Fordham Law Review

Volume 59 | Issue 1 Article 2

1990

Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling

C. Steven Bradford

Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling

Cover Page Footnote

Research for this article was funded in part by a Ross McCollum Summer Research Grant. I wish to thank Professor Josephine Potuto for helpful comments on an earlier draft. I also wish to thank Todd Bice, University of Nebraska College of Law Class of 1991, for his excellent research assistance.

FOLLOWING DEAD PRECEDENT: THE SUPREME COURT'S ILL-ADVISED REJECTION OF ANTICIPATORY OVERRULING

by
*C. STEVEN BRADFORD**

INTRODUCTION

STARE decisis is an integral, accepted principle of American and common-law jurisprudence. The idea that courts should follow past decisions, whether of the same or a higher court, was accepted before this nation was born[1] and continues to be generally accepted today. Criticism

* Assistant Professor of Law, University of Nebraska College of Law. B.S. 1978, Utah State University; J.D. 1982, Harvard Law School; M.P.P. 1982, Harvard University.

Research for this article was funded in part by a Ross McCollum Summer Research Grant. I wish to thank Professor Josephine Potuto for helpful comments on an earlier draft. I also wish to thank Todd Bice, University of Nebraska College of Law Class of 1991, for his excellent research assistance.

1. Blackstone wrote: "The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration." 1 W. Blackstone, Commentaries *70.

of stare decisis is equally ancient, however.[2] A countervailing tradition allows a court to overrule precedent to correct its errors and develop the law. "The life of the law has not been logic," Holmes wrote; "it has been experience."[3] Stare decisis has never been an inexorable command in the American system; courts have always been willing to overrule under the proper circumstances. The United States Supreme Court in particular has never held an absolute view of the validity of its own prior decisions.[4]

This willingness to overrule has created a problem for inferior courts, for even stronger than the tradition that a court should follow its own prior decisions is the tradition that a court should follow the prior decisions of a superior court in the same appellate system.[5] The Supreme Court's willingness to change doctrine creates situations in which a lower court cannot be completely loyal to the Supreme Court: a Supreme Court precedent directly applies to the case at hand, but later Supreme Court cases cast doubt on that precedent, either rejecting its analysis or applying a different test to an analogous issue. If the lower court is convinced that the Supreme Court would no longer follow the doubtful precedent, must the lower court nevertheless pay heed to stare decisis and apply that precedent? Or should it be faithful to the later decisions and rule as it believes the Supreme Court, given the opportunity, now would?

Two competing lines of decision arose in the lower federal courts. One line of cases, apparently a minority view, held that lower courts must blindly and absolutely follow Supreme Court decisions until the Supreme Court expressly overrules them. According to this view, lower courts owe allegiance to earlier Supreme Court precedent, regardless of how doubtful that precedent may have become in light of Supreme Court developments in other areas. The majority view rejected this wooden appli-

---

2. Jonathan Swift wrote:

> It is a maxim among . . . lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of *precedents*, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly.

J. Swift, Gulliver's Travels 201 (L. Landa ed. 1960). In *The Merchant of Venice*, Portia criticized precedent thus:

> It must not be, there is no power in Venice
> Can alter a decree established.
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state.

W. Shakespeare, *The Merchant of Venice*, Act IV, Sc. 1 (1596-97).

3. O.W. Holmes, The Common Law (1881), Lecture I.

4. *See* Eskridge, *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1361 (1988).

5. *See* Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 402 n.6 (1988); Kelman, *The Force of Precedent in the Lower Courts*, 14 Wayne L. Rev. 3, 4 (1967); *see also* Note, *Anticipatory Stare Decisis*, 8 U. Kan. L. Rev. 165, 167 (1959) (discussing circumstances in which a lower court may be justified in departing from precedent established by a higher court).

cation of stare decisis, arguing that lower courts should recognize when a Supreme Court precedent is effectively dead, whether or not the Supreme Court has acknowledged the murder. According to this view, lower courts should disregard Supreme Court decisions when they are reasonably sure[6] that the Supreme Court would overrule them given the opportunity. This rejection of doubtful precedent by lower courts has been termed anticipatory overruling.[7]

Over the years, the Supreme Court reviewed lower court decisions taking both positions but not until 1989 did the Court express a clear opinion on the validity of anticipatory overruling. Whether the lower court blindly followed a doubtful precedent that the Supreme Court later reversed, rejected a precedent that the Supreme Court later reaffirmed, or reached a decision with which the Supreme Court ultimately agreed, the Court was silent on the question of anticipatory overruling.

In the 1989 case *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[8] the Court finally spoke in favor of blind obedience to precedent. *Rodriguez* involved a conflict between two Supreme Court decisions concerning arbitration of federal securities claims. In 1953, in *Wilko v. Swan*,[9] the Supreme Court held that predispute agreements to arbitrate claims arising under the Securities Act of 1933[10] violated that Act's antiwaiver provisions and were thus unenforceable. For over twenty years, most courts assumed that the *Wilko* ruling also applied to claims arising under the Securities Exchange Act of 1934.[11] Courts reasoned that the two statutes have virtually identical antiwaiver provisions and are interpreted as interrelated, interdependent components of a single regulatory scheme.[12] However, in 1987, in *Shearson/American Express, Inc. v. McMahon*,[13] the Supreme Court rejected much of *Wilko*'s reasoning and held that predispute agreements to arbitrate claims arising under the 1934 Act are enforceable. The *McMahon* majority refused to overrule *Wilko* and expressly reserved the 1933 Act issue.[14]

---

6. As discussed below, the level of certainty required varied from court to court. *See infra* notes 25-26 and accompanying text.

7. *See* Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 Fordham L. Rev. 53, 53 (1982).

8. 109 S. Ct. 1917 (1989).

9. 346 U.S. 427 (1953), *overruled*, Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1922 (1989).

10. Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1988).

11. Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1988).

12. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). In *Hochfelder*, the Court noted that

> The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities. As the Court indicated in *SEC v. National Securities, Inc.*, 'the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen.'

Id. at 206 (citations omitted).

13. 482 U.S. 220 (1987).

14. *See id.* at 234.

McMahon left the lower courts in a quandary. The Supreme Court had rejected *Wilko*'s rationale, thereby casting its holding into doubt, but had not expressly overruled the case. Should the lower courts follow *Wilko* or not? The resulting decisions reflected the doctrinal split concerning anticipatory overruling. Approximately half of the subsequent decisions followed *Wilko*.[15] The other half held that *Wilko* could not survive *McMahon* and rejected *Wilko* even though the Supreme Court had expressly refused to overrule it.[16]

In *Rodriguez*, the court expressly overruled *Wilko* and extended the *McMahon* holding to 1933 Act claims, in effect confirming the prediction of those courts that viewed *McMahon* as overruling *Wilko*. Both the majority and the dissent in *Rodriguez*, however, lashed out at the lower courts for what the Justices saw as a premature rejection of *Wilko*. According to the Supreme Court, lower courts owe absolute allegiance to Supreme Court opinions, doubtful or not, until the Supreme Court expressly overrules them. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," the *Rodriguez* majority wrote, "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[17] With no further discussion of the issue, the Supreme Court rejected anticipatory overruling.

A Supreme Court position on this jurisprudential question was overdue. Unfortunately, the Court chose the wrong position. By focusing so narrowly on an inflexible rule of stare decisis, the Court overlooked the very policies that stare decisis is meant to serve. Anticipatory overruling makes the law more responsive to change, it ensures litigants fair and equal treatment, it enhances the predictability of the law and it promotes judicial efficiency.[18] Instead of condemning the lower courts that refused to follow *Wilko*, the Supreme Court should have applauded them.

---

15. *See, e.g.*, Sacco v. Prudential-Bache Sec., Inc., 703 F. Supp. 362, 364 (E.D. Pa. 1988) (applying *Wilko*, district court held arbitration agreement unenforceable with respect to claims alleging misrepresentation under Securities Act of 1933); Araim v. Painewebber, Inc., 691 F. Supp. 1415, 1417 (N.D. Ga. 1988) (finding that *Wilko* was still good law, court held claims under Securities Act not subject to mandatory arbitration); McCullough v. Shearson Lehman Bros., Inc., Nos. 86-2752-2758 (W.D. Pa. Feb. 18, 1988) (WESTLAW, 1988 WL 23008) (claims brought under section 12(2) of 1933 Act not arbitrable); Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 700 F. Supp. 1092, 1095 (S.D. Fla. 1987) (following *Wilko*, arbitration could not be compelled).

16. *See, e.g.*, Rodriguez de Quijas v. Shearson/Lehman Bros., 845 F.2d 1296, 1298 (5th Cir. 1988) (finding that *McMahon* evidenced the demise of *Wilko*, court held agreements to arbitrate Securities Act claims enforceable), *aff'd*, 490 U.S. 477 (1989); Schuster v. Kidder, Peabody & Co., 699 F. Supp. 271, 275 (S.D. Fla. 1988) (same); Kavouras v. Visual Prods. Sys., 680 F. Supp. 205, 207 (W.D. Pa. 1988) (same); Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 673 F. Supp. 1009, 1011 (C.D. Cal. 1987) (same).

17. Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1921-22 (1989).

18. *See infra* Part V.

I. ANTICIPATORY OVERRULING PRIOR TO *RODRIGUEZ*

The doctrine of anticipatory overruling rejected in *Rodriguez* was in no sense revolutionary. Anticipatory overruling has been vigorously debated in the lower courts for some time. Prior to *Rodriguez*, a number of lower court opinions indicated, often in dictum, a willingness to disregard a Supreme Court precedent if convinced that the Supreme Court would not follow it.[19] The few scholars writing on the issue generally agreed.[20]

Another line of cases stated that lower courts must follow Supreme Court precedent, doubtful or not, until it had been expressly overruled.[21]

19. *See* Miller v. United States, 868 F.2d 236, 241 (7th Cir. 1989); Levine v. Heffernan, 864 F.2d 457, 461 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989); Colby v. J.C. Penney Co., Inc., 811 F.2d 1119, 1123 (7th Cir. 1987); Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986); Indianapolis Airport Auth. v. American Airlines, 733 F.2d 1262, 1272 (7th Cir. 1984); Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197, 201 (7th Cir. 1983); Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982); Buzynski v. Oliver, 538 F.2d 6, 7 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976); In re Korman, 449 F.2d 32, 39 (7th Cir. 1971), *rev'd sub nom.* United States v. Korman, 406 U.S. 952 (1972); Breakefield v. District of Columbia, 442 F.2d 1227, 1230 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 909 (1971); Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968); Spector Motor Serv. v. Walsh, 139 F.2d 809, 814 (2d Cir. 1943), *vacated sub nom.* Spector Motor Serv. v. McLaughlin, 323 U.S. 101 (1944); Perkins v. Endicott Johnson Corp., 128 F.2d 208, 217-18 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943); Healy v. Edwards, 363 F. Supp. 1110, 1117 (E.D. La. 1973), *vacated*, 421 U.S. 772 (1975); Fishkin v. United States Civil Serv. Comm'n, 309 F. Supp. 40, 45 (N.D. Cal. 1969), *appeal dismissed*, 396 U.S. 278 (1970); Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd., 298 F. Supp. 339, 350 (W.D. Wis. 1969); Harris v. Younger, 281 F. Supp. 507, 511 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971); Gold v. DiCarlo, 235 F. Supp. 817, 819 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520 (1965); Barnette v. West Virginia Bd. of Educ., 47 F. Supp. 251, 252-53 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943); Mason v. United States, 461 F.2d 1364, 1374-75 (Ct. Cl. 1972), *rev'd*, 412 U.S. 391 (1973); *see also* United States v. Caldwell, 543 F.2d 1333, 1372 (D.C. Cir. 1974) (opinion of Bazelon, C.J. in support of rehearing en banc) (lower court should predict how the Supreme Court would rule and not depend solely on Court's failure to expressly overrule precedent), *cert. denied*, 423 U.S. 1087 (1976); United States v. Girouard, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting) (stare decisis does not require lower courts to blindly follow higher courts), *rev'd*, 328 U.S. 61 (1946).

20. *See* Kelman, *supra* note 5, at 26; Kniffin, *supra* note 7, at 87-89; Note, *supra* note 5, at 168; Comment, *Stare Decisis and the Lower Courts: Two Recent Cases*, 59 Colum. L. Rev. 504, 508 (1959); Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 Wash. L. Rev. 87, 89 (1984) [hereinafter Comment, *Predicting the Demise*]; Comment, *The Attitude of Lower Courts to Changing Precedents*, 50 Yale L.J. 1448, 1457 (1941).

21. *See Caldwell*, 543 F.2d at 1369-70; Northern Virginia Regional Park Auth. v. United States Civil Serv. Comm'n, 437 F.2d 1346, 1350-1351 (4th Cir.), *cert. denied*, 403 U.S. 936 (1971); Ashe v. Swenson, 399 F.2d 40, 45-46 (8th Cir. 1968), *rev'd*, 397 U.S. 436 (1970); Ferina v. United States, 340 F.2d 837, 839 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965); United States v. Chase, 281 F.2d 225, 229 (7th Cir. 1960); Lichter Found., Inc. v. Welch, 269 F.2d 142, 145 (6th Cir. 1959); Blalock v. United States, 247 F.2d 615, 621 (4th Cir. 1957); United States v. Ullman, 221 F.2d 760, 762 (2d Cir. 1955), *aff'd*, 350 U.S. 422 (1956); Sears v. Hassett, 111 F.2d 961, 964-65 (1st Cir. 1940); Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1181 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir.

The strongest defense of this absolute position was written by Justice Blackmun when he was on the Eighth Circuit Court of Appeals. In refusing to disregard two ten-year-old Supreme Court double jeopardy cases, he wrote:

> This court is not the Supreme Court of the United States. We therefore are not free to disregard an existing fiat and still live holding of the Supreme Court even though that holding is one by a sharply divided tribunal and even though only one of the Justices who participated in the majority decision remains active. A change in constitutional concept and the overruling of an existing decision, if indicated at all, is for the Supreme Court and is not for us. Firmness of precedent otherwise could not exist. Further, we deal here with no mere implication or interpretation of language. We are confronted with a specific holding.[22]

Not every statement of the rigid rule of stare decisis was absolute, however. Some of the cases hedged enough to allow the court to depart from that rule in appropriate circumstances.[23] In many other cases that stated

---

1982), *cert. denied*, 464 U.S. 863 (1983); United States v. Swift & Co., 189 F. Supp. 885, 901 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961); United States v. Silverman, 166 F. Supp. 838, 840 (D.D.C. 1958), *aff'd*, 275 F.2d 173 (D.C. Cir. 1960), *rev'd*, 365 U.S. 505 (1961); Family Sec. Life Ins. Co. v. Daniel, 79 F. Supp. 62, 68-69 (E.D.S.C. 1948), *rev'd*, 336 U.S. 220 (1949).

Chase is representative of courts adhering to a strict rule of stare decisis. In *Chase*, the court of appeals was asked to reject the Supreme Court's holding in Rogers v. United States, 340 U.S. 367 (1951). Judge Duffy wrote for the court:

> The Rogers case was a five to three decision. It has been frequently criticized. It is extremely doubtful that the holding in Rogers would be followed by the present Supreme Court. Nevertheless, if the Rogers decision is applicable to the situation before us, we must follow that decision, at least until such time as the Supreme Court may overrule it.

Chase, 281 F.2d at 230. Although that absolute view has been rejected by more recent Seventh Circuit cases, it has at least survived on that court in a relatively recent concurrence. *See* Norris v. United States, 687 F.2d 899, 909 (Cudahy, J., concurring). In *Norris*, Judge Cudahy wrote:

> The majority urges that we seek out the living law and not be content with the dead. *Ante* at 904. I would be the last to denigrate this unexceptionable aspiration, but somehow I do not recognize it in the form discerned by the majority. We are not here to predict, even when there is controlling Supreme Court precedent, 'how the Supreme Court will decide particular issues when presented to it for decision.' *Ante* at 904. (This is not a case in which there is no Supreme Court precedent on point, but one in which the determinative question has been definitively answered by the Court fairly recently.) Somehow *stare decisis* has come a cropper if we are to seriously pursue the majority's approach. Any hope of certainty must be abandoned if the majority has its way. More than the inclinations of a majority of the Supreme Court, or of a panel of the court of appeals, must shift before a controlling precedent can be declared defunct.

Id.

22. *Ashe*, 399 F.2d at 45.

23. For example, in United States v. Caldwell, 543 F.2d 1333 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976), a panel of the D.C. Circuit wrote that "[o]ur duty is to abide Leland *as long as the Supreme Court has not made its demise plain.*" *Id.* at 1370 (emphasis added). The court apparently accepted the appellants' argument that the Supreme Court case could be rejected if it had been overruled sub silentio. *See id*; *see also*

an absolute rule of stare decisis, the court had no reason to doubt the applicable Supreme Court precedent.[24]

Even courts supporting anticipatory overruling disagreed about when it was appropriate. Most courts required a strong showing that the Supreme Court was likely to overrule before they would disregard live Supreme Court precedent. The actual phrasing of the standard varied from "near certainty" to "strong evidence."[25] Some courts, however,

---

Blalock, 247 F.2d at 621 ("*Rarely* would a Court of Appeals be justified in declaring devitalized and no longer to be followed a Supreme Court decision passing directly on the precise point at issue, because of another decision of the Supreme Court in a related, though different area.") (emphasis added); *Ullman*, 221 F.2d at 762 ("an inferior court like ours may not modify a Supreme Court doctrine *in the absence of any indication of new doctrinal trends in that Court's opinions*") (emphasis added).

