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The Possible Future of Private Rights of Action for Proxy Fraud: The Parallel between *Borak* and *Wilko*

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I. INTRODUCTION

This is a story of parallels—two cases decided by the United States Supreme Court eleven years apart, one now overruled, the other unchallenged for over twenty-five years. Both cases are important federal securities law decisions, but substantively they are quite different.

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In *Wilko v. Swan*,[1] a 1953 decision, the Supreme Court held that predispute agreements to arbitrate claims arising under the Securities Act of 1933[2] (1933 Act) were unenforceable because arbitration would not adequately protect the rights the 1933 Act gave injured investors.[3] In *J.I. Case Co. v. Borak*,[4] decided in 1964, the Court held that persons injured by false and misleading proxy statements had an implied private right of action under section 14(a) of the Securities Exchange Act of 1934[5] (1934 Act).

These two cases, each tremendously important to federal securities law when decided, have little surface similarity. They involve different issues and different legal analyses, but their subsequent treatments by the Supreme Court are astoundingly parallel. After each case was decided, the Supreme Court began to chip at its foundation, first distinguishing it, but eventually rejecting its reasoning outright. Although the foundation on which each case stood was demolished and neither holding would have survived under the new standards, initially the Supreme Court allowed the narrow holdings of both *Wilko* and *Borak* to survive.

In *Shearson/American Express, Inc. v. McMahon*,[6] a 1987 decision, the Court refused to extend *Wilko* to 1934 Act claims, even though the 1934 Act was remarkably similar to the 1933 Act and lower courts had applied *Wilko* to 1934 Act claims. *McMahon* absolutely rejected *Wilko*'s reasoning, but refused to upset its basic holding—that agreements to arbitrate 1933 Act claims were unenforceable. Two years after *McMahon*, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[7] a majority of the Supreme Court concluded that *Wilko*'s holding was no longer acceptable given the Court's longstanding rejection of the *Wilko* rationale.[8]

The problem the history of *Wilko* poses for *Borak* is enormous. *Borak*'s holding has not been challenged since 1964 and section 14(a) remains a fruitful source of private litigation. But the result in *Borak* rested on a liberal standard for implying private rights of action; both that liberal standard and the specific argumentation in *Borak* have been rejected in subsequent Supreme Court decisions.[9] The Supreme Court has moved from a view that private rights of action should be implied whenever they would promote the protective scheme legis-

1. 346 U.S. 427 (1953), *overruled*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).
2. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1981 & Supp. 1990).
3. Wilko v. Swan, 346 U.S. 427, 435-38 (1953).
4. 377 U.S. 426 (1964).
5. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-7811 (1981 & Supp. 1990).
6. 482 U.S. 220 (1987).
7. 490 U.S. 477 (1989).
8. *Id.*
9. *See infra* text accompanying notes 80-105.

lated by Congress to a view that private rights of action should be implied only if there is strong evidence that Congress intended to create such rights. *Borak* would not survive under the new standard, but so far the Court has treated *Borak* as a historical anomaly, regretfully wrong but nevertheless valid.

Borak, like *Wilko* before it was overruled, is thus a case without foundation. The Supreme Court has clearly rejected *Borak*'s reasoning, leaving only an unsupported holding. Will the Supreme Court treat *Borak* as it did *Wilko* and eventually overrule *Borak* as well? This Article examines the histories of *Borak* and *Wilko* and the parallel between those histories, and searches for distinctions. I conclude that the two histories are indeed parallel and that, if the Court follows the same path it took with respect to *Wilko*, *Borak* will eventually fall. What remains of *Borak* stands ready to collapse, waiting only for the appropriate push.

II. *WILKO v. SWAN*

Wilko v. Swan[10] was the Supreme Court's first consideration of the arbitrability of federal securities claims. The petitioner alleged that his brokerage firm fraudulently induced him to purchase stock, in violation of section 12(2) of the 1933 Act.[11] His brokerage agreement obligated him to submit all disputes with the firm to arbitration, but he argued that section 14 of the 1933 Act, the anti-waiver provision, made the arbitration agreement unenforceable.[12] 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

10. 346 U.S. 427 (1953).

