Seek Ban on Clauses for Arbitration*, Wall St. J., June 2, 1988, at 26, col. 5.

[166] 2 ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) 157 (Apr. 28, 1988).

[167] Shell, *supra* note 8, at 667-68.

[168] 9 U.S.C. § 2 (1982).

[169] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

ment to arbitrate.[170] Plaintiffs who have signed arbitration agreements from a relatively weak bargaining position, who have failed to read their contracts, or who simply did not understand the significance of the arbitration clause they signed have frequently sought relief under the "revocation" exception. But courts have been notably unsympathetic to such claims and are likely to remain so in the wake of *McMahon*.[171]

A recent case in the Southern District of New York illustrates well both the procedural morass and the ultimate futility of this litigation strategy. In *Rush v. Oppenheimer & Co.*,[172] a securities customer alleged that his broker had defrauded him by urging that he sign, without reading, a margin agreement containing an arbitration clause. The district court decided that the plaintiff's fraud claim regarding the contract as a whole was suitable for arbitration. But it ruled that the customer was entitled to a jury trial on the narrow issue of whether the arbitration agreement was specifically induced by fraud.

After a full trial on this issue, the jury returned a verdict for the customer, holding that the customer had, in fact, been induced to sign the arbitration agreement by the broker's misrepresentations. The court then ruled that there was no reasonable basis for the jury's finding and entered a judgment n.o.v. for the defendant.[173] The entire case was finally ordered to arbitration, some four years after it was filed.

The leading case since *McMahon* dealing with challenges to the enforcement of arbitration agreements on the grounds of "fraud in the inducement" and "unconscionability" is the Ninth Circuit's decision in *Cohen v. Wedbush, Noble, Cooke, Inc.*.[174] In *Cohen*, a customer lost $3 million in securities when his broker sold out his account to meet a margin call. The customer-broker margin agreement contained an arbitration clause calling for arbitration under the rules of either the National Association of Securities Dealers, Inc. or the New York Stock Exchange. Relying on several California state cases,[175] the customer claimed that arbitration pursuant to rules drafted by the securities industry was unconscionable.

The Ninth Circuit, citing *McMahon*, rejected the customer's claim. The court noted that securities industry arbitration is regulated by the SEC and that the SEC had approved the rules to which the customer objected.

[170] *McMahon*, 107 S. Ct. at 2337; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 613, 627 (1985); Southland Corp. v. Keating, 465 U.S. 1, 16 n.11 (1984).

[171] *See, e.g.*, Coleman v. Prudential-Bache Sec., Inc., 802 F.2d 1350 (11th Cir. 1986); Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 733 F.2d 59 (8th Cir. 1984).

[172] 681 F. Supp. 1045 (S.D.N.Y. 1988).

[173] *Id.* at 1054-55.

[174] 841 F.2d 282 (9th Cir. 1988).

[175] Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 183 Cal. App. 3d 1097, 228 Cal. Rptr. 345 (1986); Lewis v. Prudential-Bache Sec., Inc., 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (1986).

The court held that, in these circumstances, adoption of the plaintiff's argument "would frustrate [a] carefully crafted regulatory scheme."[176] Nor was the court impressed that the margin agreement was a contract of adhesion and that the customer did not read the contract before signing it. "[S]tate law adhesion contract principles may not be invoked to bar arbitrability of disputes" under the FAA,[177] stated the court, and there is "no unfairness in expecting parties to read contracts before they sign them."[178] The arbitration agreement was therefore enforced as a matter of law.

If legal objections to arbitration at the outset of the proceedings are fruitless, what of objections to the award when the process is completed? The introduction to complex, supercompensatory statutory schemes such as RICO and the antitrust laws into the arbitration context raises the distinct possibility that courts will be asked to confirm what are clearly compromise or legally defective awards. It seems likely that at least some courts will find it uncomfortable to confirm such decisions.[179] Stricter judicial review, in turn, will lead to greater legal sophistication by arbitrators and more "law" in the arbitration process.[180]

The doctrine most suited to bear the burden of enhanced judicial review of the legal sufficiency of arbitration awards is the doctrine of "manifest disregard" of the law.[181] In *Wilko*, the Court stated that "a failure of the arbitrators to decide in accordnace with the provisions of the Securities Act" might well constitute grounds for vacating the award under the FAA.[182] And in *McMahon*, the Court stated that judicial review of awards under the FAA "is sufficient to ensure that arbitrators comply with the requirements of the statute."[183]

[176] *Cohen*, 841 F.2d at 286.

[177] *Id.*

[178] *Id.* at 287.

[179] Professor John Allison suggested several years ago that courts undertake an enhanced supervisory role in the arbitration of antitrust cases as a way of accommodating "the perceived conflict between arbitration and antitrust policies." Allison, *Arbitration Agreements and Antitrust Claims: The Need For Enhanced Accomodation of Conflicting Public Policies*, 64 N.C.L. REV. 219, 271-74 (1986). After *McMahon*, the pressures for such supervision are certain to increase.