24. For example, a panel of the Sixth Circuit stated in 1959: "The Court of Appeals is required to follow the existing rulings of the Supreme Court instead of forecasting that the ruling will be changed when the matter is again considered by the Court." *Welch*, 269 F.2d at 145. However, the court in that case was presented with no evidence that the Supreme Court might have changed its mind, just an argument that the Supreme Court decision at issue was unsound. Cases like this are more appropriately read as reaffirming the general principle of stare decisis. *See, e.g.*, *Sears*, 111 F.2d at 964-65 (prior Supreme Court precedent distinguished on facts in later cases but never "disapproved"); *Quilici*, 532 F. Supp. at 1181-83 (prior Supreme Court precedent was "still good law"); *Swift*, 189 F. Supp. at 901 (same).

25. Some courts said they would disregard a Supreme Court precedent only if subsequent events created a "near certainty" that the Supreme Court would overrule it if given the chance. *See* Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986); Buzynski v. Oliver, 538 F.2d 6, 7 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976); Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). Other courts required that later decisions indicate to a "high degree of probability" that the Supreme Court would repudiate the earlier precedent. *See* Levine v. Heffernan, 864 F.2d 457, 461 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989); *see also Norris*, 687 F.2d at 904 (anticipatory overruling appropriate only where "later decisions . . . indicate that the Court very probably will not decide the issue the same way the next time."). Other courts said that they would disregard a Supreme Court precedent only if "convinced" or "powerfully convinced" that the Supreme Court would overrule. *See, e.g.*, Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987) ("powerfully convinced"); Indianapolis Airport Auth. v. American Airlines, 733 F.2d 1262, 1272 (7th Cir. 1984) ("convinced"); *In re* Korman, 449 F.2d 32, 39 (7th Cir. 1971) ("convinced"), *rev'd sub nom.* United States v. Korman, 406 U.S. 952 (1972). A variety of other standards have been articulated. *See, e.g.*, Miller v. United States, 868 F.2d 236, 241 (7th Cir. 1989) ("strong evidence"); Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197, 201 (7th Cir. 1983) (same); Breakefield v. District of Columbia, 442 F.2d 1227, 1230 (D.C. Cir. 1970) ("very clear"), *cert. denied*, 401 U.S. 909 (1971); Healy v. Edwards, 363 F. Supp. 1110, 1117 (E.D. La. 1973) ("obviously"), *vacated*, 421 U.S. 772 (1975); Fishkin v. United States Civil Serv. Comm'n, 309 F. Supp. 40, 45 (N.D. Cal. 1969) ("apparent"), *appeal dismissed*, 396 U.S. 278 (1970); Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd., 298 F. Supp. 339, 350 (W.D. Wis. 1969) ("clearly eroded").

Judge Richard Posner has written on anticipatory overruling more often than any other judge: he has discussed the issue in at least five cases. *See Colby*, 811 F.2d at 1123; *Olson*, 806 F.2d at 734; *Indianapolis Airport Auth.*, 733 F.2d at 1272; *City of South Bend*, 721 F.2d at 200-201; *Norris*, 687 F.2d at 902-904. He was also a member of a panel issuing a per curiam opinion in another case. *See Miller*, 868 F.2d at 241. His various statements of the rule indicate the difficulty of defining a standard. In his first approach to the subject, Judge Posner posed the issue as one of predicting how the Supreme Court

seemed willing to overrule on a mere preponderance standard—was it more likely than not that the Supreme Court would overrule?[26] These latter opinions viewed the lower court's function as merely predicting what the Supreme Court would do. Unlike other standards employed by the lower courts, the predictive standard accords precedent no presumption of validity. The lower court takes the best evidence available and predicts what the Supreme Court would do, with no artificial presumption in favor of following the questionable precedent.

The cases in which lower courts actually disregarded Supreme Court precedent, as opposed to merely stating a willingness to do so, are fewer in number.[27] In fact, it is safe to say that the post-*McMahon* cases rejecting *Wilko* more than doubled the number of lower court cases directly rejecting Supreme Court precedent that had not been expressly overruled.[28] Seen as the *Rodriguez* majority would view them, the post-

---

will decide a particular issue when it is presented for decision. Ordinarily the best predictor is past precedent,

> [b]ut sometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.

Norris, 687 F.2d at 904. Judge Posner later wrote that a lower court may reject a Supreme Court precedent only when faced with "strong evidence" that the Supreme Court would overrule if it had the opportunity. *See Miller*, 868 F.2d at 241 (per curiam); *City of South Bend*, 721 F.2d at 201. He later wrote that the court had to be "convinced" that the Supreme Court would overrule. *See Indianapolis Airport Auth.*, 733 F.2d at 1272 (dictum). Later still, he limited anticipatory overruling to cases where "the lower court is certain or almost certain that the decision or doctrine would be rejected by the higher court if a case presenting the issue came before it." *Olson*, 806 F.2d at 741. According to Judge Posner, "[t]his is a high standard and will rarely be met." *Id.* His most recent pronouncement requires the lower court to be "powerfully convinced" that the Supreme Court would overrule if given the chance. *See Colby*, 811 F.2d at 1123 (dictum).

26. The opinions in an oft-cited Second Circuit case, Spector Motor Serv. v. Walsh, 139 F.2d 809 (2d Cir. 1943), *vacated sub nom.* Spector Motor Serv. v. McLaughlin, 323 U.S. 101 (1944), illustrate this position. Writing for the majority, Judge Clark stated that the court's job was to "determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to these litigants or to others similarly situated." *Id.* at 814. Judge Learned Hand dissented, but accepted this "predictive" function of the lower courts. The measure of the lower court's duty, according to Judge Hand, "is to divine, as best it can, what would be the event of an appeal in the case before it." *Id.* at 823 (L. Hand, J., dissenting). Chief Judge Bazelon of the D.C. Circuit repeated this standard years later in a dissenting opinion. *See* United States v. Caldwell, 543 F.2d 1333, 1372 (D.C. Cir. 1974) (opinion of Bazelon, C.J. in support of rehearing en banc), *cert. denied*, 423 U.S. 1087 (1976).

27. *See Norris*, 687 F.2d at 904; Andrews v. Louisville & Nashville R.R., 441 F.2d 1222, 1224 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972); Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968); Healy v. Edwards, 363 F. Supp. 1110, 1117 (E.D. La. 1973), *vacated*, 421 U.S. 772 (1975); Harris v. Younger, 281 F. Supp. 507, 511 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971); Gold v. DiCarlo, 235 F. Supp. 817, 819-20 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520 (1965); Barnette v. West Virginia Bd. of Educ., 47 F. Supp. 251, 252-53 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

28. This development is even more striking considering that only two years passed between the Supreme Court's decisions in *McMahon* and *Rodriguez*.

McMahon cases rejecting *Wilko* presented the greatest challenge to stare decisis in the history of American jurisprudence.

Barnette v. West Virginia Board of Education,[29] decided in 1942, is the most frequently cited example of anticipatory overruling. *Barnette* involved a constitutional challenge to a compulsory flag salute in public schools. The Supreme Court had upheld the constitutionality of such a flag salute in *Minersville School District v. Gobitis*,[30] which, at the time *Barnette* was decided, had not been overruled. Judge Parker's rejection of *Gobitis* has become classic:

> Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones v. City of Opelika. The majority of the court in Jones v. City of Opelika, moreover, thought it worth while to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.[31]

A more striking example is *Harris v. Younger*,[32] where the district court rejected an earlier Supreme Court decision upholding the very statute being challenged. In 1927, the Supreme Court specifically upheld the constitutionality of California's Criminal Syndicalism Act in *Whitney v. California*.[33] *Harris v. Younger* was a 1968 constitutional challenge to that same statute. The district court noted that statutes implicating first amendment concerns had been held to a higher level of scrutiny since *Whitney*. The court concluded that *Whitney* was no longer binding, even though it had never been expressly overruled.[34] The district court obviously predicted correctly: the Supreme Court overruled *Whitney* the

29. 47 F. Supp. 251 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

30. 310 U.S. 586 (1940), *overruled*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

31. Barnette v. West Virginia Bd. of Educ., 47 F. Supp. at 252-53 (citation omitted).

32. 281 F. Supp. 507 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971).

33. 274 U.S. 357 (1927), *overruled*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

34. *See Harris*, 281 F. Supp. at 511-16.

year after the district court's decision.[35]

II. PRIOR SUPREME COURT PRONOUNCEMENTS

Rodriguez's strong rejection of anticipatory overruling was surprising. Supreme Court decisions prior to *Rodriguez* said very little about how the lower courts should treat doubtful Supreme Court precedent. The Supreme Court had many opportunities to criticize anticipatory overruling, but did not do so.

In most cases in which a lower court rejected suspect Supreme Court precedent, the Supreme Court simply ignored the jurisprudential issue and confined its opinion to the substantive issue at hand.[36] The Court did so even when a majority or plurality held that the lower court's rejection of precedent was substantively incorrect.[37] Similarly, the Supreme Court has refused to criticize lower courts for blindly following prece-

35. *See Brandenburg*, 395 U.S. at 449. The Supreme Court nevertheless reversed the district court in *Harris* on procedural grounds. *See* Younger v. Harris, 401 U.S. 37 (1971).

36. *See, e.g.*, United States v. Mason, 412 U.S. 391, 396-97 (1973) (brushing aside the stare decisis issue, Court reversed on basis of substantive law of trusts), *rev'g* 461 F.2d 1364 (Ct. Cl. 1972); Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 325-26 (1972) (basing decision on petitioner's failure to exhaust remedies), *aff'g* 441 F.2d 1222 (5th Cir. 1971); United States v. White, 401 U.S. 745, 747 (1971) (without raising stare decisis concerns, Court reversed on basis of lower court's misinterpretation and erroneous retroactive application of precedent), *rev'g* 405 F.2d 838 (7th Cir. 1969); Peyton v. Rowe, 391 U.S. 54, 57-58, 65-67 (1968) (upholding lower court's decision on the merits based on subsequent development of writ of habeas corpus), *aff'g* 383 F.2d 709 (4th Cir. 1967); Silverman v. United States, 365 U.S. 505, 510-12 (1961) (distinguishing facts rather than asserting stare decisis), *rev'g* 275 F.2d 173 (D.C. Cir. 1960); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (ignoring district court's anticipatory overruling and holding that compulsory flag salute is unconstitutional), *aff'g* 47 F. Supp. 251 (S.D.W. Va. 1942).

37. *See* Bowers v. Hardwick, 478 U.S. 186, 190-94 (1986). In *Bowers*, the court of appeals struck down a Georgia statute criminalizing homosexual sodomy, holding that it violated a constitutional right of privacy. *See* Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 478 U.S. 186, 196 (1986). The court of appeals refused to follow an earlier Supreme Court summary affirmance upholding a similar Virginia statute. *See* Doe v. Commonwealth's Attorney for Richmond, 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975). The court of appeals recognized that a summary affirmance was binding precedent, but held that later Supreme Court privacy cases had undermined it. *See* Hardwick v. Bowers, 760 F.2d at 1207-13. Even though the earlier Supreme Court decision had not been overruled, the Court of Appeals concluded that it was free to reach its own decision on the merits: "Doctrinal developments need not take the form of an outright reversal of the earlier case. The Supreme Court may indicate its willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent." *Id.* at 1209. The petitioner directly challenged this jurisprudential ruling in the Supreme Court, but the Court chose not to address it:

> Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in *Doe*. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*.

Bowers v. Hardwick, 478 U.S. at 189 n.4. None of the opinions in the case discusses this

dents that the Court itself overruled.[38]

Occasional language in Supreme Court opinions can be read as supporting or criticizing anticipatory overruling, but such language is usually limited by its context. The most direct statement consistent with *Rodriguez* appeared in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*,[39] which involved an issue of federal-question jurisdiction. In *Thurston Motor Lines*, the Ninth Circuit attempted to distinguish *Louisville & Nashville R.R. Co. v. Rice*,[40] an earlier Supreme Court case, expressing in dictum its "doubt that *Rice* [was] still good law."[41] The Supreme Court rejected the Ninth Circuit's attempt to distinguish *Rice* and went on to note that, "[n]eedless to say, only this Court may overrule one of its precedents. Until that occurs, *Rice* is the law."[42]

In *Jaffree v. Board of School Commissioners*,[43] Justice Powell wrote an opinion which also seemed to require blind adherence to Supreme Court precedent until overruled. In granting an application for a stay of a district court ruling in a school prayer case, he wrote:

---

issue. Instead, the Court rejected the Eleventh Circuit's interpretation of the constitutional right of privacy on the merits.

United States v. Mason, 412 U.S. 391 (1973), is similar. In West v. Oklahoma Tax Comm'n, 334 U.S. 717, 726-27 (1948), the Supreme Court had held that Oklahoma could levy its estate tax on certain trust property of restricted Osage Indians. In 1972, administrators of an Osage Indian's estate claimed that the federal government had breached its fiduciary duty by paying the Oklahoma estate tax without challenge. *See Mason*, 412 U.S. at 394. The U.S. Court of Claims agreed, holding that an intervening Supreme Court case had undercut the foundations of the *West* opinion and that the Supreme Court would no longer follow *West*. *See* Mason v. United States, 461 F.2d 1364, 1374-75 (Ct. Cl. 1972), *rev'd*, 412 U.S. 391 (1973). The Supreme Court reversed without reaching the *West* issue. *See Mason*, 412 U.S. at 400. The Supreme Court held that, whether or not *West* should be overruled, the United States did not breach a fiduciary duty by failing to anticipate that it would be overruled. *See id.* at 397. Justice Marshall's majority decision expressed reserved support for the continuing vitality of *West*: "Although it might be fair to say that over the years the fringes of the *West* doctrine have been worn away, its core holding remains unimpeached by any decisions of this or any other court." *Id.* In spite of its defense of *West*, however, the Supreme Court said nothing about the Court of Claims' willingness to disregard this "unimpeached" precedent. *See also White*, 401 U.S. at 747 (ignoring the anticipatory overruling issue); *Silverman*, 365 U.S. at 512 (same).

38. *See* Ashe v. Swenson, 397 U.S. 436 (1970), *rev'g* 399 F.2d 40 (8th Cir. 1968); Girouard v. United States, 328 U.S. 61 (1946), *rev'g* 149 F.2d 760 (1st Cir. 1945). *Ashe v. Swenson* is particularly interesting. In describing the district court and court of appeals opinions, the Supreme Court quoted language from each opinion refusing to forecast whether the Supreme Court would reverse, but the Supreme Court did not comment on these excerpts. *See Ashe*, 397 U.S. at 440 n.4, 441 n.5.

39. 460 U.S. 533 (1983), *rev'g* 682 F.2d 811 (9th Cir. 1982).

40. 247 U.S. 201 (1918). In *Rice*, the Court held that a suit by a carrier to recover money for the interstate shipment of livestock under tariffs regulated by the Interstate Commerce Act presented a federal question. *See id.* at 203.

41. Thurston Motor Lines v. Jordan K. Rand, Ltd., 682 F.2d 811, 813-14 (9th Cir. 1982), *rev'd*, 460 U.S. 533 (1983). The court of appeals stated that the term "arising under" federal law had taken on a narrower meaning since *Rice*, although it cited no later cases questioning *Rice*. *See id.*

42. *Thurston Motor Lines*, 460 U.S. at 535.

43. 459 U.S. 1314 (1983).

> Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them. Similarly, my own authority as Circuit Justice is limited by controlling decisions of the full Court.[44]

This opinion, however, must be considered in context. The district court did not conclude that the existing Supreme Court precedent's application to the particular case was uncertain or that the Supreme Court was likely to overrule. The district court concluded that "the United States Supreme Court has erred,"[45] and directly overruled clearly applicable, unquestioned Supreme Court precedent. Read in context, Justice Powell's opinion is more a general defense of stare decisis than a rejection of anticipatory overruling.

A similar limitation applies to certain language in *Hicks v. Miranda*.[46] *Hicks* involved the constitutionality of a California obscenity statute. Although the Supreme Court had summarily dismissed an appeal of a prior case that found the same statute constitutional, the district court in *Hicks* concluded that the summary disposition did not have "plenary precedential value."[47] The Supreme Court, however, held that the summary disposition was a decision on the merits with full precedential effect, and concluded with an admonishment to the lower court:

> The District Court should have followed the Second Circuit's advice, first, in *Port Authority Bondholders Protective Committee v. Port of New York Authority*, that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise'; and, later, in *Doe v. Hodgson*, that the lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'[48]

This statement, like Justice Powell's opinion in *Jaffree*, is limited by context—the Supreme Court responded to the lower court's refusal to follow what the Court believed was valid, unquestioned precedent. In addition, the Court recognized that a lower court might refuse to follow a summary disposition " 'when doctrinal developments indicate otherwise.' "[49]

---

44. *Id.* at 1316.

45. Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1128 (S.D. Ala.), *aff'd in part and rev'd in part*, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

46. 422 U.S. 332 (1975).

47. *See* Miranda v. Hicks, 388 F. Supp. 350, 364 (C.D. Cal. 1974), *rev'd*, 422 U.S. 332 (1975).

48. Hicks v. Miranda, 422 U.S. at 344-45 (quoting Port Auth. Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259, 263 n.3 (2nd Cir. 1967), *cert. denied*, 391 U.S. 436 (1968) *and* Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973) (quoting Fein v. Deegan, 410 F.2d 13, 22 (2nd Cir.), *cert. denied*, 395 U.S. 935 (1969))).

49. *Id.* at 344 (citations omitted).

This suggests that a precedent that has not been overruled may be disregarded when later doctrinal developments render it suspect.

At least two Supreme Court cases provide tenuous support for the idea that lower courts may reject doubtful precedent. In *Skrupa v. Sanborn*,[50] a three-judge district court struck down a Kansas statute prohibiting "debt adjusting" except as incident to the practice of law. The district court relied on a state-court case adopting the philosophy of *Adams v. Tanner*,[51] which held that the due process clause prevented a state from prohibiting a business that was "useful" and not "inherently immoral or dangerous to public welfare."[52] The Supreme Court pointed out that *Adams v. Tanner*, although never directly overruled, was a *Lochner*-era decision and that

> reliance on *Adams v. Tanner* is as mistaken as would be adherence to *Adkins v. Children's Hospital*, overruled by *West Coast Hotel Co. v. Parrish*. Not only has the philosophy of *Adams* been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having 'clearly undermined' *Adams*.[53]

Thus, at least in some cases, the Court expects lower courts to reject doubtful precedent even if that precedent has not been directly overruled.