11. Any person who —

> . . .
>
> (2) 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.

Securities Act of 1933, 15 U.S.C. § 77l (1981).

12. Wilko v. Swan, 346 U.S. 427, 434-35 (1953).

void."[13] The Supreme Court in *Wilko* held that the 1933 Act gives injured plaintiffs a right to sue in court[14] and pre-dispute arbitration agreements waive that right in violation of section 14's anti-waiver provision. According to Justice Reed, arbitration would not "fairly assure . . . [the] . . . effectiveness" of the protections provided in the 1933 Act.[15] The 1933 Act liability provisions would apply in arbitration, but they would be less effective:

> 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 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.[16]

Justice Frankfurter, joined by Justice Minton in his dissent, rejected the argument that arbitration would jeopardize the plaintiff's rights.[17] He felt that the record did not support that conclusion and that, even if it did, judicial review could adequately insure that arbitrators followed the law.

III. THE SUBSEQUENT TREATMENT OF *WILKO*

A. Chipping at the Foundation

The first major challenge to *Wilko* came in 1974. In *Scherk v. Alberto-Culver Co.*,[18] the Court refused to extend *Wilko* to a pre-dispute agreement to arbitrate a claim arising under the 1934 Act. *Scherk* involved an international transaction and the majority held that *Wilko* did not apply to international contracts.[19] Justice Stewart's majority opinion argued that, in the international setting, the advantages offered by the security buyer's right to sue in federal court "become chimerical 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."[20] Because the parties to an international transaction are uncertain even as to what law will apply, a contractual provision specifying the forum and the applicable law is "an almost indispensable

13. Securities Act of 1933, 15 U.S.C. § 77n (1981).
14. Wilko v. Swan, 346 U.S. 427, 432-33, 433 n.16, 435-37 (1953). *See* Securities Act of 1933, 15 U.S.C. § 77v(a)(1987).
15. Wilko v. Swan, 346 U.S. 427, 437 (1953).
16. *Id.* at 435-37 (footnote omitted).
17. *Id.* at 439-40 (Frankfurter, J., dissenting).
18. 417 U.S. 506 (1974).
19. *Id.* at 515-21.
20. *Id.* at 518.

precondition to achievement of the orderliness and predictability essential to any international business transaction."[21]

In what came to be known as the "colorable argument," the majority suggested in dictum that *Wilko* might not apply to *any* claims under section 10(b) of the 1934 Act.[22] First, argued Justice Stewart, unlike the section 12(2) cause of action in *Wilko*, the private right of action under section 10(b) of the 1934 Act is implied, not express. Thus, according to the majority, the 1934 Act does not itself create any "special right" such as the *Wilko* Court found significant. Second, the 1934 Act, unlike the 1933 Act, limits plaintiffs to federal court. An arbitration agreement's further restriction of the choice of forum is therefore different, although the majority did not explain why this difference mattered.

Four dissenters in *Scherk* would have followed *Wilko* to its logical conclusion and applied it to 1934 Act claims. Justice Douglas' dissent argued that the jurisdictional differences were irrelevant: "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."[23] The dissent then repeated *Wilko*'s recitation of the problems with arbitration, adding a new one — federal pretrial discovery would not be available in arbitration.[24]

The next Supreme Court securities arbitration case was *Dean Witter Reynolds Inc. v. Byrd*,[25] where the Supreme Court again avoided deciding whether *Wilko* applied to causes of action arising under the 1934 Act.[26] At issue in *Byrd* was the appropriate procedure when a plaintiff asserted both federal securities claims, which under *Wilko* presumably could not be forced to arbitration, and pendent state law claims, which could. Some of the circuit courts 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 of the claims.[27] *Byrd* unanimously rejected the intertwining doctrine but the Court refused to indicate whether 1934 Act claims were arbitrable.[28] In a footnote,[29]