[180] Some commentators have already begun to suggest that the securities industry consider requiring arbitrators to decide cases according to legal principles. *See* Lipton, *The Standard On Which Arbitrators Base Their Decisions: The SROs Must Decide*, 16 SEC. REG. L.J. 3, 19-20 (1988).

[181] *See supra* note 16 and accompanying text.

[182] Wilko v. Swan, 346 U.S. at 436. Justice Frankfurter, who dissented in *Wilko*, commented that the Justices were "all agreed" that "[a]rbitrators may not disregard the law." *Id.* at 440 (Frankfurter, J., dissenting).

[183] *McMahon*, 107 S. Ct. at 2340.

The lower courts, however, have been reluctant to use the "manifest disregard" standard as a meaningful tool of judicial review. For example, the Second Circuit recently stated that to run afoul of the standard:

> [T]he [legal] error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.[184]

With antitrust and RICO claims at issue, however, it is relatively easy to imagine situations in which even the Second Circuit's limited view of "manifest disregard" might apply to overturn an award. For example, arbitrators may award a plaintiff only single damages and no attorneys' fees on a RICO or antitrust claim even though both laws mandate awards of treble damages and attorneys' fees whenever the defendant is found to have violated the statute. It would be clear in such cases that the arbitrators were aware of the relevant law and simply chose, perhaps out of a desire for compromise, to ignore the requirement of the statute. However well-meaning the arbitrators' decision in such a case, the award would exhibit a "manifest disregard" of applicable law.

As judicial experience with the arbitration of statutory claims broadens, courts that are dismayed with what they perceive to be inconsistent applications of statutes may be tempted to go beyond the Second Circuit's limited standard and adopt the Supreme Court's broader statement that arbitrators must "comply with the requirements of the statute."[185] Such a legal test would give the "manifest disregard" standard additional bite.[186]

From the Legislatures: More Arbitration Statutes

Commercial arbitration has been rapidly overtaking conventional litigation as a means of settling civil disputes for several years.[187] This rise

[184] *See* Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 933-34 (2d Cir. 1986).

[185] *McMahon*, 107 S. Ct. at 2340.

[186] At least one case has given a hint that damage awards will be more closely reviewed in the post-*McMahon* era. In *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 674 F. Supp. 920 (D.D.C. 1987), the court was asked to confirm an arbitration award of $46,000 that was based on a securities customer's demand for $260,000 in damages. There was no record of the proceedings, and the arbitrators provided no written explanation for the award. The court found that judicial review in these circumstances was "extremely difficult." *Id.* at 922. Rather than accept the award at face value, the court remanded the matter to the panel for "clarification." *Id.* at 921. Clearly frustrated, the court argued that "an arbitrator's award cannot be absolutely immune from scrutiny." *Id.* at 922.

[187] *See* Brown, Shell & Tyson, *supra* note 47, at 33 n.92 (noting that in 1986 securities arbitration filings were rapidly overtaking the number of cases filed in federal court under all the securities and commodities laws).

in popularity, in turn, has begun to alarm yet another generation of lawyers, who are uncomfortable with the non-legal characteristics of this process. Rather than seek reform from within arbitration organizations, some lawyers have chosen to draft an entirely new arbitration statute that answers their concerns.[188]

In February 1987, the New Jersey legislature enacted the New Jersey Alternative Procedure For Dispute Resolution Act[189] in response to growing dissatisfaction with the arbitral process.[190] A bill modeled on the New Jersey legislation has been introduced in Congress.[191]

The centerpiece of the New Jersey statute is a provision that requires arbitrators (called "umpires" under the Act) to decide all cases according to substantive law.[192] Formal, accelerated discovery is provided that includes both document exchanges and depositions,[193] and there is provision for interlocutory appeals of various procedural issues.[194] Finally, the arbitrator's award must be in writing and state findings of fact and conclusions of law.[195] The award is fully reviewable by a court for legal error.[196]

This statutory scheme imposes full "legal discipline" on arbitrators and has predictably aroused opposition from institutions such as the American Arbitration Association.[197] The statute, however, is but another signal that the interest groups whose substantive rights are at stake do not intend to go meekly into a post-*McMahon* world and permit statutory claims to become mere collateral aspects of transactional strife.[198]

Congress is also actively addressing the specific issue of securities arbitration in the wake of *McMahon*. In June 1988, the House Subcommittee on Telecommunications and Finance held hearings on a bill that would forbid brokerage firms from requiring arbitration as a condition of doing business with a public customer and would mandate full disclosure to

[188] Comment, *The New Jersey Alternative Procedure For Dispute Resolution Act: Vanguard of a "Better Way"?*, U. PA. L. REV. 1723, 1751-52 n.173 (1988).

[189] N.J. STAT. ANN. § 2A:23A-1 to 19 (West 1987).

[190] Comment, *supra* note 188, at 1751-60.

[191] *Id. See* 1 ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) 131 (July 9, 1987).