Peyton v. Rowe[54] also provides arguable support for anticipatory overruling. *Peyton* was a constitutional challenge by writ of habeas corpus to state criminal sentences that ran consecutively with earlier sentences and thus would not be served until sometime in the future. At issue was the Supreme Court's 1934 holding in *McNally v. Hill*[55] that the writ of habeas corpus was unavailable to challenge a sentence to be served in the future. The court of appeals refused to follow *McNally*, arguing that it was no longer valid:

> Since McNally v. Hill the Supreme Court has not dealt directly with the problem, but it has embraced a more liberal, less technical concept of the writ. . . . The new approach is thoroughly inconsistent with the narrowly technical one of *McNally*.[56]

In affirming, the Supreme Court expressly approved the reasoning of the court of appeals:

> Recognizing that the District Courts had correctly applied *McNally*, the Court of Appeals declined to adhere to that decision. Writing for a unanimous court, Chief Judge Haynsworth reasoned that this Court would no longer follow *McNally*, which in his view represented a 'doc-

50. 210 F. Supp. 200 (D. Kan. 1961), *rev'd sub nom.*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

51. 244 U.S. 590 (1917), *overruled*, Ferguson v. Skrupa, 372 U.S. at 731.

52. Adams v. Tanner, 244 U.S. at 593. In *Tanner*, the Court found that a Washington state law forbidding the running of an employee agency violated the guarantees of the fourteenth amendment. *See id.* at 596-97.

53. Ferguson v. Skrupa, 372 U.S. at 731 (citations omitted).

54. 391 U.S. 54 (1968).

55. 293 U.S. 131 (1934), *overruled*, Peyton v. Rowe, 391 U.S. at 67.

56. Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968).

> trinaire approach' based on an 'old jurisdictional concept' which had been 'thoroughly rejected by the Supreme Court in recent cases.' We are in complete agreement with this conclusion and the considerations underlying it.[57]

This last sentence probably expresses no more than the Supreme Court's agreement that *McNally* should be overruled. However, the Court's approval of the "considerations underlying" the lower court's opinion could be read as agreeing that a lower court may disregard doubtful, but still live, precedent. The quoted passage certainly indicates no hostility to the lower court's action.

Some of the Supreme Court's opinions evidence an almost schizophrenic attitude towards anticipatory overruling. Justice Harlan's dissent in *Desist v. United States*[58] is illustrative. Justice Harlan focused on the effect, for habeas corpus purposes, of constitutional precedent that was questionable at the time of conviction and subsequently overruled. He first wrote that "the lower courts cannot be faulted when, following the doctrine of *stare decisis*, they apply the rules which have been authoritatively announced by this Court. If anyone is responsible for changing these rules, it is this Court."[59] On the next page, however, Justice Harlan apparently recognized the legitimacy of anticipatory overruling:

> It is hard to believe that any lawyer worthy of the name could, after reading *Silverman*, rely with confidence on the continuing vitality of the *Goldman* rule. Nor is it by any means clear to me that it would have been improper for a lower court to have declined to follow *Goldman* in the light of *Silverman*.[60]

Thus, at worst, the Court's earlier pronouncements affecting anticipatory overruling were inconsistent. At best, some of them could actually be read as approving anticipatory overruling.

III. THE HISTORY BEHIND *RODRIGUEZ*: SECURITIES ARBITRATION AND THE SUPREME COURT

As shown above, the Supreme Court's rejection of anticipatory overruling in *Rodriguez* was certainly not required, or even foreshadowed, by earlier rulings. *Rodriguez* rejected without discussion a long tradition of anticipatory overruling in the lower courts despite a tacit toleration of those decisions by the Supreme Court. A full understanding of the Supreme Court's statements in *Rodriguez* first requires a review of the Court's prior rulings on securities arbitration. Only with that background can one appreciate the dilemma lower courts faced after *McMahon* and the magnitude of the Supreme Court's rejection of anticipatory

57. Peyton v. Rowe, 391 U.S. at 57-58 (citation omitted).
58. 394 U.S. 244, 255-69 (1969) (Harlan, J., dissenting).
59. *Id.* at 264 (Harlan, J., dissenting).
60. *Id.* at 265 (Harlan, J., dissenting).

overruling in *Rodriguez*.[61]

A. Wilko v. Swan

Wilko v. Swan[62] was the first Supreme Court case dealing with the arbitrability of federal securities claims. The petitioner alleged that his brokerage firm violated section 12(2) of the 1933 Act[63] by fraudulently inducing him to purchase stock. The petitioner had signed an agreement with the broker agreeing to arbitrate all disputes with the firm, but contended that section 14 of the 1933 Act, the anti-waiver provision, rendered the agreement unenforceable.[64] Section 14 provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."[65] The 1933 Act gives injured plaintiffs a right to sue,[66] and pre-dispute arbitration agreements waive that right; the *Wilko* Court therefore reasoned that section 14 voids predispute arbitration agreements. According to Justice Reed, judicial direction is necessary to "fairly assure [the] effectiveness"[67] of the 1933 Act's protections. Even though the Act's liability provisions would apply in arbitration, they would be less effective there:

> This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden

61. The *Rodriguez* rejection of anticipatory overruling was also a bad policy decision. *See infra* Part V.

62. 346 U.S. 427 (1953), *overruled*, Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989).

63. Section 12(2) provides that any person who

> offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

15 U.S.C. § 77*l*(2) (1988).

64. *See Wilko*, 346 U.S. at 432-33.

65. 15 U.S.C. § 77n (1988).

66. *See* 15 U.S.C. § 77v(a) (1988).

67. Wilko v. Swan, 346 U.S. 427, 437 (1953), *overruled*, Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989).

> of proof,' 'reasonable care' or 'material fact' . . . cannot be examined. Power to vacate an award is limited. . . . In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.[68]

Justice Frankfurter wrote a brief dissent, joined by Justice Minton, rejecting the argument that arbitration would jeopardize the plaintiff's rights.[69] Justice Frankfurter found nothing in the record to support that conclusion and also argued that judicial review could adequately insure that arbitrators followed the law.

B. *The Intervening Years—Avoiding the Issue*

In the 1974 case *Scherk v. Alberto-Culver Co.*,[70] the Supreme Court had its first opportunity to apply *Wilko* to 1934 Act claims, but the majority refused to do so. *Scherk* involved an international transaction and the majority held that *Wilko* did not apply to international contracts.[71] Writing for the majority, Justice Stewart stated that the advantages offered by the security buyer's right to sue in federal court "become chimerical [in the international context] since . . . an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice."[72] In fact, because of uncertainties as to the applicable law, a contractual provision specifying the forum and the applicable law is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[73] Using this analysis, the majority managed to avoid the *Wilko* issue.

In dictum, however, the majority suggested that *Wilko* might not apply to *any* claims under section 10(b) of the 1934 Act. The majority gave two reasons for distinguishing such cases. First, unlike the express cause of action created by section 12(2) of the 1933 Act, the private right of action under section 10(b) is merely implied. Thus, according to the majority, the 1934 Act does not itself create any "special right" such as that which the *Wilko* court found significant.[74] Second, the 1934 Act, unlike the 1933 Act, limits the plaintiff to federal court; thus, an arbitration agreement's further restriction of the choice of forum is different, although the majority did not explain the significance of this difference.[75] This two-part distinction between 1933 Act and 1934 Act cases came to

68. *Id.* at 435-37.
69. *Id.* at 439-40 (Frankfurter, J., dissenting).
70. 417 U.S. 506 (1974).
71. *See id.* at 519-21.
72. *Id.* at 518.
73. *Id.* at 516.
74. *See id.* at 513-14.
75. *See id.* at 514.

be known as the "colorable argument."[76]

The four *Scherk* dissenters would have extended *Wilko* to 1934 Act claims. Justice Douglas' dissent rejected the argument that the jurisdictional differences should matter: "While Alberto-Culver would not have the right to sue in either a state or federal forum as did the plaintiff in *Wilko* . . . the Court deprives it of its right to have its Rule 10b-5 claim heard in a federal court."[77] The dissent then repeated *Wilko*'s recitation of the problems with arbitration and added a new one—federal pretrial discovery would not be available in arbitration.

Dean Witter Reynolds Inc. v. Byrd,[78] the next Supreme Court securities arbitration case, also avoided deciding whether *Wilko* applied to causes of action arising under the 1934 Act. The issue in *Byrd* was what to do when a plaintiff asserted both federal securities claims, which presumably could not be forced to arbitration, and pendent state law claims, which could. Some of the circuits had developed what came to be known as the "intertwining doctrine"—when the arbitrable and nonarbitrable claims were sufficiently intertwined factually and legally, a court could deny arbitration of all the claims.[79] In *Byrd*, the Supreme Court unanimously rejected the intertwining doctrine, but expressly refused to indicate whether 1934 Act claims were arbitrable.[80] The Court limited its discussion of *Wilko* to a footnote[81] that pointed to the "colorable argument" made in *Scherk*, but recognized that most of the lower courts had not adopted the *Scherk* distinction and were following *Wilko* with respect to 1934 Act claims.[82]

---

76. *See id.* at 513-14.

77. *Id.* at 532 (Douglas, J., dissenting) (citation omitted).

78. 470 U.S. 213 (1985).

79. *See* Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982); Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981).

80. "In the District Court, Dean Witter did not seek to compel arbitration of the federal securities claims. Thus, the question whether *Wilko* applies to [section] 10(b) and Rule 10b-5 claims is not properly before us." *Byrd*, 470 U.S. at 216 n.1.

81. *See id.*

82. *See id.* at 215-16 & n.1. Justice White filed a concurring opinion in *Byrd* calling the application of *Wilko* to 1934 Act claims "a matter of substantial doubt," *id.* at 224 (White, J., concurring), and essentially repeating the "colorable argument" made in *Scherk*. Justice White wrote:

> *Wilko*'s reasoning cannot be mechanically transplanted to the 1934 Act. While [section] 29 of that Act . . . is equivalent to [section] 14 of the 1933 Act, counterparts of the other two provisions are imperfect or absent altogether. Jurisdiction under the 1934 Act is narrower, being restricted to the federal courts. . . . More important, the cause of action under [section] 10(b) and Rule 10b-5, involved here, is implied rather than express. . . . The phrase 'waive compliance with any *provision of this chapter*' . . . is thus literally inapplicable. Moreover, *Wilko*'s solicitude for the federal cause of action — the 'special right' established by Congress . . . is not necessarily appropriate where the cause of action is judicially implied and not so different from the common-law action.

Id. at 224-25 (White, J., concurring) (citations omitted). He concluded that "the contrary holdings of the lower courts must be viewed with some doubt." *Id.* at 225 (White, J., concurring). Justice White's concurrence is especially interesting given his position in *Scherk*. In *Scherk*, he joined Justice Douglas's dissenting opinion arguing that *Wilko*

Scherk's introduction of the "colorable argument" had little effect on the lower courts. They continued to apply *Wilko* to 1934 Act claims.[83] After *Byrd*, however, the foundations of *Wilko* began to crumble—at least slightly. Two courts of appeals[84] and a number of federal district courts[85] held that agreements to arbitrate 1934 Act claims were enforceable. Nevertheless, the majority of courts of appeals continued to hold, even after the decision in *Byrd*, that 1934 Act claims were not arbitrable.[86]

C. Shearson/American Express, Inc. v. McMahon

In 1987, the Supreme Court finally confronted the issue of whether arbitration agreements are valid under the 1934 Act. In *Shearson/American Express, Inc. v. McMahon*,[87] a bare majority of the Court held that

should be applied to 1934 Act claims. That dissent expressly rejected the "colorable argument." *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 531-33 (1974) (Douglas, J., dissenting). In *Byrd*, he hinted strongly that his earlier position was wrong. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985) (White, J., concurring).

83. *See, e.g.*, Raiford v. Buslease, Inc., 745 F.2d 1419, 1421 (11th Cir. 1984) (applying the rule in *Wilko* to preclude the arbitration of claims arising under section 10(b) of the 1934 Act); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1030 (6th Cir. 1979) (stating that holding and rationale of *Wilko* "are equally applicable" to claims under 1934 Act); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 827-29 (10th Cir. 1978) (same); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831, 833-835 (7th Cir. 1977) (same); Allegaert v. Perot, 548 F.2d 432, 437-38 (2d Cir.) (stating general need for judicial tribunal in securities cases, court applied *Wilko* to section 10(b) claim under 1934 Act), *cert. denied*, 432 U.S. 910 (1977); Sibley v. Tandy Corp., 543 F.2d 540, 543 n.3 (5th Cir. 1976) (stating similarities between 1933 and 1934 Acts outweigh differences and thus *Wilko* is applicable to both), *cert. denied*, 434 U.S. 824 (1977); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536-37 (3d Cir.) (stating that Congress had accepted view that Wilko applies in the 1934 Act context), *cert. denied*, 429 U.S. 1010 (1976).

84. Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291, 296-98 (1st Cir. 1986); Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393, 1397-98 (8th Cir. 1986), *cert. denied*, 482 U.S. 931 (1987).

85. *See* Fisher v. Prudential-Bache Sec., 635 F. Supp. 234 (D. Md. 1986), *aff'd in part and rev'd in part*, 831 F.2d 290 (4th Cir. 1987); Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith, 623 F. Supp. 1005, 1008 (E.D. Mich. 1985); Finkle and Ross v. A.G. Becker Paribas, Inc. 622 F. Supp. 1505, 1509 (S.D.N.Y. 1985); *see also* Bedell, Harrison & Harvey, *The McMahon Mandate: Compulsory Arbitration of Securities and RICO Claims*, 19 Loy. U. Chi. L.J. 1, 17 & n.118 (1987) (citing additional cases).

86. *See* Sterne v. Dean Witter Reynolds, Inc., 808 F.2d 480, 483 (6th Cir. 1987); Wolfe v. E.F. Hutton & Co., 800 F.2d 1032, 1036-37 (11th Cir. 1986), *vacated*, 482 U.S. 923 (1987); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197, 1202 (3d Cir. 1986), *vacated*, 482 U.S. 923 (1987); King v. Drexel Burnham Lambert, Inc., 796 F.2d 59, 60 (5th Cir. 1986), *vacated*, 482 U.S. 922 (1987); Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 527 (9th Cir. 1986), *vacated*, 482 U.S. 923 (1987); McMahon v. Shearson/American Express, Inc., 788 F.2d 94, 98 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987). Bedell, Harrison & Harvey claimed that "[i]n light of the Supreme Court decisions in *Byrd* and *Scherk*, the majority of district courts have ordered arbitration when deciding the arbitrability of Section 10(b) and Rule 10b-5 claims." Bedell, Harrison & Harvey, *supra* note 85, at 17 & n.118.

87. 482 U.S. 220 (1987). *McMahon* also involved a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1988). The Court

predispute agreements to arbitrate 1934 Act claims are enforceable.[88] Part III of Justice O'Connor's majority opinion began with a discussion of section 29(a) of the 1934 Act, which, like section 14 of the 1933 Act, declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder."[89] Justice O'Connor argued that section 29(a) does not prohibit waiver of section 27, which allows suit in federal court; section 29(a) only prohibits waiver of the *substantive* obligations imposed by the 1934 Act. She interpreted *Wilko* as making this same distinction.[90] The arbitration agreement in *Wilko* was unenforceable not because it conflicted with the jurisdictional provisions of the 1933 Act but because arbitration was inadequate to enforce the statutory rights created by section 12(2); the arbitration agreement thus constituted a waiver of section 12(2) itself. "*Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue."[91]

Justice O'Connor's reading of *Wilko* made her decision in *McMahon* relatively easy. Cases decided by the Supreme Court after *Wilko* approved arbitration in spite of claims that substantive rights would not be adequately protected.[92] As Justice O'Connor stated:

> [T]he reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals — most apply with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally. It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act.
>
> Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable.[93]

Further, she argued, even if *Wilko* was right when decided, it was no longer correct because of the Securities and Exchange Commission's ("SEC") increased power to oversee the arbitration procedures of self-regulatory organizations.[94] Because arbitration procedures were no

---

decided unanimously that pre-dispute agreements to arbitrate RICO claims were enforceable. *See McMahon*, 482 U.S. at 242.

88. *See McMahon*, 482 U.S. at 227-38.

89. 15 U.S.C. § 78cc(a)(1988).

90. *See McMahon*, 482 U.S. at 228-29.

91. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 229 (1987). One scholar has termed this reading of *Wilko* "revisionist history." *See* Fletcher, *Learning to Live with the Federal Arbitration Act — Securities Litigation in a Post-McMahon World*, 37 Emory L.J. 99, 110 (1988).

92. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

93. *McMahon*, 482 U.S. at 231-32 (citations omitted).

94. *See id.* at 233-34.

longer inadequate to protect the substantive rights granted by the 1934 Act, the arbitration agreement was enforceable.

Justice O'Connor rejected the argument that congressional inaction since *Wilko*, particularly when Congress adopted amendments to the 1934 Act in 1975, ratified the application of *Wilko* to 1934 Act claims.[95] The respondents relied on the following language in the conference report on the amendments:

> It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, . . . concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.[96]

Justice O'Connor indicated that the comment might be construed as affecting only *Wilko*'s interpretation of the 1933 Act because *Wilko*'s holding did not concern 1934 Act claims. Even if the conference committee was referring to 1934 Act claims, she argued, *Scherk* and the "colorable argument" made it unclear at the time of the report exactly what "existing law" was with respect to 1934 Act arbitration. Finally, she noted that the conference report disclaimed any intent to change existing law, leaving the issue to the courts. Thus, Congress had done nothing to determine the outcome.[97]

Justice O'Connor offered only one comment on the continuing viability of *Wilko*'s 1933 Act holding: "While *stare decisis* concerns may counsel against upsetting *Wilko*'s contrary conclusion under the [1933] Act, we refuse to extend *Wilko*'s reasoning to the [1934] Act in light of these intervening regulatory developments."[98] Justice O'Connor did not mention the "colorable argument" for distinguishing 1933 Act and 1934 Act claims, a distinction that the SEC in an amicus brief had strongly urged the Court to reject.[99]

Justice Blackmun's dissent in *McMahon* on the 1934 Act issue, which was joined by Justices Brennan and Marshall, stressed how fully the majority had broken from precedent.[100] Justice Blackmun disagreed with the majority's reading of *Wilko*. *Wilko*, he argued, held that section 14

---

95. *See id.* at 234-35.

96. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 236-37 (1987) (citation omitted) (quoting H.R. Conf. Rep. No. 94-229, 111 (1975)).

97. *See id.* at 236.

98. *Id.* at 234.

99. *See* Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners at 21, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) ("A major purpose of this brief is to urge the Court not to let the unsatisfactorily explained decision in *Wilko* lead it to distinguish that case today on grounds that would in our judgment be productive of mischief.").

100. Justice Stevens also chided the majority for its rejection of precedent. In a brief opinion, he argued that the Supreme Court should respect the longstanding conclusion of lower courts that *Wilko* was fully applicable to 1934 Act claims: "after a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss

prohibited waiver of the right to a judicial forum embodied in the 1933 Act's jurisdictional provision; it did not turn on the perceived inadequacy of arbitration to enforce substantive rights under section 12(2). Because the relevant 1934 Act provisions are "virtually identical," Justice Blackmun argued, *Wilko* must prohibit waiver of the judicial forum for section 10(b) claims as well.[101]

Even accepting the majority's interpretation of *Wilko*, Justice Blackmun felt that the inadequacies of arbitration noted in *Wilko* still existed, and that those inadequacies were still incompatible with the investor-protection rationale of the federal securities laws.[102] Justice Blackmun chided the SEC for changing its position on the enforceability of arbitration agreements and argued that SEC oversight of arbitration rules was still inadequate to protect investors.[103]

The majority opinion, Justice Blackmun stated, "effectively overrule[d] *Wilko*."[104] According to Justice Blackmun, the relevant statutory provisions in the 1933 Act and the 1934 Act were "virtually identical,"[105] and the "colorable argument," which the majority had not mentioned and which commentators had almost uniformly rejected, was unsupportable.[106] "That the Court passes over the 'colorable argument' in silence, although petitioners have advanced it," Justice Blackmun argued, "would appear to relegate that argument to its proper place in the graveyard of ideas."[107]

Justice Blackmun also argued that Congressional inaction at the time of the 1975 amendments implicitly approved the application of *Wilko* to the 1934 Act.[108] According to Justice Blackmun, the statement from the conference report indicated that Congress did not want the amendments to overrule *Wilko*. Rather, the statement's placement in materials amending the 1934 Act suggested that Congress was aware of and supported the extension of *Wilko* to section 10(b) claims.

D. *Confusion in the Lower Courts*

McMahon presented the lower courts with a dilemma. Prior to *Mc-*

had been drafted by the Congress itself." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part).

101. *See id.* at 256-57 (Blackmun, J., dissenting).

102. *See id.* at 257-61 (Blackmun, J., dissenting).

103. *See id.* at 261-66 (Blackmun, J., dissenting).

104. *Id.* at 243 (Blackmun, J., dissenting).

105. *Id.* at 256 (Blackmun, J., dissenting).

106. *Id.* at 245 n.2 (Blackmun, J., dissenting). Justice Blackmun argued that section 10(b)'s implied right of action is in no way inferior to the express right of action in section 12(2) and that the procedural protections available in a section 10(b) action are just as pronounced as those available in a section 12(2) action. The jurisdictional differences between the 1933 Act and the 1934 Act are not significant because "the proper question is whether a [section] 10(b) or [section] 12(2) claimant is entitled to a judicial forum, not whether the claimant has a choice between judicial fora." *Id.* (Blackmun, J., dissenting).

107. *Id.* (Blackmun, J., dissenting).

108. *See id.* at 246-47 (Blackmun, J., dissenting).

Mahon, lower courts had recognized the similarities between the 1933 Act and the 1934 Act and applied *Wilko* to claims under both statutes. Then, in *McMahon*, the Supreme Court refused to acknowledge those statutory similarities and directly overrule *Wilko*. *Wilko* said "no" to 1933 Act arbitration, *McMahon* said "yes" to 1934 Act arbitration, and yet the relevant statutory provisions were virtually identical. The one possible distinction—the so-called "colorable argument"—was not mentioned in the majority opinion in *McMahon* and was resoundingly rejected in the dissent. Many commentators saw *McMahon* as effectively overruling *Wilko*.[109] At the least, commentators thought *McMahon* made *Wilko* suspect.[110]

The lower courts thus had to decide whether to follow a doubtful, but live, Supreme Court precedent or acknowledge the obvious effect of the Court's reasoning in *McMahon* and reject *Wilko*. Both courts that rejected *Wilko*,[111] and those that continued to apply it,[112] acknowledged

109. *See, e.g.*, Bedell, Harrison & Harvey, *supra* note 85, at 28 ("[T]he Supreme Court has all but overruled *Wilko v. Swan*; at the very least, its precedential value has been severely circumscribed."); Ginger, *Managing Securities Disputes After McMahon: A Call for Consolidation and Arbitration*, 33 Vill. L. Rev. 515, 530-31 (1988) ("This drastic limitation on the precedential value of *Wilko*, based on the notion that times — and arbitration procedures — have changed, seriously calls into question the continuing vitality of the *Wilko* exception to the [Federal Arbitration Act] for claims arising under the [1933 Act]."); Note, *Shearson/American Express v. McMahon: The Expanding Scope of Securities Arbitration*, 12 Nova L. Rev. 1375, 1401 (1988) ("arguments for extending the *McMahon* holding flow naturally from the Court's reasoning"); Note, *Shearson/American Express, Inc. v. McMahon: What's Left for the Courts in Securities Litigation?*, 62 Tul. L. Rev. 284, 290 (1987) ("Despite its disclaimer, the Court effectively overruled *Wilko*."); Note, *SECURITIES - ARBITRATION - Agreements to Arbitrate are Valid*, 10 U. Ark. Little Rock L.J. 523, 533 (1987-88) ("[I]t is clear that the Court does not accept what it perceives to be the reasoning of [the *Wilko*] opinion. Thus, when and if the issue is ever properly before the Court, the Court will probably hold claims based on section 12(2) of the Securities Act to be arbitrable."). *But see* Klein & Harkins, *Significance for Investors and the SEC*, 20 Rev. Sec. & Comm. Reg. 195, 200 (1987) (reading *McMahon* as leaving *Wilko* intact).

110. *See* Cleaves, *An Irresistible Force Meets an Immovable Object: Reforming Current Standards as to the Arbitration of Statutory Claims*, 8 J. L. & Com. 245, 271 (1988); Fletcher, *supra* note 91, at 113; Hood, *Arbitration and Litigation of Public Customers' Claims Against Broker-Dealers After McMahon*, 19 St. Mary's L.J. 541, 544 n.13 (1988); Selig & Dinkoff, *The McMahon Decision: Arbitration of Securities and Futures Disputes*, 20 Rev. Sec. & Comm. Reg. 189, 190 n.11 (1987).

111. *See, e.g.*, Rodriguez de Quijas v. Shearson/Lehman Bros., 845 F.2d 1296, 1298 (5th Cir. 1988) ("the reasoning in *McMahon* completely undermined *Wilko*"), *aff'd*, 490 U.S. 477 (1989); Schuster v. Kidder, Peabody & Co., 699 F. Supp. 271, 274 (S.D. Fla. 1988) ("Clearly, *McMahon* has left the status of the *Wilko* doctrine in question."); Kavouras v. Visual Prods. Sys., 680 F. Supp. 205, 207 (W.D. Pa. 1988) ("Our review of *McMahon* leaves us with the conviction that *Wilko* is now untenable."); Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 673 F. Supp. 1009, 1011 (C.D. Cal. 1987) (*McMahon* "seriously undermined *Wilko*'s rationale").

112. *See, e.g.*, Sacco v. Prudential-Bache Sec., Inc., 703 F. Supp. 362, 364 (E.D. Pa. 1988) (*McMahon* "cast serious doubt on the continued viability of *Wilko*"); Araim v. Painewebber, Inc., 691 F. Supp. 1415, 1417 (N.D. Ga. 1988) ("*McMahon* raises serious questions about the vitality of *Wilko*'s holding"); McCullough v. Shearson Lehman Bros., Nos. 86-2752-2758 (W.D. Pa. Feb. 18, 1988) (WESTLAW, 1988 WL 23008) (*McMahon*

that *McMahon* created serious problems for *Wilko*. Only one decision,[113] however, discussed the resulting jurisprudential problem: whether and when a lower court may ignore a doubtful but unreversed Supreme Court precedent. Many courts blindly followed *Wilko* despite its doubtful status. Other courts rejected *Wilko* with little expressed concern for their duty to follow precedent.

1. Cases Following *Wilko*

Many of the post-*McMahon* cases that refused to enforce agreements to arbitrate 1933 Act claims relied blindly on the principle of stare decisis. For example, the district court in *Goldberg v. Drexel Burnham Lambert, Inc.*[114] stated: "*Wilko* is still valid, even if its future validity has been questioned. . . . The Supreme Court has not overruled *Wilko*, and we must follow it."[115] The lower courts assumed that, no matter how tattered the precedent, a decision must be followed until the Supreme Court expressly overrules it. The Supreme Court did not expressly overrule *Wilko* in *McMahon*, and to many of the lower courts that was enough.[116]

Only three cases following *Wilko* went beyond a bare recitation of stare decisis. One of those cases, *Araim v. Paine Webber, Inc.*,[117] specifically dealt with the issue of anticipatory overruling. *Araim* rejected the idea that district courts must "adhere slavishly to Supreme Court precedents that have not been explicitly overruled."[118] Instead, a lower court may decline to follow precedent that it believes the Supreme Court would

"cast serious doubt on the reasoning behind *Wilko*"); Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 700 F. Supp. 1092, 1095 (S.D. Fla. 1987) (after *McMahon*, "the reasoning behind *Wilko* has been cut away").

113. *See Araim*, 691 F. Supp. at 1417.

114. No. 83 C. 8586 (N.D. Ill. Dec. 16, 1987) (WESTLAW, 1987 WL 31604).

115. *Id.* (citation omitted).

116. *See, e.g.*, McCullough v. Shearson Lehman Bros., Nos. 86-2752-58 (W.D. Pa. Feb. 18, 1988) (WESTLAW, 1988 WL 23008) ("Although [*McMahon*] cast serious doubt in the reasoning behind *Wilko*, we find that the Securities Act claims are not arbitrable."); Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 700 F. Supp. 1092, 1095 (S.D. Fla. 1987) ("[W]hile the reasoning behind *Wilko* has been cut away, its bare holding remains in force. Accordingly, this court is bound to follow the *Wilko* holding."); McCowan v. Dean Witter Reynolds, Inc., 682 F. Supp. 741, 744 (S.D.N.Y. 1987) ("the *McMahon* Court did not go so far as to overrule *Wilko*"), *appeal dismissed*, 889 F.2d 451 (2d Cir. 1989); Continental Serv. Life & Health Ins. Co. v. A.G. Edwards & Sons, Inc., 664 F. Supp. 997, 1001 (M.D. La. 1987) (Although *McMahon* questioned the "underlying rationale" of *Wilko*, it did not overrule it); Santa v. Prudential-Bache Sec., Inc., No. 85-6421 (S.D. Fla. Nov. 2, 1987) (WESTLAW, 1987 WL 49385) ("[A]lthough the rationale of *Wilko* was seriously undermined by *McMahon*, *Wilko* specifically was not overruled and continues to retain viability."); Helfricht v. Jefferies & Co., No. 85-0466 (D.N.J. Oct. 14, 1987) (WESTLAW, 1987 WL 14777) ("It would be premature at this time to conclude that *Wilko* has been overruled and that claims asserted under the Securities Act are subject to arbitration.").

117. 691 F. Supp. 1415 (N.D. Ga. 1988).

118. *Id.* at 1417-18.

overrule if given the opportunity.[119] *Araim* recognized that *McMahon* "raise[d] serious questions about the vitality of [the *Wilko*] holding,"[120] but the court concluded that "*McMahon*'s reference to *stare decisis* and the Supreme Court's traditional reluctance to reverse longstanding interpretation of a statute, as opposed to the Constitution, make this court unwilling to conclude that the overruling of *Wilko* is a near certainty."[121]

The other two cases[122] added substantive arguments to bolster *Wilko* and distinguish *McMahon*. First, the legislative history quoted in *McMahon* suggested that Congress had ratified *Wilko*, even though *McMahon* held that Congress's action did not affect the 1934 Act issue. Second, the "colorable argument" first made in *Scherk* was not rejected by the *McMahon* majority, and thus supported a distinction between *Wilko* and *McMahon*.[123]

2. Cases Rejecting *Wilko*

The post-*McMahon* cases rejecting *Wilko* also did not discuss the jurisprudential issue.[124] Finding *Wilko*'s rationale inconsistent with *McMahon*'s, these cases simply rejected *Wilko*, paying little attention to the *McMahon* majority's express refusal to overrule it. The discussion in these cases centered not on the jurisprudential issue, but on the merits of applying *McMahon* to 1933 Act arbitration.

These cases generally pointed to the similarity of the relevant provisions in the 1933 and 1934 Acts. They noted that section 29(a) of the 1934 Act is virtually identical to section 14, the 1933 Act anti-waiver provision.[125] *McMahon* held that section 29(a) only bars waiver of the

---

119. *Id.* at 1418.

120. *Id.* at 1417.

121. *Id.* at 1418.

122. *See* Ketchum v. Almahurst Bloodstock IV, 685 F. Supp. 786, 792 (D. Kan. 1988); Schultz v. Robinson-Humphrey/American Express, Inc., 666 F. Supp. 219, 220 (M.D. Ga. 1987). Yet a third court adopted the *Schultz* analysis by reference. *See* Santa v. Prudential-Bache Sec., Inc., No. 85-6421 (S.D. Fla. Nov. 2, 1987) (WESTLAW, 1987 WL 49385).

123. *See Ketchum*, 685 F. Supp. at 792; *Schultz*, 666 F. Supp. at 220. Actually, as of the *McMahon* decision, five of the sitting justices had rejected the "colorable argument." Justices Brennan, White and Marshall rejected it in joining Justice Douglas's dissent in *Scherk*. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 532 (1974) (Douglas, J., dissenting). Justice Blackmun rejected the "colorable argument" in his *McMahon* dissent. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 244-45 (1987) (Blackmun, J., dissenting). Finally, Justice Stevens implicitly rejected it in his separate opinion in *McMahon* finding *Wilko* applicable to the 1934 Act. *See id.* at 268-69 (Stevens, J., concurring in part and dissenting in part). However, as mentioned earlier, Justice White apparently changed his mind in *Byrd*. *See supra* note 82 and accompanying text.

124. *See* Rodriguez de Quijas v. Shearson/Lehman Bros., 845 F.2d 1296, 1298-1299 (5th Cir. 1988), *aff'd*, 490 U.S. 477 (1989); Schuster v. Kidder, Peabody & Co., 699 F. Supp. 271, 273-275 (S.D. Fla. 1988); Kavouras v. Visual Prods. Sys., 680 F. Supp. 205, 207 (W.D. Pa. 1988); Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 673 F. Supp. 1009, 1011 (C.D. Cal. 1987).

125. *See Rodriguez*, 845 F.2d at 1298; *Schuster*, 699 F. Supp. at 273-74; Benoay v. E.F. Hutton & Co., 699 F. Supp. 1523, 1526 (S.D. Fla. 1988); Ryan v. Liss, Tenner &

substantive provisions of the 1934 Act, not the 1934 Act's jurisdictional provisions. Therefore, these courts reasoned, compulsory arbitration is rejected only when arbitration is inadequate to protect substantive rights.[126] Given the almost identical provisions in the two statutes, these courts reasoned that the *McMahon* holding applies to section 14 and the 1933 Act as well.[127] If so, the 1933 Act issue was an easy one to decide. The substantive rights granted by the 1933 Act and the 1934 Act are quite similar. The *McMahon* majority itself concluded that modern arbitration procedures under the regulatory oversight of the SEC were adequate to protect the substantive rights granted by the federal securities laws.[128] If arbitration was adequate to protect 1934 Act substantive rights, it must also be adequate to protect substantive rights under the 1933 Act. As one court indicated, "[t]here is nothing to show that judicial resolution is more necessary when 1933 Act claims are asserted than when claims are brought under the 1934 Act."[129] Under this reading, *Wilko* was a historical anomaly made inapplicable by changed circumstances.[130] "Indeed, the [*McMahon*] court stated that it believed *Wilko* would have been determined differently had the arbitration process in 1953 provided an adequate substitute for adjudication."[131] Under this view, agreements to arbitrate 1933 Act claims, like agreements to arbitrate 1934 Act claims, were enforceable.

Cases rejecting *Wilko* virtually ignored the "colorable argument" for distinguishing claims brought under the 1933 and 1934 Acts. The Fifth Circuit opinion in *Rodriguez* mentioned the "colorable argument" but

---

Goldberg Sec. Corp., 683 F. Supp. 480, 484 (D.N.J. 1988); *Kavouras*, 680 F. Supp. at 207; Aronson v. Dean Witter Reynolds, Inc., 675 F. Supp. 1324, 1326 (S.D. Fla. 1987); *Staiman*, 673 F. Supp. at 1011.

126. *See Rodriguez*, 845 F.2d at 1298; *Schuster*, 699 F. Supp. at 274; *Benoay*, 699 F. Supp. at 1527; *Kavouras*, 680 F. Supp. at 207-208; Rosenblum v. Drexel Burnham Lambert Inc., 700 F. Supp. 874, 877 (E.D. La. 1987); *Staiman*, 673 F. Supp. at 1011; *Aronson*, 675 F. Supp. at 1326.