21. *Id.* at 516.
22. *Id.* at 513-14.
23. *Id.* at 532 (Douglas, J., dissenting)(citation omitted).
24. *Id.* at 532 (Douglas, J., dissenting).
25. 470 U.S. 213 (1985).
26. *Id.* at 215 n.1.
27. *See, e.g.*, 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).
28. "In the District Court, Dean Witter did not seek to compel arbitration of the federal securities claims. Thus, the question whether *Wilko* applies to § 10(b) and Rule 10b-5 claims is not properly before us." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 215 n.1 (1985).

the Court pointed to the "colorable argument" made in *Scherk* but acknowledged that most of the lower courts had not accepted the colorable argument and were still following *Wilko* with respect to 1934 Act claims. A concurring opinion by Justice White called the application of *Wilko* to 1934 Act claims "a matter of substantial doubt,"[30] and repeated the "colorable argument" made in *Scherk*.[31] Justice White concluded that "the contrary holdings of the lower courts must be viewed with some doubt."[32]

Byrd was soon followed by a non-securities arbitration case, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*.[33] In *Mitsubishi Motors*, Soler argued that the parties' contractual agreement to arbitrate all disputes was unenforceable as to a Sherman Act antitrust claim against Mitsubishi. The majority relied on the *Scherk* exception for international business transactions and enforced the arbitration agreement.[34] The majority nevertheless reviewed the policy arguments for judicial rather than arbitral resolution,[35] concluding, among other things, that the importance of the private damages remedy in antitrust cases did not justify a refusal to allow arbitration.[36] The problems with arbitration which the *Wilko* majority discussed were not even mentioned in *Mitsubishi Motors*, and *Wilko* received only a perfunctory *cf.* citation.[37]

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29. *Id.*

30. *Id.* at 212-13, 224 (White, J., concurring).

31. He wrote:

> Wilko's reasoning cannot be mechanically transplanted to the 1934 Act. While § 29 of that Act is equivalent to § 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 § 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).

32. *Id.* at 225 (White, J., concurring).

33. 473 U.S. 614 (1985).

34. [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id. at 629.

35. *Id.* at 632-40.

36. *Id.* at 634-40.

37. *Id.* at 637.

B. Rejecting the *Wilko* Analysis

In 1987, the Supreme Court made a frontal attack on *Wilko*. *Shearson/American Express, Inc. v. McMahon*,[38] involved two claims, one under the 1934 Act and one under the Racketeer Influenced and Corrupt Organizations Act (RICO).[39] The Court held that both claims were arbitrable.

The Court's decision on the RICO claim was unanimous. Nothing in the text or legislative history of RICO purported to exclude RICO claims from arbitration, but the plaintiffs argued that "there is an irreconcilable conflict between arbitration and RICO's underlying purposes."[40] Relying primarily on *Mitsubishi Motors*, the majority rejected this claim.[41] Ignoring *Wilko* and *Wilko*'s discussion of the problems with arbitration, the Court concluded that RICO plaintiffs could effectively vindicate their RICO claims in the arbitral forum.[42]

With respect to the 1934 Act claim, Justice O'Connor's majority opinion started with 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 any rule or regulation thereunder."[43] According to Justice O'Connor, section 29(a) does not prohibit waivers of section 27, which allows suit in federal court; section 29(a) prohibits waivers only of the *substantive* obligations imposed by the 1934 Act.[44] Justice O'Connor felt that *Wilko* made this same distinction: "*Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue."[45] The arbitration agreement in *Wilko* was unenforceable not because it waived the jurisdictional provisions of the 1933 Act (the power to sue in federal or state court) but because arbitration was inadequate to enforce the substantive rights created by section 12(2).[46] According to Justice O'Connor, the arbitration agreement in *Wilko* was a waiver of section 12(2) itself.