[192] N.J. STAT. ANN. § 2A:23A-12(e) (West 1987).

[193] Comment, *supra* note 188, at 1755-57.

[194] N.J. STAT. ANN. § 2A:32A-7 (West 1987).

[195] *Id.* §§ 2A:23A-12(a), (e).

[196] *Id.* §§ 2A:23A-13(c)(5) & (e)(4).

[197] Comment, *supra* note 188, at 1753 n.180.

[198] California is also considering post-*McMahon* legislation that would require securities brokers to fully disclose to customers the full effects of signing an arbitration clause prior to execution of contract documents. 2 ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) 138 (Apr. 14, 1988). Massachusetts regulators recently adopted such rules. Harlan, *Massachusetts Says Brokers Can't Insist on Arbitration*, Wall St. J., Sept. 12, 1988, at 41, col. 5.

customers of the legal effects of an agreement to arbitrate.[199] These hearings, as well as similar hearings conducted in March 1988, addressed the fairness of the arbitration process and the issue of whether customer agreements to arbitrate are, in fact, voluntary.[200] It thus appears quite likely that congressional and well as judicial and regulatory pressures will move arbitration toward a more legally accountable model.

CONCLUSION

The Supreme Court's decision in *McMahon* contains many lessons. On its most immediate level, the case illustrates the fragility of precedent in the hands of the "Rehnquist Court." There is little doubt that, viewed strictly from the perspective of applying precedent under our common law system, *Wilko* required the Court to find that 1934 Act claims, like claims under the 1933 Act, were nonarbitrable. The 1933 Act and 1934 Act are complementary in purpose, virtually identical in the relevant portions of their texts, and contain substantive rights central to the functioning of the nation's capital markets. Moreover, as argued by Justice Blackmun, the 1975 amendments to the 1934 Act strongly suggest that Congress was in accord with the *Wilko* doctrine in recent years.

Yet the Court chose to ignore *Wilko*'s "law-centered" concern for statutory rights and to focus instead on the arbitration process as a means of resolving "run-of-the-mill" securities disputes. The categorization of legal claims arising from securities transactions as statutory thus became secondary to the routine nature of securities controversies.

If *McMahon*'s legal reasoning is flawed, does the decision make sense as policy? Yes. Securities disputes between customers and brokers are, as the Court sensed, too much a part of everyday life in the stock market to be handled in the complex, dual-forum manner that had evolved under the teachings of *Wilko* and *Byrd*. Because efficient court adjudication of all securities disputes is functionally impossible given the current judicial overload of civil cases, arbitration is the only sensible alternative. Indeed, in light of these policy imperatives and the Court's willingness to ignore precedent, the *McMahon* Court should have taken the last step demanded by the logic of its opinion and overruled *Wilko*. By killing *Wilko* but refusing to bury it, the Court left customers and brokers to engage in yet another round of expensive and time-consuming litigation to resolve the issue of arbitrating claims under the 1933 Act. The Court had an op-

[199] H.R. 4960, 100th Cong., 2d Sess., 134 CONG. REC. 4992 (1988).

[200] *Securities Arbitration Reform Act of 1988: Hearings on H.R. 4960 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988); *Securities Arbitration: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988).

portunity to construct a fully integrated jurisprudence of securities litigation in *McMahon* but stopped short of doing so out of a half-hearted respect for stare decisis.

From a broader perspective, as this article as shown, *McMahon* sets the stage for the next era of commercial arbitration. Arbitration after *McMahon* promises to evolve into a forum that is equal to and parallel with judicial litigation. Organizations such as the American Arbitration Association, the Securities Industry Conference on Arbitration, and others can be expected to take steps to assure the public that statutory claims will be handled in a responsible, accountable manner. The courts are likely to hear new, more urgent pleas to examine arbitration awards rendered in "manifest disregard" of the law. And both legislatures and regulators will move to inject procedural requirements into the arbitration process to guarantee that arbitration is truly "voluntary" and that substantive rights are not lost in the rush to expedite the processing of disputes.

The post-*McMahon* movement toward "legalization" of arbitration is not regrettable, as some commentators have indicated.[201] Rather, it is part of a dialectic that has animated policy debate since commercial arbitration first became a popular alternative to the courts for the resolution of business disputes. Private dispute resolution and public law are uneasy bedfellows. Policymakers are simply being responsible when they attempt to balance the procedural and substantive aspects of justice in arbitration. As private adjudication forums assimilate more and more of the public policy disputes that originate in the larger society, this process can be expected to lead to more changes in both the substantive law and arbitration. Reformers must, of course, take care to preserve the essential efficiencies of arbitration as an alternative to the costs and delays of court adjudication. The balance to be struck between justice and efficiency is a delicate one, and a shift too far in either direction will prompt public criticism. But the task of reform is essential if public confidence in alternatives to formal court litigation is to be won. That confidence, meanwhile, will be essential to social stability if, as seems likely, our society's appetite for legal conflict continues to grow.

[201] *See* Fletcher, *supra* note 3, at 137.