127. *See Rodriguez*, 845 F.2d at 1298 n.5; *Schuster*, 699 F. Supp. at 274; *Benoay*, 699 F. Supp. at 1526; *Staiman*, 673 F. Supp. at 1011.

128. *See* Rodriguez de Quijas v. Shearson/Lehman Bros., 845 F.2d 1296, 1298 (5th Cir. 1988), *aff'd*, 490 U.S. 477 (1989); Kavouras v. Visual Prods. Sys., 680 F. Supp. 205, 208 (W.D. Pa. 1988); *Aronson*, 675 F. Supp. at 1326; Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 673 F. Supp. 1009, 1011 (C.D. Cal. 1987).

129. Schuster v. Kidder, Peabody & Co., 699 F. Supp. 271, 275 (S.D. Fla. 1988).

130. As one commentator argued,

> the majority's comments in *McMahon* that the mistrust of arbitration which formed the basis for the *Wilko* decision is no longer defensible, and that therefore '*Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue,' authorize courts to rule that *Wilko* no longer bars arbitration of claims brought under the Securities Act of 1933.

Ginger, *supra* note 108, at 532 n.11.

131. Ryan v. Liss, Tenner & Goldberg Sec. Corp., 683 F. Supp. 480, 484 (D.N.J. 1988).

summarily rejected it.[132] Most other courts did not even consider it.[133] Most courts also neglected the argument that Congress, by mentioning *Wilko* in the debate on the 1975 amendments, intended to keep section 12(2) claims nonarbitrable. Again, the Fifth Circuit was the only exception, dismissing this argument in one sentence: "We find it implausible that Congress intended to prohibit arbitration of Securities Act claims but intended to allow courts to determine the arbitrability of Exchange Act claims."[134]

3. Avoiding the Issue: A Possible Way Out

Surprisingly, almost no courts took the less controversial approach of seizing on some other issue to avoid reaching the *Wilko* issue. For example, the most obvious way to avoid the *McMahon* dilemma would have been to hold that the parties' contract did not require arbitration of 1933 Act cases. Prior to 1987, SEC Rule 15c2-2 required that arbitration clauses in customer agreements allow securities claims to be brought in federal court.[135] This requirement was really nothing more than a regulatory restatement of *Wilko*. Courts could have read such contractual provisions as barring arbitration of 1933 Act claims regardless of whether the compulsory arbitration of such claims would be consistent with the 1933 Act.[136] Few courts took this opportunity, however, and some even went out of their way to reach the *Wilko* question. For example, in *Continental Service Life & Health Ins. Co. v. A.G. Edwards & Sons, Inc.*,[137] decided only three days after *McMahon*, the district court ignored a clause in the contract providing that the arbitration paragraph "shall not apply to any controversy involving a nonspurious claim under

132. *See* Rodriguez de Quijas v. Shearson/Lehman Bros., 845 F.2d 1296, 1299 (5th Cir. 1988), *aff'd*, 490 U.S. 477 (1989).

133. *See supra* notes 111-112. One state court, however, relied in part on a variant of the "colorable argument" to hold that a 1933 Act claim was arbitrable:

> *Wilko* was based largely on the fact that [section] 12(2) of the Securities Act of 1933 provides an *express* private right of action. Any private right of action under [section] 17(a) of the same Act is implied, not express, just like any private right of action recognized under [section] 10(b) of the 1934 Act, at issue in *McMahon*. Therefore, Rocz's [section] 17(a) claim is arbitrable.

Rocz v. Drexel Burnham Lambert, Inc., 154 Ariz. 462, 465, 743 P.2d 971, 974 (Ariz. Ct. App. 1987).

134. *Rodriguez*, 845 F.2d at 1299.

135. *See Recourse to the Courts Notwithstanding Arbitration Clauses in Broker-Dealer Customer Agreements*, Securities Exchange Act of 1934 Release No. 20397, 48 Fed. Reg. 53,404 (1983).

136. *See, e.g.*, Wehe v. Montgomery, 711 F. Supp. 1035, 1038 (D. Or. 1989) (stating that agreement to arbitrate claims under 1933 and 1934 acts was unenforceable under Rule 15c2-2); Mignocchi v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 707 F. Supp. 140, 141-42 (S.D.N.Y. 1989) (construing language of arbitration agreement, court holds that plaintiffs securities claims must be heard in judicial forum); Brick v. J.C. Bradford & Co., 677 F. Supp. 1251, 1256 (D.D.C. 1987) ("as a matter of contract law [p]laintiff's section 10(b) claim is not subject to arbitration").

137. 664 F. Supp. 997 (M.D. La. 1987).

federal securities laws."[138] In *McCowan v. Dean Witter Reynolds, Inc.*,[139] another district court faced an addendum to a customer agreement providing that the customer was "not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts."[140] The court held that the addendum merely disclosed the federal law existing at the time and did not itself create or preserve any contractual right to litigate in federal court. Several other cases reached similar results.[141] Only one published case in the period between *McMahon* and *Rodriguez* used contractual language to avoid the *Wilko* issue.[142] Thus, courts that might have avoided the issue went out of their way to reach the *Wilko* question.

Similarly, courts not even presented with a *Wilko* problem reached out in dictum to express their opinions. For example, in *Chang v. Lin*,[143] the parties agreed in the district court that the plaintiffs' 1933 Act claims were not arbitrable. The only issue on appeal was whether the 1933 Act claims should be stayed pending arbitration of other, arbitrable claims. The Second Circuit panel nevertheless discussed the viability of *Wilko*: "Although the Supreme Court in *McMahon* questioned the rationale underlying *Wilko*, the Court nevertheless did not overrule that decision, and it continues to govern us."[144] In a case involving only a 1934 Act claim, a Tenth Circuit panel expressed its view that *McMahon* "essentially overruled *Wilko*."[145] A Third Circuit panel wrote that "[a]s long as *Wilko* stands in the Supreme Court, agreements to arbitrate claims under the Securities Act of 1933 will remain unenforceable,"[146] and a district court in that circuit dutifully responded.[147] Finally, in another

138. *Id.* at 1000.

139. 682 F. Supp. 741 (S.D.N.Y. 1987), *appeal dismissed*, 899 F.2d 451 (2d Cir. 1989).

140. *Id.* at 743.

141. *See, e.g.*, Reed v. Bear, Stearns & Co., 698 F. Supp. 835, 841 (D. Kan. 1988) (contract provided that "this Agreement to arbitrate does not constitute a waiver of your right to a judicial forum where such waiver would be void under the securities laws and specifically does not prohibit you from pursuing any claim or claims arising under the federal securities laws in any court of competent jurisdiction"); Ryan v. Liss, Tenner & Goldberg Sec. Corp., 683 F. Supp. 480, 483 (D.N.J. 1988) (language nearly identical to that in *Reed*); DeKuyper v. A.G. Edwards & Sons, 695 F. Supp. 1367, 1368 (D. Conn. 1987) (contract provided that "[a]rbitration cannot be compelled with respect to disputes arising under federal securities laws").

142. *See* Paulson v. Dean Witter Reynolds, Inc., 708 F. Supp. 1163, 1164 (D. Or. 1989), *vacated*, 905 F.2d 1251 (9th Cir. 1990). In *Paulson*, the arbitration agreement actually covered securities claims. The court, however, held that the agreement was unenforceable because it violated SEC Rule 15c2-2 when executed.

143. 824 F.2d 219 (2d Cir. 1987).

144. *Id.* at 222.

145. Peterson v. Shearson/American Express, Inc., 849 F.2d 464, 466 (10th Cir. 1988).

146. Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 841 F.2d 508, 512 (3d Cir. 1988). Curiously, an earlier panel of the Third Circuit had concluded that *McMahon* distinguished *Wilko* "almost to extinction." Johnson v. United Food and Commercial Workers, Int'l Union Local No. 23, 828 F.2d 961, 966 (3d Cir. 1987).

147. *See* Sacco v. Prudential-Bache Sec., Inc., 703 F. Supp. 362, 365 (E.D. Pa. 1988).

1934 Act case, the Fifth Circuit cast its lot against *Wilko* in dictum: "*McMahon* undercuts every aspect of *Wilko v. Swan*; a formal overruling of *Wilko* appears inevitable — or, perhaps, superfluous."[148]

IV. THE DEATH OF *WILKO* AND OF ANTICIPATORY OVERRULING: *RODRIGUEZ DE QUIJAS V. SHEARSON/AMERICAN EXPRESS, INC.*

The Supreme Court finally overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[149] *Rodriguez*, like *Wilko*, involved an alleged violation by a broker of section 12(2) of the 1933 Act. As in *Wilko*, the petitioners had signed an agreement with the broker requiring that all disputes relating to their accounts be settled through arbitration. A bare majority of the justices overruled *Wilko* and held that the arbitration agreement was enforceable.[150]

A. *The Court's Comments on Anticipatory Overruling*

In light of *McMahon*, the Supreme Court's rejection of *Wilko* is not surprising. The Court's strong criticism of the lower courts for their handling of the dilemma *McMahon* created is surprising, however. All of the justices firmly rejected the concept of anticipatory overruling. Justice Kennedy wrote:

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.[151]

These two sentences represent the majority's only comment on the issue. The court gave no reason for rejecting anticipatory overruling, nor did it consider why the lower courts had developed the doctrine. Justice Stevens' dissent also criticized the lower courts, accusing them of engaging in "an indefensible brand of judicial activism."[152] Like the majority, the dissent did not explain why anticipatory overruling was "indefensible." Justice Stevens devoted most of his opinion to complaining that the majority's overruling of *Wilko* was indefensible. Thus, all of the justices

---

The court in *Sacco* relied on *Osterneck* to conclude that agreements to arbitrate 1933 Act claims were unenforceable in the Third Circuit. *See id.* at 365.

148. Noble v. Drexel, Burnham, Lambert, Inc., 823 F.2d 849, 850 n.3 (5th Cir. 1987) (citations omitted).

149. 109 S. Ct. 1917 (1989).

150. *See id.* at 1922. Justices Rehnquist, White, O'Connor and Scalia joined Justice Kennedy's majority opinion enforcing predispute agreements to arbitrate 1933 Act claims. Justice Stevens filed a brief dissent, joined by Justices Brennan, Marshall and Blackmun.

151. *Id.* at 1921-22.

152. *Id.* at 1923 (Stevens, J., dissenting).

summarily rejected anticipatory overruling, without considering its possible benefits.

B. *The Court's Substantive Analysis*

The *Rodriguez* majority's strong defense of precedent is especially interesting given the majority's treatment of its own precedent. Justice Kennedy interpreted *Wilko* in a way that directly contradicts the majority in *McMahon*. Justice O'Connor wrote in *McMahon* that *Wilko* did not apply the antiwaiver provision to the 1933 Act's procedural provisions. According to Justice O'Connor,

> The conclusion in *Wilko* was expressly based on the Court's belief that a judicial forum was needed to protect the substantive rights created by the Securities Act . . . *Wilko* must be understood, therefore, as holding that the plaintiff's waiver of the 'right to select the judicial forum' was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by [section] 12(2).[153]

Justice Kennedy expressly rejected this reading of *Wilko*:

> It has been recognized that *Wilko* was not obviously correct, for 'the language prohibiting waiver of 'compliance with any provision of this title' could easily have been read to relate to substantive provisions of the Act without including the remedy provision.' *Alberto-Culver Co. v. Scherk*. The Court did not read the language this way in *Wilko*, however . . . .[154]

Justice Kennedy then concluded that *Wilko* was wrong and *McMahon* was right: "[T]he right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that [section] 14 is properly construed to bar any waiver of these provisions."[155] According to Justice Kennedy, *McMahon* involved the same question under section 29(a) of the 1934 Act, and there was no reason to distinguish the two provisions.

Justice Kennedy expressly rejected one of the prongs of the "colorable argument":

> The only conceivable distinction in this regard between the Securities Act and the Securities Exchange Act is that the former statute allows concurrent federal-state jurisdiction over causes of action and the latter statute provides for exclusive federal jurisdiction. But even if this distinction were thought to make any difference at all, it would suggest that arbitration agreements, which are 'in effect, a specialized kind of forum-selection clause,' *Scherk v. Alberto-Culver Co.*, should not be prohibited under the Securities Act, since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing buy-

153. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 228-29 (1987) (quoting Wilko v. Swan, 346 U.S. 427, 435 (1953)).

154. Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1919 (1989) (citation omitted).

155. *Id.* at 1920.

> ers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.[156]

As to the need to protect the 1933 Act's *substantive* provisions, Justice Kennedy argued that the aversion to arbitration which pervaded *Wilko* was "outmoded" and rejected by later decisions.[157] Justice Kennedy's opinion adopted *McMahon*'s views on this issue without further discussion.[158]

Justice Kennedy concluded that it "would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side."[159] According to the *Rodriguez* majority, the 1933 and 1934 Acts are interrelated parts of a single federal regulatory scheme, and they should be construed harmoniously. Letting those two holdings coexist, Justice Kennedy wrote, would undermine the rationale for harmonious construction, "which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another."[160]

V. THE POLICY ARGUMENTS FOR AND AGAINST ANTICIPATORY OVERRULING

Rodriguez was a knee-jerk reaction by the Supreme Court to the refusal of the lower courts to accept an iron-clad rule of stare decisis. The Court saw a challenge to stare decisis and quashed it. The Court simply failed to recognize the distinction between lower court rejection of a strong precedent and lower court rejection of a precedent that the Supreme Court itself would no longer follow. The lower courts that rejected *Wilko* in the aftermath of *McMahon* were not doing so to be unfaithful to *Wilko*; they were doing so to be faithful to *McMahon*. The *Rodriguez* Court, overly eager to protect the doctrine of stare decisis, failed to consider whether the policy concerns behind stare decisis support a requirement that the lower courts blindly follow even the most doubtful Supreme Court precedent. In fact, these policies do not support such a requirement. Anticipatory overruling is not an attack on the policies supporting stare decisis; it is an affirmation of them.

Stare decisis is actually two related principles,[161] one horizontal and one vertical. The horizontal principle of stare decisis says that a court should follow its own prior decisions. Once the Supreme Court has ruled on an issue, it should follow that ruling whenever the same issue is presented. The vertical principle of stare decisis says that a lower court should follow the prior decisions of a higher court in the same appellate

156. *Id.* at 1921 (citation omitted).
157. *See id.* at 1920.
158. *See id.* at 1921.
159. *Id.* at 1922.
160. *Id.*
161. *See* Kelman, *supra* note 5, at 4.

system. Once the Supreme Court has ruled on an issue, all of the other federal courts should follow that ruling.

The rule that a court should follow its own prior decisions has never been absolute. Horizontal stare decisis "has been considered by American courts to be more a rule of thumb than an iron-fisted command."[162] Change in judicial decisions is inevitable. Society and technology change and it would be foolhardy to constrain courts to the rules their predecessors created in a bygone era.[163] The likelihood that a court will reject a prior decision increases as the judicial system matures.[164] In 1789, the Supreme Court had little reason to reject prior precedent. The body of American precedent was sparse and the likelihood of doctrinal inconsistency in the few existing opinions was small. Further, the pace of social and technological change was slower. Today, however, a huge body of Supreme Court precedent exists and both the pace of decision and the pace of change are rapid. Friction between the old and the new is inevitable. This conflict is magnified when, as in the last ten years, the doctrinal leanings of the Court shift dramatically.

No one has suggested that the doctrine of stare decisis be abolished, thereby enabling a court to reverse every prior decision it believes was erroneously decided. Rather, the decision to overrule requires careful balancing: "Baldly stated, . . . whether a precedent will be modified depends on whether the policies which underlie the proposed rule are strong enough to outweigh both the policies which support the existing rule and the disadvantages of making a change."[165]

The problem for lower courts is not that the Supreme Court overrules its own precedent; that is inevitable. The problem is the Court's failure

162. Eskridge, *supra* note 4, at 1361; *see also* Kelman, *supra* note 5, at 4 ("[f]or most American courts of final appeal the policy of maintaining uniformity of law over the course of time is not inexorable"); Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 Tex. L. Rev. 514, 539 (1943) ("[t]he general American doctrine behind stare decisis . . . is that a court is not inexorably bound by its own precedents").

163. *See* Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 4-5 (1983); Wise, *The Doctrine of Stare Decisis*, 21 Wayne L. Rev. 1043, 1056-57 (1975). This is not necessarily an argument in favor of the evolutionary view of constitutional or statutory interpretation and against "original intent." To allow judges to change their own prior rules to meet changing circumstances does not necessarily mean that they may ignore the clear commands of the Constitution or legislation. If, however, the Supreme Court does have an evolutionary view of the Constitution, the problem for lower courts discussed in this Article becomes even more acute. *See* R. Bork, The Tempting of America: The Political Seduction of The Law 155-59 (1990). Many of the problem cases referred to in this article involve the Supreme Court's changing views on the Constitution.

164. *See* Stevens, *supra* note 163, at 4-5.

165. Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 12 (1966); *see also* Jackson, *supra* note 163, at 334 ("To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."); Stevens, *supra* note 163, at 9 ("Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law.").

to do so candidly and certainly. A court may avoid its own precedent in a number of ways without openly acknowledging it, and a court may openly overrule its own precedent without acknowledging the full extent of the doctrinal shift. Karl Llewellyn's famous list of techniques for dealing with precedent includes at least thirteen ways to avoid a precedent without expressly overruling it.[166] A court can distinguish the precedent on its facts, interpret the old rule so that the new case falls outside of the rule, limit or dismiss its broadest statement as dictum, or simply ignore the old rule. Similarly, a court can overtly overrule a prior precedent in ways that less directly attack the quality of the original ruling.[167] The court may argue that changed conditions have undermined the basis of the original ruling.[168] The court may rely on what Professor Israel calls the "lesson of experience"—the difficulties experienced in applying the old rule.[169] Finally, the court may claim that the precedent overruled is inconsistent with subsequent decisions by the court.[170]

All of these techniques have costs. Uncertainty results when, as in *McMahon*, the Supreme Court refuses to openly acknowledge the jurisprudential impact of its decision, generating what one scholar calls "a labyrinth of anomalies."[171] As Justice Douglas once wrote, "[y]ears of litigation may be needed to rid the law of mischievous decisions which should have fallen with the first of the series to be overruled."[172] This gradual process of erosion, not the departure from stare decisis, creates

166. *See* K. Llewellyn, The Common Law Tradition: Deciding Appeals 84-87 (1960). Techniques 33 to 45 allow a court to avoid application of a precedent to the problem at hand.