Justice O'Connor relied on subsequent cases to reject *Wilko*'s conclusion that arbitration was inadequate to enforce securities claims:

> [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

38. 482 U.S. 220 (1987).
39. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1962, 1964-1968 (1984 & Supp. 1990).
40. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 239 (1987).
41. *Id.* at 239-42.
42. *Id.* at 242.
43. Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a)(1981).
44. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 227-28 (1987).
45. *Id.* at 229. Professor Fletcher has termed this reading of *Wilko* "a bit of revisionist history." Fletcher, *Learning to Live with the Federal Arbitration Act — Securities Litigation in a Post-McMahon World*, 37 EMORY L.J. 99, 110 (1988).
46. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 228-29 (1987).

> 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.[47]

Justice O'Connor further argued that, after *Wilko* was decided, Congress had significantly strengthened the SEC's oversight of the arbitration procedures of self-regulatory organizations such as brokerage companies. According to the majority, this heightened scrutiny of arbitration rules adequately protected the substantive rights granted by the 1934 Act.[48] Thus, the agreement to arbitrate 1934 Act claims was enforceable.

Justice O'Connor rejected an argument that congressional inaction since *Wilko* ratified the application of *Wilko* to 1934 Act claims.[49] The respondents relied on language in the conference report on the 1975 amendments to the 1934 Act which stated: "It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko* . . . concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations."[50] Justice O'Connor pointed out that the comment might be construed to affect only *Wilko*'s interpretation of the 1933 Act, since *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.

The majority opinion in *McMahon* did not expressly overrule nor attempt to distinguish the holding in *Wilko*. Justice O'Connor commented only briefly 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."[51]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented from the majority's ruling on the 1934 Act issue. Justice Blackmun felt that congressional inaction at the time of the 1975 amendments implicitly approved the application of *Wilko* to the 1934

47. *Id.* at 231-32 (citations omitted).
48. *Id.* at 233-34.
49. *Id.* at 234-38.
50. *Id.* at 236-37.
51. *Id.* at 234.

Act.[52] According to Justice Blackmun, the language in the conference report indicated that Congress did not want the amendments to overrule *Wilko*, and, written in the context of amendments to the 1934 Act, suggested that Congress was aware of and supported the extension of *Wilko* to section 10(b) claims. Justice Blackmun also disagreed with the majority's understanding of *Wilko*. *Wilko*, he argued, did not turn on the perceived inadequacy of arbitration to enforce substantive rights under section 12(2); it held that section 14 prohibited waiver of the right to a judicial forum embodied in the 1933 Act's jurisdictional provision.[53] Since the relevant 1934 Act provisions are "virtually identical," Justice Blackmun argued that *Wilko* must prohibit waiver of the judicial forum for section 10(b) claims as well.[54]

Justice Blackmun also believed that the inadequacies of arbitration noted in *Wilko* still existed, and that those inadequacies were still incompatible with the substantive protections of the federal securities laws.[55] Justice Blackmun argued that SEC oversight over arbitration rules was still inadequate to protect investors; he criticized the SEC for changing its position on the enforceability of arbitration agreements.[56]

According to Justice Blackmun, the majority opinion in *McMahon* "effectively overrules *Wilko*."[57] He rejected the "colorable argument" as a possible distinction.[58] Section 10(b)'s implied right of action is in no way inferior to the express right of action in section 12(2) of the 1933 Act, he argued, and 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 § 10(b) or § 12(2) claimant is entitled to a judicial forum, not whether the claimant had a choice between judicial fora."[59] "That the Court passes over the 'colorable argument' in silence, although petitioners have advanced it," Justice Blackmun wrote, "would appear to relegate that argument to its proper place in the graveyard of ideas."[60]

Justice Stevens also rejected the majority's conclusion. Justice Stevens argued that the longstanding conclusion of the lower courts that *Wilko* was fully applicable to 1934 Act claims should be respected: "[A]fter a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it ac-