167. *See* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 219-25; *see also* Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 Const. Commentary 123, 128 (1985) (discussing the Court's flexibility in considering constitutional precedent). These conditions have also been suggested as criteria for determining when overruling is proper. *See* Note, *The Power that Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U.L. Rev. 345, 358-59 (1986).

168. Professor Israel argues that the change-in-circumstances rationale lets the court avoid a direct attack on the validity of the decision when decided:

> [A]n opinion emphasizing the changed circumstances naturally will contain the counter suggestion that, in any event, the former Court might well have decided differently if confronted with today's conditions. Thus, with the change-in-circumstances rationale, the Court may obtain the best of both worlds. Not only is the prior decision overruled, but the adverse emphasis upon differences in the Court's personnel that normally attends such action is eliminated, or at least diluted, by relying upon grounds consistent with that concept of impersonal decision-making ordinarily supported by *stare decisis*.

Israel, *supra* note 167, at 221 (footnote omitted).

169. Again, this allows the overruling court to minimize the effect of changes in court personnel "by either the outright suggestion or, at least, the insinuation that the present result was one that its predecessors might well have reached if they had had the same information, derived from experience under the rule first promulgated." *Id.* at 222.

170. *See id.* at 223-25. Of course, this begs the obvious question—why did those other cases not follow the prior precedent? *See* K. Llewellyn, *supra* note 166, at 87.

171. *See* Wise, *supra* note 163, at 1057.

172. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 749 (1949).

the problem that courts seek to solve through anticipatory overruling.[173] A return to a rigid rule of stare decisis is not needed. Rather, the Supreme Court should openly and candidly acknowledge whether it is rejecting a prior precedent and state plainly the doctrinal changes it is making.[174]

A. *The Argument for Anticipatory Overruling*

Anticipatory overruling facilitates growth in the law because legal rules can adjust to changes in doctrine faster if each issue does not require separate Supreme Court resolution.[175] Once the Supreme Court has announced a doctrinal change, the lower courts can adjust the legal rules accordingly. Correction of old precedent need not depend on whether individual cases reach the Supreme Court. Anticipatory overruling thus promotes growth in the law much like the Supreme Court's overruling of its own precedents, but at a more rapid pace.

1. Treatment of *Brown v. Board of Education*

Two cases arising in the aftermath of *Brown v. Board of Education*[176] illustrate the stifling effect the *Rodriguez* position could have. *Brown v. Board of Education*, decided in 1954, rejected the separate-but-equal doctrine and held that racial segregation in public education was constitutionally impermissible.[177] Two challenges to segregation policies on buses followed the *Brown* decision.[178] At the time those cases arose, the Supreme Court had not expressly overruled *Plessy v. Ferguson*,[179] which allowed segregated public transportation. Under the *Rodriguez* view, the lower courts would have been required to follow *Plessy* and uphold the segregated bus policies, even though *Brown* clearly disapproved of public racial segregation. In fact, lower courts refused to follow *Plessy*. One lower court noted that "a judicial decision, which is simply evidence of the law and not the law itself, may be so impaired by later decisions as no longer to furnish any reliable evidence."[180] The Fourth Circuit wrote:

> We do not think that the separate but equal doctrine of Plessy v. Fer-

173. *See id.*

174. *See* Douglas, *supra* note 172, at 749; Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1, 2-3 (1979); Wise, *supra* note 163, at 1057.

175. *See* Gold v. DiCarlo, 235 F. Supp. 817, 819 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520 (1965); Kniffin, *supra* note 7, at 80; Comment, *Predicting the Demise*, *supra* note 20, at 93.

176. 347 U.S. 483 (1954).

177. *Id.* at 495.

178. Flemming v. South Carolina Elec. and Gas Co., 224 F.2d 752 (4th Cir. 1955), *appeal dismissed*, 351 U.S. 901 (1956); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).

179. 163 U.S. 537 (1896). Attempts to check the subsequent history *Plessy* illustrate the problems dealt with in the text. Both Shepard's United States Citations and the Auto-Cite service available on LEXIS incorrectly indicate that *Brown v. Board of Education* overruled *Plessy*. Actually, *Plessy* has never been expressly overruled.

180. *Browder*, 142 F. Supp. at 716.

> guson can any longer be regarded as a correct statement of the law. That case recognizes segregation of the races by common carriers as being governed by the same principles as segregation in the public schools; and the recent decisions in Brown v. Board of Education and Bolling v. Sharpe, which relate to public schools, leave no doubt that the separate but equal doctrine approved in Plessy v. Ferguson has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of Henderson v. United States where segregation in dining cars was held violative of a section of the interstate commerce act providing against discrimination.[181]

Without anticipatory overruling, legal progress is segmented. The law lurches forward first in one limited area and then in another, as the Supreme Court slowly changes its rules on a narrow, case-by-case basis. Policies that the Supreme Court no longer approves remain frozen in time. Obsolete, disapproved rulings continue to control people's behavior until a case presenting that precise issue again works its way to the Supreme Court. Anticipatory overruling, on the other hand, allows the law to adjust to changes in Supreme Court policy more rapidly. The transition is smoother and the benefits of new federal policies become available to the public more quickly.

2. Treatment of *Lochner*-Era Cases

Lower court treatment of the Supreme Court's *Lochner*-era decisions presents an interesting contrast between anticipatory overruling and absolute stare decisis.[182] *Gold v. DiCarlo*[183] presented a constitutional challenge to a New York statute regulating the price at which licensed brokers could resell theatre and other tickets to places of public amusement. The predecessor to the New York statute had been declared unconstitutional by the Supreme Court in *Tyson & Brother v. Banton*,[184] a 1927 decision. *Tyson* held that New York had no power to regulate the resale prices of theatre and sports tickets because they were not "affected with a public interest."[185] After *Tyson*, the Supreme Court decided *Nebbia v. New York*,[186] which upheld a state statute regulating the retail price of milk. *Nebbia* said that due process required only that state regulation not be arbitrary or discriminatory and have a reasonable relation to a proper legislative purpose.[187] In *Olsen v. Nebraska*,[188] the Supreme

181. *Flemming*, 224 F.2d at 752-53 (citations omitted).

182. *See* Gold v. DiCarlo, 235 F. Supp. 817 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520 (1965); Skrupa v. Sanborn, 210 F. Supp. 200 (D. Kan. 1961), *rev'd sub nom.* Ferguson v. Skrupa, 372 U.S. 726 (1963); Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62 (E.D.S.C. 1948), *rev'd*, 336 U.S. 220 (1949).

183. 235 F. Supp. 817, 819 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520 (1965).

184. 273 U.S. 418 (1927).

185. *Tyson & Brother*, 273 U.S. at 430 (quoting Munn v. Illinois, 94 U.S. 113, 126 (1877)).

186. 291 U.S. 502 (1934).

187. *See id.* at 537.

Court subsequently upheld a state statute regulating fees charged by employment agencies. The *Gold* court believed that *Olsen* effectively discarded the *Tyson* standard.[189] *Tyson* had not been overruled, but the *Gold* court noted that it was "obsolescent" and should be disregarded. The court wrote:

> We would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words 'We hereby overrule Tyson,' as the plaintiffs contend we should, before recognizing that the case is no longer binding precedent but simply a relic for the constitutional historians. Judges do not have such mechanical or wooden attitudes nor are they devoid of all powers of interpretation, analogy and application of constitutional principles; they and the law must keep pace with our vibrant and dynamic society and the changes in the law which the courts have pronounced.[190]

The district courts' positions in *Family Security Life Ins. Co. v. Daniel*[191] and *Skrupa v. Sanborn*[192] present an interesting contrast to the court's position in *Gold*. In *Daniel*, the plaintiff sued to enjoin enforcement of a South Carolina statute prohibiting insurance companies from having ties to mortuaries. The *Daniel* court relied on the Supreme Court's reasoning in *Liggett Co. v. Baldridge*,[193] which struck down as unconstitutional a Pennsylvania statute limiting drug store ownership to licensed pharmacists. Over a strong dissent by Judge Dobie,[194] the *Daniel* court invalidated the South Carolina statute and held that a district court had no power to reject *Liggett*:

> [T]he defendants assume that the Liggett case, if followed by this Court, would require the granting of plaintiffs' prayer. However, they point to Mr. Justice Holmes' dissent and assert that we should conclude that the present constituency of the Supreme Court will follow the dissenting opinion of Mr. Justice Holmes rather than the majority

188. 313 U.S. 236 (1941).

189. *See* Gold v. DiCarlo, 235 F. Supp. 817, 819 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520 (1965).

190. *Id.* at 819-20.

191. 79 F. Supp. 62 (E.D.S.C. 1948), *rev'd*, 336 U.S. 220 (1949).

192. 210 F. Supp. 200 (D. Kan. 1961), *rev'd sub nom.* Ferguson v. Skrupa, 372 U.S. 726 (1963).

193. 278 U.S. 105 (1928), *overruled*, North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

194. Judge Dobie wrote:

> [t]here has been a decided swing in the viewpoint of the United States Supreme Court in this field. Formerly, the Court seemed willing to strike down State statutes on the score that these statutes contravened the Fourteenth Amendment. The dissenting opinions of Holmes and Brandeis in the earlier cases have now been quite generally upheld. . . . The modern cases have stressed the idea that questions of policy are for the legislature and not for the courts, and that courts cannot strike down a statute merely because they think the statute is unwise or because it is not the best remedy for the apparent evil. These cases give wide latitude to State legislatures for experimental legislation in economic and social fields.

Daniel, 79 F. Supp. at 74 (Dobie, J., dissenting) (citations omitted).

> opinion of the Court. We cannot agree to the view that lower courts may review the decisions of the Supreme Court, and, following the predilection for individual justices, subvert the salutary doctrine of stare decisis into a study of personalities rather than a becoming observance of the accepted majority decisions of the Supreme Court. We are firmly of the opinion that if the decisions of the Supreme Court are to be reversed, that function should be reserved to the Supreme Court itself. Any other rule would bog down the judicial processes hopelessly in those quagmires of uncertainty which would justly lay the District Courts open to the gravest public censure. It is not our duty to speculate on what the Supreme Court as now constituted may do on an appeal in this case. It is our duty to decide the case as we think it ought to be decided on the decisions as they now stand.[195]

The Supreme Court subsequently reversed.[196]

A similar approach was taken by the district court in *Skrupa v. Sanborn*. The plaintiff challenged a Kansas statute prohibiting "debt adjusting" except as incident to the practice of law.[197] The district court held that the statute was unconstitutional. Although the district court did not cite a Supreme Court case to support its opinion, on appeal the Supreme Court read the lower court's opinion as adopting the philosophy of *Adams v. Tanner*,[198] which held that a state could not prohibit a business that is "useful" and "not inherently immoral or dangerous to public welfare."[199] Noting later decisions that abandoned such *Lochner*-type reasoning, the Supreme Court reversed.[200]

Daniel, *Skrupa v. Sanborn* and *Gold* offer a clear illustration of the choice between anticipatory overruling and a rigid rule of stare decisis. In *Daniel* and *Skrupa v. Sanborn*, the district courts adopted a strict rule of stare decisis and followed questionable *Lochner*-era cases. In response, the Supreme Court intervened to update the law. In *Gold*, on the other hand, the lower court, sensing that the Supreme Court was moving away from its *Lochner*-era precedents, was able to anticipate the change that the Supreme Court subsequently made.

B. *The Argument Against Anticipatory Overruling*

The Supreme Court's unexplained rejection of anticipatory overruling in *Rodriguez* undoubtedly results from a rigid application of stare decisis: stare decisis is a good policy; therefore, it must be good in all contexts. Closer examination, however, reveals that the arguments in favor of stare decisis fail, or are at least much weaker, in situations where anticipatory overruling is appropriate.

---

195. *Id.* at 68-69.

196. Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 225 (1949).

197. *See* Skrupa v. Sanborn, 210 F. Supp. 200, 201 (D. Kan. 1961), *rev'd sub nom.* Ferguson v. Skrupa, 372 U.S. 726 (1963).

198. 244 U.S. 590 (1917), *overruled*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

199. Ferguson v. Skrupa, 372 U.S. at 728 (quoting Adams v. Tanner, 244 U.S. at 593).

200. *See id.* at 731; *supra* text accompanying notes 50-53.

Four categories of policy arguments support a general rule of stare decisis: (1) predictability, certainty and reliability; (2) fairness and uniformity of treatment; (3) judicial economy and (4) protecting the public image of the courts. The same policies supporting horizontal stare decisis generally support vertical stare decisis.[201] Additional policy arguments are sometimes made against anticipatory overruling. Some argue that anticipatory overruling violates a duty of obedience owed by the lower court to the higher court.[202] Others argue that anticipatory overruling requires a unique type of speculative judgment that courts are not competent to make.[203] Although these policies undoubtedly favor lower court adherence to unquestioned Supreme Court precedent, such policies do not always support lower court adherence where the precedent is doubtful. In this context, the Supreme Court has already questioned its own precedent. The question is not *whether* the lower court should follow the Supreme Court, but *how* the lower court should follow the Supreme Court. When the Supreme Court casts doubt on its own precedent, it is better for the lower court to reject the doubtful precedent and follow the doctrinal developments in more recent decisions. The same policies that usually favor stare decisis favor anticipatory overruling in these situations.

1. Predictability, Certainty and Reliability

The argument for predictability, certainty and reliability focuses on the justified expectations of the parties. Stare decisis allows people to make decisions and plan their conduct with confidence that the legal rules on which they rely will not be changed retroactively to make their conduct wrongful. Therefore, lawyers can advise their clients "with a reasonable degree of confidence that certain acts will produce certain consequences."[204] Such predictability and reliability decreases the risk associated with transactions covered by known legal rules and thereby decreases the overall cost of such transactions. No one must be compensated to bear the risk of a change in the law.

Predictability is always reduced when courts depart from stare decisis. If the Supreme Court may change its mind, individuals are less able to predict the rules that will be applied to their conduct. Transactions become more costly because of the resulting risk. As Justice Roberts ar-

201. *See generally* Lyons, *Formal Justice and Judicial Precedent*, 38 Vand. L. Rev. 495 (1985) (inquiring into the rationales for stare decisis and the reasonable scope of the doctrine); Schauer, *Precedent*, 39 Stan. L. Rev. 571, 595-602 (1987) (outlining policy arguments supporting strict rule of stare decisis); Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 505-506 (1945) (listing arguments in support of stare decisis); Note, *supra* note 167, at 347-48 (same).

202. *See* Kniffin, *supra* note 7, at 74-75; *infra* notes 234-35 and accompanying text.

203. *See* United States v. Caldwell, 543 F.2d 1333, 1370 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976); *infra* notes 247-51 and accompanying text.

204. Sprecher, *supra* note 201, at 505.

gued, "the law becomes not a chart to govern conduct but a game of chance."[205]

The argument for certainty and predictability is easily overstated, however, even in the horizontal stare decisis context.[206] For instance, stare decisis does not protect the parties against legislative changes to the law, although the legislative (and constitutional) norm against retroactive application of newly enacted laws has the practical effect of providing some protection. Certainty is not guaranteed even if the inquiry is limited to the judiciary. The rule of stare decisis is not absolute and is often breached, so the risk of change is only reduced, not eliminated. In any event, the risk that a court might overrule prior decisions is probably small compared to the risk associated with legal questions not yet decided. The reduction of transaction costs produced by stare decisis is thus relatively small. Finally, some legal rules present no potential reliance problem. For example, a criminal defendant cannot be said to have relied on the existing test for insanity, for that very reliance presupposes sanity. In such cases, neither party's conduct is affected by the existing legal rule, and no justified expectations would suffer if that rule were changed. Of course, even in these cases, lawyers may rely on the existing rule once a case arises, so some reliance interest is still associated with stare decisis, but that interest is small.[207]

In spite of its limitations, the argument for certainty and predictability is clearly valid in many cases. Some have extended this argument to anticipatory overruling, arguing that anticipatory overruling leads to chaos and a resulting breakdown in predictability.[208] The validity of the

205. Mahnich v. Southern S.S. Co., 321 U.S. 96, 112 (1944) (Roberts, J., dissenting).

206. *See* Schaefer, *supra* note 165, at 12.

207. The argument that uniformity and certainty require a rigid stare decisis rule mirrors the general argument for a rule-based jurisprudence over one requiring a case-by-case analysis of the equities. The modern rejection of the rules-oriented approach in other fields might portend changes to the rule of stare decisis. For example, the argument for the traditional territorial conflict of law rules, represented by the First Restatement, was that the need for certain, uniformly applied rules outweighed the need for a more "just" result in particular cases. *See* D. Cavers, The Choice of Law Process 22-24 (1965). The territorial rules approach has been rejected by some courts in favor of one of several approaches falling under the general heading of interest analysis. *See generally* R. Leflar, L. McDougal, III & R. Felix, American Conflicts Law 281-305 (4th ed. 1986) (discussing the evolution of choice-of-law theory as reflected in judicial decisions). These approaches generally call for a case-by-case review of the particular facts and policies, rather than the application of a broad, inflexible rule. Professors Scoles and Hay point out that the evolution of these rules resulted from a focus on what courts really did rather than the rules they purported to be following. *See* E. Scoles & P. Hay, Conflict of Laws 32-33 (1984). A similar focus might produce a new approach to stare decisis, rather than the invocation of an absolute rule that is frequently violated.