52. *Id.* at 246-47 (Blackmun, J., dissenting).
53. *Id.* at 252-56 (Blackmun, J., dissenting).
54. *Id.* at 256-57 (Blackmun, J., dissenting).
55. *Id.* at 257-61 (Blackmun, J., dissenting).
56. *Id.* at 261-66 (Blackmun, J., dissenting).
57. *Id.* at 243 (Blackmun, J., dissenting).
58. *Id.* at 245 n.2 (Blackmun, J., dissenting).
59. *Id.*
60. *Id.*

quires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself."[61]

C. The Death of *Wilko*—*Rodriguez De Quijas v. Shearson/American Express, Inc.*

It was clear after *McMahon* that *Wilko*'s holding was not on strong ground. After *McMahon*, a number of lower federal courts refused to follow *Wilko* even for 1933 Act claims, concluding that *Wilko* had been effectively overruled.[62] The Supreme Court finally overruled *Wilko* in 1989 in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[63] a 5-4 decision. *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.

Justice Kennedy's majority opinion implicitly rejected *McMahon's* interpretation of *Wilko*. Justice O'Connor had written in *McMahon* that *Wilko* did not apply the antiwaiver provision to the 1933 Act's procedural provisions.[64] 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 provisions." The Court did not read the language this way in *Wilko*, however.[65]

Justice Kennedy then concluded that *Wilko* was wrong and *McMahon* was right—"the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions."[66] According to Justice Kennedy, *McMahon* involved the same issue under section 29(a) of the 1934 Act, and there was no basis for distinguishing the two provisions. Justice Kennedy expressly rejected one of the prongs of the "colorable argument":

> The only conceivable distinction in this regard between the . . . [1933] . . . Act and the . . . [1934] . . . 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

61. *Id.* at 268 (Stevens, J., concurring in part and dissenting in part).
62. *See* Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 59-66 (1990).
63. 490 U.S. 477 (1989), *overruling*, Wilko v. Swan, 346 U.S. 427 (1953).
64. *See supra* text accompanying notes 43-46.
65. Rodriguez de Quijas v. Shearson/American Express, Inc. 490 U.S. 477, 480 (1989)(citation omitted).
66. *Id.* at 481.

> "in effect, a specialized kind of forum-selection clause," should not be prohibited under the Securities Act, since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.[67]

Concerning the need to protect the 1933 Act's *substantive* provisions, Justice Kennedy saw the aversion to arbitration pervading *Wilko* as "outmoded" and rejected by later decisions.[68] Justice Kennedy's opinion adopted *McMahon*'s views on this issue without further discussion.[69]

Justice Kennedy concluded that "[i]t . . . would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side."[70] 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."[71]

Thus, after a long and tortured history of first distinction and then disagreement, the Supreme Court finally overruled *Wilko*. After first rejecting *Wilko*'s liberal, free-wheeling rationale, the more conservative Court finally eliminated its holding as well.

IV. *J.I. CASE CO. v. BORAK*

In *Rodriguez*, the Supreme Court showed a willingness to overcome the limits of stare decisis and reject a decision which it perceived as inconsistent with the reasoning of more recent cases. *Borak* stands in a position closely analogous to that of *Wilko* four years ago. Later decisions have destroyed the *Borak* rationale, treating it as an historical anomaly. Does *Rodriguez* portend a similar overruling of *Borak*?

In *J.I. Case Co. v. Borak*,[72] decided in 1964, the Supreme Court held that private parties injured by circulation of a false and misleading proxy statement had a private right of action under section 14(a) of the 1934 Act.[73] *Borak* gave two reasons for authorizing a private right of action. First, the Court focused on section 27 of the 1934 Act,[74] giving the federal courts exclusive jurisdiction in 1934 Act cases. Section 27 grants the federal district courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created

67. *Id.* at 482-83.
68. *Id.* at 480-81.
69. *Id.* at 483
70. *Id.* at 484.
71. *Id.* at 485.
72. 377 U.S. 426 (1964).
73. Securities Exchange Act of 1934, 15 U.S.C. § 78n(a)(1981).
74. *Id.* at § 78aa (1987).