208. *See, e.g.*, Norris v. United States, 687 F.2d 899, 909 (7th Cir. 1982) (Cudahy, J., concurring) ("[a]ny hope of certainty must be abandoned"); United States v. Silverman, 166 F. Supp. 838, 840 (D.D.C. 1958) ("Such speculation might perhaps lead to a chaotic situation, since different judges might reach different results by this means."), *rev'd*, 365 U.S. 505 (1961); Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62, 69 (E.D.S.C. 1948) ("would bog down the judicial processes hopelessly in . . . quagmires of uncer-

predictability/certainty argument in this context is less clear. The Supreme Court's own willingness to depart from precedent lessens predictability; anticipatory overruling by the lower courts, if done correctly, merely accelerates the inevitable change. If lower courts must follow a precedent that the Supreme Court has cast into doubt, then predictability is lessened. Whether, and when, the Supreme Court will eventually overrule a doubtful precedent is uncertain and highly unpredictable. The parties may or may not have the doubtful precedent applied to their conduct. Anticipatory overruling actually enhances predictability because the parties can be reasonably certain that the old rule will not be applied to their conduct.

Some scholars argue that the result should be different when the parties have acted in reliance on the existing precedent.[209] If the reliance interest is strong enough, these authors claim, the lower court should not disregard the doubtful Supreme Court precedent. This reliance argument is misdirected. The reliance interest should affect the lower court's prediction of whether the Supreme Court will overrule because the Supreme Court will consider reliance in deciding whether to overrule and, if so, whether to overrule retroactively or prospectively.[210] If the lower court is convinced, however, that the Supreme Court would overrule the precedent in spite of any reliance interest, then any resulting unfairness must be charged to the Supreme Court. The lower court is merely predicting what the Supreme Court would do and following that prediction. To allow the Supreme Court to disturb the reliance interest by retroactive application of its decisions while denying that same power to lower courts is incongruous.

In any event, the reliance argument is circular when applied to doubtful precedent. Reliance on a questionable precedent is justified only if a party is convinced that the precedent will be applied in future cases. If a Supreme Court precedent is doubtful enough to convince a lower court that the Supreme Court would overrule it, reliance is justified only if there is an absolute rule against anticipatory overruling by lower courts. If anticipatory overruling is allowed, reliance on the doubtful rule is not justified. The parties should anticipate that the precedent will be disre-

---

tainty"), *rev'd*, 336 U.S. 220 (1949); Cooper, *supra* note 5, at 402 n.6 ("the alternative is . . . obviously chaos"); Kniffin, *supra* note 7, at 82-83 (discussing arguments for and against anticipatory overruling).

209. *See* Kniffin, *supra* note 7, at 76-77; Comment, *Predicting the Demise*, *supra* note 20, at 99-100.

210. *See, e.g.*, Patsy v. Board of Regents of New York, 457 U.S. 496, 501 n.3 (Supreme Court did not overrule prior precedents because, in part, "[o]verruling these decisions might injure those § 1983 plaintiffs who had forgone or waived their state administrative remedies in reliance on these decisions"); Chevron Oil Co. v. Huson, 404 U.S. 97, 105-109 (1971) (litigant's reliance on a prior legal rule is a factor in deciding whether decision abolishing that rule should be applied retroactively). *See generally*, Eskridge, *supra* note 4, at 1382-84 (where there is great reliance on precedent, it is presumptively unfair to overrule retroactively).

garded by the lower courts.[211]

2. Fairness and Uniformity

The fairness argument for stare decisis focuses on the desire to treat similar cases alike. Stare decisis forces judges to apply the law equally and uniformly to all similarly situated litigants. According to this argument, stare decisis protects against judicial partiality or prejudice, whether that partiality or prejudice results from corruption or ignorance.[212] The problem lies in defining what is meant by "similar" cases. Every case is in some way different from all others, and many cases that may not be considered "similar" for stare decisis purposes nevertheless contain common elements. Unless there is some clear way to characterize and categorize cases, a judge is always free to seize upon a minor difference, characterize the earlier precedent as dissimilar and apply a different rule. This is precisely what the Supreme Court did in *McMahon* when it refused to apply *Wilko* to 1934 Act claims.[213]

Whatever its effect with respect to horizontal stare decisis, the argument for fairness and uniformity supports anticipatory overruling. Letting the result of a particular case depend upon whether a party can afford to take the case to the Supreme Court or upon whether certiorari is granted is unfair.[214] If the lower court woodenly follows a precedent that it strongly believes the Supreme Court would overrule, justice depends on whether the Supreme Court grants review to a particular litigant's case. Anticipatory overruling promotes equal treatment of all litigants.

Professor Kniffin argues that anticipatory overruling could result in geographical inconsistency: "To the extent that a court of appeals may anticipate, while another circuit or a district court may not do so in a case involving the same issue, different law will be applied according to the accident of which court hears a case."[215] Geographical inconsistency of this sort could have two causes: (1) some courts might follow an absolute rule requiring them to rigidly follow all Supreme Court precedent, while others may not; and (2) even if all lower courts were to accept the concept of anticipatory overruling, they might nevertheless disagree as to whether the Supreme Court would overrule a particular precedent.

Neither the anticipatory overruling nor the blind adherence approach may be faulted for inconsistency of the first sort. Disparity in the first

211. The situation is somewhat different when a party relies on the precedent and thereafter a later Supreme Court decision renders the first ruling doubtful. In this case, the party's reliance was justified. However, if the lower court is clearly convinced that the party's reliance would not deter the Supreme Court from retroactively overruling the first precedent, it is unclear why the lower court should give greater weight to the reliance interest than the Supreme Court would.

212. *See* Sprecher, *supra* note 201, at 505-506.

213. *See supra* notes 87-98 and accompanying text.

214. *See* Kniffin, *supra* note 7, at 75-76.

215. *Id.* at 82.

case results from uncertainty as to what the appropriate federal rule is. Regardless of the answer, once the Supreme Court announces with certainty whether and when anticipatory overruling is proper, the first type of inconsistency vanishes. Such uncertainty affords no reason to choose one approach over the other.

The second cause of inconsistency is more troubling. Courts will certainly disagree about whether the Supreme Court is likely to overrule some precedents. A standard such as "clear conviction" or "certainty" makes such disagreement less likely, but does not eliminate it.[216] The possibility still exists that one circuit will follow a Supreme Court precedent while another circuit will reject it. This problem, however, is not unique to doubtful precedent. Geographical inconsistencies arise when lower courts interpret the scope of authoritative precedent or make decisions in cases where there is no authoritative precedent. Geographical inconsistencies also arise when lower courts must determine whether a later Supreme Court decision has directly overruled a prior precedent. These examples do not excuse the addition of another possible geographical disparity, but they do make it less troubling. Compared to these other instances of geographical inconsistency, the inconsistency resulting from anticipatory overruling may be insignificant.

Departing from a rigid rule of stare decisis also creates a problem of temporal inconsistency—like cases are not treated alike if they arise at different times. A case that arises while the Supreme Court precedent is still strong will be decided differently than the identical case arising after the Supreme Court overrules that precedent. Of course, if temporal uniformity were the only concern, courts would never overrule either their own, or a higher court's, earlier decisions. If the Supreme Court can depart from stare decisis and overrule its own decisions, temporal inconsistency is unavoidable. The question is to what extent lower courts should adhere to a precedent when a case arises after Supreme Court decisions make such precedent doubtful, but before the Supreme Court itself overrules that precedent. Neither blind adherence nor anticipatory overruling produces temporal uniformity, but, at least where there is little doubt as to the impaired value of a prior precedent, anticipatory overruling applies the rule the Supreme Court now believes to be correct to a greater number of people.

3. Judicial Economy

The judicial economy argument claims that stare decisis makes judicial

216. One commentator argues that the lower courts should not anticipate the overruling in cases where the lower courts are likely to disagree. *See* Comment, *Predicting the Demise*, *supra* note 20, at 99-100. This merely changes the focus from whether the Supreme Court is likely to overrule to whether the lower courts are likely to disagree. Geographical disuniformity is still possible if one court thinks the question is controversial and therefore follows the doubtful precedent but another court thinks it is not and disregards the doubtful precedent.

decision making easier. Rather than decide each case anew, courts can rely on past decisions. According to this view, stare decisis decreases the workload of the courts, giving them more time to focus on undecided questions.[217] A problem with this argument is that stare decisis also forces courts to spend *more* time on undecided questions. If a decision will be binding on all later, similar cases, the consequences of an incorrect first decision are much harsher. Consequently, the court must (or perhaps should) be more careful to decide correctly the first time. The more likely an issue is to arise again, the more care the court must take to reach the right decision when that issue is initially presented. In addition, once a precedent exists, a great deal of time and effort in later cases goes into characterizing and distinguishing earlier precedent, time and effort that might go to direct analysis of law and policy if there were no rule of stare decisis. Although practical experience leads one to believe that horizontal stare decisis promotes judicial economy, theory cannot predict the net result in light of these conflicting pressures.

The effect of anticipatory overruling on judicial economy is indeterminate. Some authors have argued that anticipatory overruling will increase the number of lawsuits[218] and decrease the number of settlements.[219] Plaintiffs who would have lost if the lower courts blindly followed the doubtful precedent are more likely to sue because the prospect of anticipatory overruling will increase their chances of ultimate victory. Victory would no longer depend on a successful Supreme Court challenge. Justice Roberts made this argument in a dissent in *Mahnich v. Southern S.S. Co.*[220]:

> In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed.[221]

On the other hand, if the Supreme Court is likely to change the applicable law, it is more just to grant such relief than to apply what the present Supreme Court sees as an incorrect rule solely to reduce the judicial workload.[222] More importantly, Justice Roberts' criticism is one-sided.

217. *See, e.g.*, Schauer, *supra* note 201, at 599; Sprecher, *supra* note 201, at 506; Note, *supra* note 167, at 348.

218. *See* Kniffin, *supra* note 7, at 84; Note, *supra* note 5, at 168.

219. *See* Note, *supra* note 5, at 168.

220. 321 U.S. 96 (1944).

221. *Id.* at 112-113 (Roberts, J., dissenting). Justice Roberts criticized the Supreme Court for failing to follow its own precedents, but the quoted portion of his opinion appears to contemplate anticipatory overruling by the lower courts.

222. *See* Kniffin, *supra* note 7, at 84; Note, *supra* note 5, at 168.

Anticipatory overruling will increase litigation by plaintiffs who would lose if the doubtful precedent were blindly followed, but should decrease litigation by plaintiffs who would win in the absence of anticipatory overruling. This latter group of plaintiffs now has a smaller chance of victory. Anticipatory overruling will discourage settlements by defendants whom the change benefits, but will encourage settlements by defendants whom the old precedent supports. Accordingly, the net effect on the amount of litigation is indeterminate.[223]

Further, if litigants assume that, on average, the lower courts correctly predict what the Supreme Court will do,[224] anticipatory overruling is likely to result in fewer appeals.[225] Because the lower court ruling is more likely to represent the ultimate Supreme Court result, the losing party is less likely to win on appeal and is thus less likely to appeal. Anticipatory overruling may also decrease the Supreme Court's workload because the Court would no longer have to review the new case in order to eliminate the old doctrine.[226] The Court may have to review more cases where a lower court incorrectly anticipated an overruling, but, again assuming that the lower courts are correct more often than not, the Supreme Court loses more cases than it gains. In order to confirm the rejection of precedent and prevent discord in the lower courts, the Supreme Court may still want to review decisions where the lower court's anticipatory overruling was correct.[227] If so, the net effect on the Supreme Court's workload is uncertain.[228]

4. Public Image of the Courts

Another reason sometimes offered in support of horizontal stare decisis is that overruling prior decisions damages the public image of the courts. Justice Roberts argued that, if courts do not honor stare decisis,

223. This assumes that Supreme Court overrulings are party-neutral; that is, on average, they favor neither the plaintiff nor the defendant. If the court is expansionistic, as it was during the 1960's, the overrulings are likely to favor plaintiffs, and, everything else being equal, litigation should increase. If the court is retrenching, as it seems to have been during the 1980's, the overrulings are likely to favor defendants, and litigation should decrease.

224. This assumption does not require that lower courts always be right in predicting what the Supreme Court will do, only that they are more often right than wrong. A failure of this assumption is a general indictment of either the ability of the lower courts to analyze Supreme Court opinions or the consistency of the Supreme Court. If the assumption is not true, a coin toss would be a better predictor of Supreme Court action.

225. *See* Kniffin, *supra* note 7, at 83; Note, *supra* note 5, at 168; Comment, *Predicting the Demise*, *supra* note 20, at 99.

226. *See* Kniffin, *supra* note 7, at 83-84; Comment, *Predicting the Demise*, *supra* note 20, at 92.

227. *See* Kniffin, *supra* note 7, at 83-84.

228. Kniffin argues that the Supreme Court's workload is rarely increased by anticipatory overruling. *See id.* at 83-84. However, Kniffin assumes that the lower court will rule as the Supreme Court would; he does not consider the possibility that the lower court will be wrong. When wrong decisions are considered, a net increase in the Supreme Court's workload is at least possible, although I agree with Kniffin that such a result is unlikely.

"the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."[229] Some authorities have cited this concern as a reason for rejecting anticipatory overruling: "Any other rule would bog down the judicial processes hopelessly in those quagmires of uncertainty which would justly lay the District Courts open to the gravest public censure."[230]

Whether the public perception argument has much weight, even in the horizontal context, is unclear. Actually doing justice may be more important than appearing to do justice if these two interests collide. However, because the rule of law and the ability to do justice are highly dependent upon public confidence in the legal system, the public image argument has some validity. Even accepting public perception as an important value, however, it is unclear that the public reacts negatively when a case is overruled. Public debate on the Supreme Court's recent flag-burning[231] and abortion[232] decisions shows that the general public tends to focus on results rather than process. If the new decision reaches a substantive result that people believe is good, they applaud the decision even if precedent is discarded. If the new decision reaches a substantive result that people believe is bad, they decry the decision even if the case results from a straightforward application of precedent. If outdated, socially unacceptable or logically questionable decisions are those most likely to be overruled or questioned by the Supreme Court, replacing such decisions with a more publicly acceptable rule should actually increase public respect for the system. The same may be said for a lower court that disregards a doubtful Supreme Court precedent.

It is difficult to fault the lower court when it disregards a doubtful precedent, even if the public image of the courts suffers. The Supreme Court creates the problem by changing doctrine and questioning its own precedent; the lower court merely completes a rejection initiated by the Supreme Court, a rejection that the Court would eventually make regardless of what the lower court did.[233] Public perception is enhanced if the lower court candidly acknowledges its action rather than creating dubious distinctions that might cause the public to doubt the competence of the court. Blindly following a doubtful precedent may actually tarnish the lower court's public image. The public probably associates Supreme Court reversal of a lower court decision with incompetence—if the

229. Mahnich v. Southern S.S. Co., 321 U.S. 96, 113 (1944) (Roberts, J., dissenting).

230. Family Security Life Ins. Co. v. Daniel, 79 F. Supp. 62, 69 (E.D.S.C. 1948), *rev'd*, 336 U.S. 220 (1949).

231. Texas v. Johnson, 109 S. Ct. 2533 (1989).

232. Webster v. Reproductive Health Serv., 109 S. Ct. 3040 (1989).

233. This assumes that the lower courts are correct in most of the cases where they use anticipatory overruling. When the lower courts incorrectly reject a precedent that the Supreme Court does not reject, the resulting Supreme Court reversal damages the public image of the courts.

Supreme Court reverses, the lower court must not have done its job well. Requiring a court to follow a questionable precedent increases the likelihood of reversal by the Supreme Court as well as the likelihood that the lower court will later have to overrule its own cases. Neither of these possibilities engenders confidence in the courts.

5. Duty of Obedience to the Supreme Court

Disregarding a standing, but doubtful, Supreme Court precedent arguably violates a lower court's duty of loyalty to the Supreme Court.[234] Our multi-tiered judicial system is premised on respect for, and allegiance to, higher court pronouncements; disregarding standing precedent upsets that system. The duty of obedience to the Supreme Court focuses not only on notions of judicial economy, but also on the unique leadership role of the higher court. We entrust the Supreme Court with the ultimate judicial decision-making power. Disregarding live Supreme Court precedent would arguably be a blatant usurpation of that power.

A lower court clearly violates its duty of allegiance to the Supreme Court when, simply because the lower court feels the earlier Supreme Court decision was analytically wrong, it rejects a precedent that the Supreme Court has not questioned. If a lower court has any duty to obey the Supreme Court, a blatant rejection of unquestioned Supreme Court doctrine violates that duty.[235]

The duty of the lower court is less clear when the Supreme Court has questioned its own precedent. In such cases, there is more than one Supreme Court decision to which the lower court owes obedience. The older, doubtful precedent requires the lower court to rule one way, but a newer case or series of Supreme Court cases argues for the opposite decision. To which line of decisions does the lower court owe obedience? If the later Supreme Court decision expressly overrules the earlier case, unquestionably the lower court should follow the latest pronouncement. Rejection of the precedent that the Supreme Court has itself overruled is not infidelity to the higher court. If this is true, should not the lower court also follow the later case where the rejection is implicit rather than explicit? If the goal is allegiance to the Supreme Court, it is sophistry to require the lower court to follow doctrine that the Court has rejected, simply because the Supreme Court has not ruled on the particular issue confronting the lower court. How is fealty served when the lower court is clearly convinced that its ruling is contrary to the choice the Supreme Court itself would make? To disregard the current doctrine and apply the discredited case is the greater violation of the duty of loyalty.

A problem, and one of the concerns that may have motivated the Supreme Court in *Rodriguez*, is that a lower court might use anticipatory

234. *See generally* Kniffin, *supra* note 7, at 74-75 (noting argument that obedience to the Supreme Court requires following even outmoded precedents).