by this chapter or the rules and regulations thereunder."[75] With almost no discussion, the Court stated that "[i]t appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act."[76]

The Supreme Court's second rationale focused on the purpose of section 14(a) and the need for a private right of action to effectively fulfill that purpose. According to the Court, section 14(a) was designed to protect investors and "to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitations."[77] The Court argued that this purpose "certainly implies the availability of judicial relief where necessary to achieve that result."[78] Given the practical limitations on SEC enforcement, the Court stated that private enforcement was "a necessary supplement to Commission action."[79]

V. THE SUBSEQUENT TREATMENT OF *BORAK*

A. Chipping at the Foundation

As more conservative justices replaced the members of the *Borak* Court, the Supreme Court cut back on the free-wheeling implication of private rights of action evident in *Borak*. In 1975, in *Cort v. Ash*,[80] the Court adopted a four-factor test to be used to decide whether to imply a private right of action where the statute is silent:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[81]

The opinion contains two substantive mentions of *Borak*. First, in discussing the first factor, Justice Brennan pointed out in a footnote that *Borak* was premised in part on section 27 of the 1934 Act, the jurisdictional provision.[82] Second, the Court briefly distinguished *Borak* from the case before it on the fourth factor.[83] *Cort v. Ash* neither questioned nor criticized *Borak* or the *Borak* rationale.

The first securities case to feel the impact of this more restrained

75. *Id.*
76. J. I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1963).
77. *Id.* at 431.
78. *Id.* at 432.
79. *Id.*
80. 422 U.S. 66 (1975).
81. *Id.* at 78 (citations omitted).
82. *Id.* at 79 n.11.
83. *Id.* at 85.

approach to private rights of action was *Piper v. Chris-Craft Industries, Inc.*[84] *Piper* held that an unsuccessful tender offeror did not have a private right of action for damages under the tender offer antifraud provision, section 14(e) of the 1934 Act.[85] Significantly, there was no mention in *Piper* of *Borak*'s argument that section 27 of the 1934 Act establishes a private right of action for violations.[86] The majority opinion focused on the second point raised in *Borak*—whether a private right of action is necessary to protect congressional purposes in adopting the provision.[87] Although *Piper* did not directly question *Borak*, the majority focused much more on congressional intent and legislative history than in *Borak*,[88] and *Piper* expressly applied the four-part *Cort v. Ash* test in deciding whether the plaintiff had a private right of action.[89] The test for whether a private action exists was clearly different and more rigorous than in *Borak*.

The only express recognition in *Piper* that the Court might be retreating from *Borak* came in Justice Stevens' dissent. Justice Stevens spent much of his opinion examining the similarities between *Borak* and the issue in *Piper*, concluding that *Borak* supports the implication of a private right of action under section 14(e).[90] Significantly, Justice Stevens felt bound to decide whether *Borak* survived *Cort v. Ash*, concluding that "*Borak* remains a viable precedent."[91]

B. Rejecting the *Borak* Analysis

Piper did not directly attack *Borak*, but two cases decided within six weeks of each other in 1979 virtually destroyed the *Borak* rationale. First, in *Cannon v. University of Chicago*,[92] Justice Powell filed a dissent, which attacked *Borak* as "both unprecedented and incomprehensible as a matter of public policy."[93] Justice Powell called *Borak* "a singular and, I believe, aberrant interpretation of a federal regulatory statute."[94] "Although I do not suggest that we should consider overruling *Borak* at this late date," Justice Powell wrote, "the lack of precedential support for this decision militates strongly against its extension beyond the facts of the case."[95]

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84. 430 U.S. 1 (1977).
85. Securities Exchange Act of 1934, 15 U.S.C. § 78n(e)(1981).
86. *See supra* text accompanying notes 74-76.
87. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 25-26 (1977).
88. *Id.* at 26-37.
89. *Id.* at 37-41.
90. *Id.* at 59-63, 66-67 (Stevens, J., dissenting).
91. *Id.* at 67 (Stevens, J., dissenting).
92. 441 U.S. 677 (1979).
93. *Id.* at 735-36 (Powell, J., dissenting). The majority opinion in *Cannon* applies the four-factor *Cort v. Ash* analysis and hardly mentions *Borak*. *See id.* at 689-709.
94. *Id.* at 736 (Powell, J., dissenting).
95. *Id.* at 735 n.6 (Powell, J., dissenting). Justice Rehnquist wrote a concurring opin-