235. See Justice Powell's denunciation of the lower court in Jaffree v. Board of School Commissioners of Mobile County, 459 U.S. 1314, 1315-16 (1983).

overruling to reject a Supreme Court precedent that is not really doubtful but merely disliked. This possibility supports limiting anticipatory overruling to cases where the lower court is "clearly convinced" or "certain" that the Supreme Court would not follow the rejected precedent,[236] but does not justify an absolute rejection of anticipatory overruling.

Accepting a lower court's power to disregard Supreme Court precedent in limited cases does not necessarily portend the general fall of stare decisis, provided the anticipatory overruling power is exercised sparingly and properly. Judge Posner's opinion in *Olson v. Paine, Webber, Jackson & Curtis, Inc.*[237] is particularly instructive. In *Olson*, the court of appeals had to decide the validity of the so-called *Enelow-Ettelson* doctrine, which held that an equitable stay of a suit at law is deemed a preliminary injunction and is therefore appealable under 28 U.S.C. section 1292(a)(1).[238] Judge Posner pointed out that the pattern of later cases was inconsistent with *Enelow-Ettelson* and that it had been conjectured that the Supreme Court had implicitly rejected the doctrine. He noted strong criticism of the doctrine and argued that it made no policy sense. Judge Posner concluded that "[t]he case against the doctrine seems to us conclusive."[239] He nevertheless followed the doctrine, because he was unsure what the Supreme Court would do and felt rejection would be inappropriate.[240] *Olson* demonstrates that the willingness of a lower court to disregard Supreme Court precedent under limited conditions does not mean that it will always do so.

Those concerned about possible abuse are naive in assuming that lower courts blindly follow Supreme Court precedent and are unable to avoid precedent they dislike. Llewellyn's list of ways to avoid precedent[241] is as applicable to a higher court's precedent as it is to a court's own precedent. Maurice Kelman noted "the black art of specious distinction by which lower courts sometimes evade authoritative precedent."[242] While acceptance of anticipatory overruling would give lower courts an additional device to evade precedent they dislike, application of the doctrine would at least expose what the lower court is really doing.

In any event, a lower court that abuses anticipatory overruling may well be overruled or subjected to the other sanctions that circumscribe lower courts. If a lower court oversteps its bounds and disregards a precedent that the Supreme Court will not overrule, "the same penalty re-

236. *See supra* note 25 and accompanying text.

237. 806 F.2d 731 (7th Cir. 1986).

238. *See* Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942), *overruled*, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935), *overruled*, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

239. *See Olson*, 806 F.2d at 741.

240. *See id.* at 741-42.

241. *See* K. Llewellyn, *supra* note 166, at 84-87.

242. Kelman, *supra* note 5, at 26.

mains as for any other wrong decision — reversal."[243] Courts are entrusted with a variety of judgment calls. If they can be trusted to apply precedent properly and faithfully and to interpret statutes and determine their constitutionality, they can also be trusted to decide honestly whether a Supreme Court precedent is so obviously injured that it should be disregarded.[244]

Lower court disregard of doubtful precedent may conflict with one particular Supreme Court policy choice: timing. The Court's docket is largely discretionary; thus, the Court can control when it will overrule a precedent. By rejecting a doubtful precedent that has not been expressly overruled, the lower court usurps the Supreme Court's control over timing.[245] If other courts also reject the precedent, the doctrine has been changed before the Supreme Court would have done so. If other courts continue to follow the old rule, the resulting conflict in the lower courts may force the Supreme Court to act.[246] In either case, the Supreme Court's control of its discretionary docket is restricted.

This objection is valid only if the Supreme Court has made a policy decision to delay reconsideration of the doubtful precedent. More likely, the Court simply has not had an opportunity to overrule the doubtful precedent. If the delay results from lack of opportunity and is not a conscious timing decision, the Supreme Court should welcome the lower court's decision to disregard the doubtful precedent. If the lower court's disregard is followed by others, it frees the Supreme Court from having to consider the issue. If the lower court's ruling is not followed, the resulting conflict presents the Supreme Court with an opportunity to expressly reject the precedent.

In any event, the timing argument misses the point. The Supreme Court made its timing decision when it rejected the old doctrine. When the Court cast doubt on its earlier precedent, it gave up whatever interest it may have had in delaying doctrinal change. Finally, the legitimacy of the timing argument is questionable. If the Supreme Court has announced in later cases that an earlier approach was wrong, what interest does it have in forcing courts to continue to reach the wrong result? And, if it has some interest in doing so, does that interest outweigh the interest in a correct, just result in the individual case?

6. Speculation

One court has criticized lower court disregard of questionable prece-

243. Note, *supra* note 5, at 168.

244. *See id.* "If lower court judges can be relied on to weigh the evidence in deciding a case, it would appear they can be trusted to weigh the evidence as to the strength of a precedent." *Id.*

245. *See* Kniffin, *supra* note 7, at 86.

246. *See* Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 741 (7th Cir. 1986).

dent as "a bold but unfruitful venture in speculation."[247] The argument that courts are unqualified to engage in the prediction required for anticipatory overruling fails, however, because the decisions involved in anticipatory overruling are not qualitatively different from many other types of decisions lower courts must make. Courts regularly analyze holdings and make predictions. The idea that a lower court exercises no judgment in following precedent is simply wrong. Determining whether the Supreme Court will overrule an existing precedent involves the same type of prediction as determining whether to apply an existing precedent to a new set of facts, or deciding how to rule when no precedent provides guidance. "In this sense *any* decision . . . [by a court] involves a 'venture in speculation.' "[248] Interpretation is the business of courts. "No more than when courts generally are interpreting a statute should lower courts in interpreting Supreme Court decisions insist on excessive explicitness, saying, 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' "[249]

Determining whether a particular case is direct precedent involves characterization—to what extent are the facts of this case and the facts of the prior one similar?[250] This characterization process is absent only in a trivial number of cases. Consider a court of appeals faced with two Supreme Court precedents. Precedent *X*, an older case, favors the plaintiff. Precedent *Y* is a more recent case whose approach favors the defendant. Language in precedent *X* is inconsistent with the approach in precedent *Y*. All three cases, including the case now before the court, fall within the general area of law represented by the large rectangle *ABCD* in the following figure:

247. United States v. Caldwell, 543 F.2d 1333, 1370 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976).

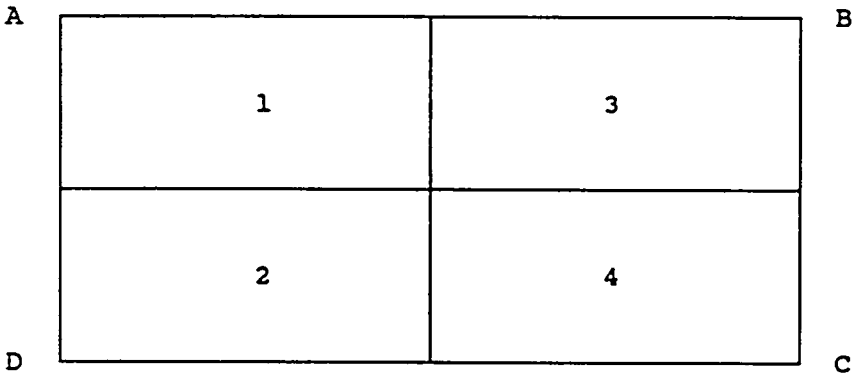
248. *Id.* at 1372 (Bazelon, C.J., opinion in support of rehearing en banc).

249. Perkins v. Endicott Johnson Corp., 128 F.2d 208, 218 n.30 (2d Cir. 1942), *aff'd*, 317 U.S. 607 (1943).

250. In Butler v. McKellar, 110 S. Ct. 1212 (1990), Justice Brennan stated:

> As every first-year law student learns, adjudication according to prevailing law means far more than obeying precedent by perfunctorily applying holdings in previous cases to virtually *identical* fact patterns. Rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breadth of their application. A judge must thereby discern whether the principles applied to specific fact patterns in prior cases fairly extend to govern *analogous* factual patterns.

Id. at 1222 (Brennan, J., dissenting); *see also* Schauer, *supra* note 201, at 577-88 (noting the difficulty in determining when like cases are alike); Lyons, *supra* note 201, at 498-503 (same).



Precedent *X*'s facts place it within category 1, a subset of *ABCD* cases. However, its holding might be read more broadly as covering all cases falling within categories 1 and 2 or as covering all cases within categories 1 and 3. Read most broadly, its holding would apply to all *ABCD* cases. Precedent *Y*'s facts fall narrowly within category 4, but it also might be read more broadly to cover all category 2 and 4 cases, or all category 3 and 4 cases, or even all cases within rectangle *ABCD*. Assume that the case now before the lower court falls within category 2 or category 3. Which precedent should the court follow—*X* or *Y*? The answer depends on how the holding of each case is categorized. A variety of results are possible. If both *X* and *Y* are limited to their narrowest categorization, the lower court has no direct precedent to follow. Depending on how the lower court reads *X* and *Y*, it is possible that only precedent *X* applies, or only precedent *Y* applies, or that precedent *X* applied but has now been overruled by precedent *Y*. The possibility of overruling exists even if the lower court's new case is a category 1 case, because precedent *Y* could overrule precedent *X* if the court construes *Y*'s holding as covering all *ABCD* cases.[251]

This analysis places the securities arbitration cases in a different light. In 1953, *Wilko* decided that pre-dispute agreements to arbitrate 1933 Act claims were unenforceable. *McMahon* held that pre-dispute agreements to arbitrate 1934 Act claims were enforceable.[252] But should *McMahon's* reasoning be limited to the 1934 Act category, or should it be seen more broadly as covering all federal securities claims, given the similarity and

251. Professor Kniffin tries to distinguish implied overruling—where the Supreme Court overturns its previous decision without mentioning it—from anticipatory overruling—where the Supreme Court's change of doctrine has arisen in another area and does not repudiate the previous decision either explicitly or by implication. *See* Kniffin, *supra* note 7, at 57. This distinction is dubious, given what the text says about characterization. A case that Kniffin sees as implied overruling can be treated as anticipatory overruling simply by recharacterizing the two Supreme Court cases. If Professor Kniffin means to imply a rigid distinction between the two categories, she is incorrect.

252. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).

interdependence of the two statutes? If *McMahon* is categorized broadly, then *McMahon* would effectively overrule *Wilko* and *Wilko* should be disregarded. If *McMahon* is characterized narrowly, then *Wilko* should still be followed as to 1933 Act claims. Of course, the Supreme Court in *McMahon* expressly reserved the *Wilko* question,[253] but the general theory of stare decisis has never treated such dictum as controlling.

The decision making involved in anticipatory overruling is not very different from the characterization required to apply stare decisis. The claim that anticipatory overruling involves some unique type of analysis that courts are not equipped to handle is simply wrong.

VI. RESCUING *RODRIGUEZ*? A MORE LIMITED INTERPRETATION

The *Rodriguez* statements concerning anticipatory overruling can be read broadly or narrowly. The broad reading is the most obvious one—lower courts must follow Supreme Court decisions, however questionable, until the Supreme Court expressly overrules them. For the reasons stated above, this position is unwarranted. A more limited reading would confine the Court's statements regarding anticipatory overruling to cases involving statutory interpretation. Courts generally, and the Supreme Court in particular, have argued that prior interpretations of statutes deserve greater deference than constitutional or common-law precedents.[254] The rationale is that a longstanding interpretation of a statute effectively becomes a part of the legislation; if Congress is dissatisfied with the court's interpretation, Congress can legislatively change it. This special deference to statutory precedent has been rather convincingly attacked in recent articles by Professor William Eskridge, Jr. and Judge Frank Easterbrook.[255] In any event, the Supreme Court has not always lived by its own rhetoric. Professor Eskridge indicates that more than eighty statutory precedents were overruled or materially modified by the Supreme Court from 1961 to 1987.[256] The *McMahon* case is one example.[257]

Lower courts have occasionally used the legislative acquiescence argument as a reason for following Supreme Court interpretations of statutes, even if later decisions made those interpretations questionable.[258] If this

253. *See id.* at 234.

254. *See* Eskridge, *supra* note 4, at 1364-84; *see also* Note, *supra* note 167, at 370 (because Congress can change a statute if it disagrees with the Court's interpretation, the Court should adhere to its previous construction of statutes until Congress changes it).

255. *See* Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 426-433 (1988); Eskridge, *supra* note 4, at 1392-1409. *But see* Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 177 (1989) (arguing in favor of absolute rule of stare decisis for all statutory and federal common-law decisions of the Supreme Court).

256. *See* Eskridge, *supra* note 4, at 1363, 1427-39.

257. *See id.* at 1435.

258. *See* Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 742 (7th Cir. 1986); Norris v. United States, 687 F.2d 899, 909-10 (7th Cir. 1982) (Cudahy, J., concurring).

is what *Rodriguez* is saying, the argument is unconvincing. It is illogical to say that the Supreme Court may modify a longstanding statutory interpretation but that lower courts may not. Legislative inaction is an equally strong argument against overruling in both cases. If legislative inaction does not prevent the Supreme Court from overruling, this inaction should not prevent the lower courts from anticipating that overruling.

The statutory/nonstatutory distinction is relevant in anticipatory overruling. A lower court must consider the Supreme Court's reluctance to overrule statutory precedent when predicting what the Supreme Court would do. In this sense, whether the prior Supreme Court case was an interpretation of a statute should affect a lower court's willingness to overrule because it affects the probability of Supreme Court action. A lower court should not, however, refuse to engage in anticipatory overruling merely because the precedent is an interpretation of statute. If the lower court believes that the Supreme Court has effectively rejected the precedent and would overrule it if given the chance, the lower court should disregard the precedent, statutory or not. There should be no absolute bar to anticipatory overruling merely because a precedent is statutory. *Wilko*'s status as an interpretation of statute gives no extra support to the *Rodriguez* disapproval of anticipatory overruling.

VII. PLACING THE BLAME

The lower court decisions after *McMahon*[259] must be criticized for failing to grasp fully the problem with which they were dealing. In their haste to decide, these courts ignored scholarly commentary and a number of prior federal cases explicitly dealing with the effect of doubtful Supreme Court precedent. All of the opinions purporting to overrule *Wilko* set aside this Supreme Court precedent with little discussion of their authority to do so. All but one[260] of the opinions following *Wilko* did so blindly, as if the body of comment and case law allowing anticipatory overruling did not exist. Done properly, anticipatory overruling requires careful examination of Supreme Court precedent and the likelihood of eventual overruling. It is not something to stumble into blindly. Neither set of opinions gave due weight to the relevant Supreme Court decisions. The cases rejecting *Wilko* ignored its effect as binding precedent. The cases following *Wilko* ignored the effect of *McMahon*.

Most of the blame for the lower courts' problems after *McMahon*, however, must be laid on the shoulders of the *McMahon* majority. *McMahon*'s refusal to recognize the clear parallels between the relevant 1933 Act and 1934 Act provisions is disingenuous. The majority's rea-

259. *See supra* cases cited in notes 111-112.

260. Araim v. Painewebber, Inc., 691 F. Supp. 1415, 1417-18 (N.D. Ga. 1988). Judge Forrester deserves special commendation for attempting to deal with the jurisprudential problem that his brethren ignored.

soning in *McMahon* provided two options: (1) directly overrule *Wilko* or (2) adopt the "colorable argument" as the basis for allowing arbitration of 1934 Act claims. The *McMahon* majority did not exercise either option.

By refusing to broaden its *McMahon* ruling and directly overrule *Wilko*, the Supreme Court ignored its unique position in our judicial system. The United States Supreme Court is not an ordinary court that must narrowly limit its holding to the facts at hand. The Supreme Court oversees approximately 156 Court of Appeals judges in twelve circuits and 544 District Court judges spread among 94 judicial districts.[261] The Court must be concerned with the efficient administration of that unwieldy bureaucracy. Changing the law through a series of narrow, fact-specific opinions—chipping away at the boulder of precedent one flake at a time—leads to confusion and inefficiency within that bureaucracy. The Court should announce policy changes as they occur and not in a piecemeal fashion over the span of several years. Overruling a longstanding precedent like *Wilko* is a difficult decision, but that decision should be made honestly and straightforwardly, not stealthily as in *McMahon*.[262]

The Supreme Court should not decide cases that are not before it, but it is foolish to ignore when a decision under one statutory provision effectively resolves the same question under another, essentially identical provision. The Supreme Court was effectively overruling *Wilko* and it knew it was effectively overruling *Wilko*. The Court's refusal to do so outright, or at least to offer a clear signal as to its direction, was a disservice to the federal judiciary and imposed a substantial cost on private litigants and the lower courts.[263]

In light of the Supreme Court's action in *McMahon*, the *Rodriguez* Court's criticism of the lower courts is misdirected. The *Rodriguez* majority blames the victim. If the Supreme Court continues to act less than forthrightly in dealing with precedent it dislikes, lower courts must be free to use the doctrine of anticipatory overruling to reach the right result.

---

261. *See* The Lawyer's Almanac 714 (1990). These figures are as of June 30, 1988.

262. Professor Fletcher sees the majority opinion in *McMahon* as an inability to come to grips with "the great conservative paradox of the newly conservative Court"—what does one do with a case that is no longer viable but has represented well-settled law for many years? *See* Fletcher, *supra* note 91, at 114. He sees *McMahon* as intentionally sending a mixed signal in order to avoid having to come to grips with this problem. "That mixed signal indicates that although the Court was willing to disparage *Wilko* as without foundation under contemporary circumstances, it was unwilling to give a hint as to how it might decide that case were it presented to the Court today." *Id.*

263. It is possible that there was not a majority in *McMahon* willing to overrule *Wilko*, but this is hard to believe. It is hard to see how any member of the *McMahon* majority could really have believed that *Wilko* was preserved. The dissent certainly recognized *Wilko*'s death. *See* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 243 (1987) (Blackmun, J., dissenting). It did not take the majority long to recognize it as well. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).