Even more damaging to the *Borak* rationale was *Touche Ross & Co. v. Redington*.[96] *Redington* considered whether to imply a private right of action pursuant to section 17(a) of the 1934 Act,[97] which requires brokerage firms to file financial reports with the SEC. Justice Rehnquist's majority opinion narrowed the inquiry solely to congressional intent: "[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted by SIPC and the Trustee."[98] And the starting point for that inquiry was "the language of the statute itself."[99]

Justice Rehnquist rejected both of the rationales of *Borak*. First, he rejected the argument that section 27 supported a private right of action. According to Justice Rehnquist, section 27 had nothing to do with private rights of action:

> Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision.[100]

Justice Rehnquist also rejected the claim that a private right of action was needed to further the remedial purposes of the 1934 Act. Generalized references to remedial purposes would not justify reading the statute "more broadly than its language and the statutory scheme reasonably permit . . . . [T]he mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf."[101] The Court expressly rejected the idea inherent in *Borak* that a private right of action should be implied based on tort principles to redress harm arising from violation of a federal statute.[102]

The majority's rejection of *Borak* was clear, but the *Borak* holding was allowed to survive. "We do not now question the actual holding of that case," Justice Rehnquist wrote, "but we decline to read the opinion so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action."[103] He went on to say that, "to the extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of

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ion in *Cannon* which, with respect to *Borak*, merely noted that the Court's more recent analysis of private rights of action was "quite different" from the analysis in *Borak*. *Id.* at 717 (Rehnquist, J., concurring).

96. 442 U.S. 560 (1979).
97. Securities Exchange Act of 1934, 15 U.S.C. § 78q(a)(1981).
98. Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).
99. *Id.*
100. *Id.* at 577.
101. *Id.* at 578 (citations omitted).
102. *Id.* at 568.
103. *Id.* at 577.

private causes of action, and we follow that stricter standard today."[104]

Borak obviously does not meet the newer, stricter standard for implication of private rights of action. Nothing in the 1934 Act itself indicates that Congress intended a private right of action for violations of section 14. Nothing in either the original legislative history of the 1934 Act or the histories of amendments to section 14 shows that Congress intended a private right of action. *Borak*'s holding rests only on the two rationales thoroughly discredited in *Redington*. Nor has Congress expressly affirmed *Borak*. At least with respect to *Wilko*, there was some argument for congressional acquiescence in the decision.[105] Here, there is none.

In short, *Borak* stands in the same position that *Wilko* did before *Wilko* was overruled. Its holding has no basis in current law, but it has not yet been overruled. The Supreme Court may have been unwilling to overrule *Borak* when it decided *Redington* in 1979, but *Rodriguez* illustrates that the present Court has little trouble overcoming such reticence.

The line of Supreme Court private right of action cases does not end with *Redington*, however. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*,[106] decided in 1982, is to some extent a retrenchment from the Court's restrictive views on private rights of action. However, *Curran* does not significantly affect the viability of *Borak*. The majority in *Curran*, a 5-4 decision, accepted the *Redington* focus on legislative intent,[107] but nevertheless created an implied private right of action under the Commodity Exchange Act (CEA).[108] Congress had comprehensively amended the CEA in 1974, after courts had already recognized an implied private remedy under the CEA.[109] The Court felt that Congress's decision not to upset these prior rulings in spite of its "comprehensive reexamination and significant amendment of the CEA" was itself evidence of an affirmative congressional intent to preserve the private remedy.[110] *Curran* does not support *Borak* because there has been no comprehensive, significant reworking of the 1934 Act since the *Borak* decision. Congress has amended section 14 of the 1934 Act several times since 1964, but not in any comprehensive manner.[111] If congressional acquiescence was insufficient to save

104. *Id.* at 578.
105. *See supra* text accompanying notes 49-50, 52.
106. 456 U.S. 353 (1982).
107. *Id.* at 377-78.
108. Commodity Exchange Act, 7 U.S.C.A. §§ 1-26 (1982 & Supp. 1990).
109. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379-82 (1982).
110. *Id.* at 381-82. The majority also found other evidence of congressional intent. *See id.* at 382-88.
111. In 1964, Congress amended the 1934 Act to extend the proxy disclosure requirements to securities traded in the over-the-counter market. 78 Stat. 565, P.L. 88-467 (Aug. 20, 1964). In 1968, Congress added the Williams Act, 82 Stat. 454, P.L.

Wilko,[112] much weaker evidence of congressional acquiescence is certainly insufficient to save *Borak*.

VI. WILL *BORAK* SURVIVE?: POSSIBLE DISTINCTIONS

The parallel between *Wilko* and *Borak* is obvious. Each was based on a free-wheeling, expansive reading of the rights of injured investors under the federal securities laws. Each case was initially distinguished as the Court took a more conservative turn in the 1970s. The rationale of each case was ultimately rejected, although its holding was allowed to stand. It was obvious at that time that neither case could survive under the newer methods of analysis. Finally, *Wilko* was overruled. The similarities between *Wilko* and *Borak*, to the extent they predict future Supreme Court action, point to the eventual overrule of *Borak* as well. But can distinctions be drawn between the two cases, distinctions that would upset the parallel and leave *Borak* on safer ground?

Three arguments can be made for distinguishing what happened to *Wilko* from what is happening to *Borak*. First, it can be argued that circumstances changed after *Wilko* was decided and those changed circumstances led to its eventual overrule. *Borak*, according to this argument, faces no similar changes in circumstances and therefore is not as likely to be overruled. Second, it can be argued that *Wilko* was overruled only because of its inconsistency with the Supreme Court's ruling in *McMahon*. Given the *McMahon* decision, something had to fall and it was *Wilko*. The *Borak* holding is not directly inconsistent with any other Supreme Court opinion, and therefore the Court is less likely to overrule *Borak*. Third, it can be argued that the holding in *Borak*, unlike that of *Wilko*, has been revisited by the Supreme Court on occasion and approved. The *Borak* holding is supported by more than a single, isolated case, and this stronger foundation makes it less likely to be overruled. All of these arguments are plausible, but none is convincing.

A. Changed Circumstances

An argument frequently used to overrule a precedent is that circumstances have changed since the original decision.[113] The Court

90-439 (July 29, 1968), and in 1970 Congress amended the Williams Act. 84 Stat. 1497, P.L. 91-567 (Dec. 22, 1970). Each of these amendments affected section 14, but none of them could be termed a "comprehensive reexamination and significant amendment" of section 14(a) or the 1934 Act as a whole, and the legislative histories of these changes do not discuss *Borak* or the section 14(a) private right of action.

112. *See* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 234-38 (1987).

113. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219-21.

can avoid a direct attack on the earlier precedent by arguing that the change of circumstances makes the former decision obsolete.[114] The Supreme Court often uses this rationale to overrule earlier decisions.[115]

The rejection of *Wilko* arguably falls into this category. In *McMahon*, the majority mentioned a post-*Wilko* change in the SEC's regulatory power.[116] Since the original decision in *Wilko*, Congress had given the SEC broader authority over the rules governing self-regulatory organizations, including their arbitration rules. The Court concluded that, because of these amendments, the SEC had "expansive power to ensure the adequacy of the arbitration procedures employed by the SROs."[117] This SEC control in turn would insure that arbitration would not waive the substantive protections of the securities laws.[118] Thus, the argument goes, these regulatory changes made *Wilko*'s distrust of arbitration obsolete. There have been no similar, significant changes to the SEC's authority or resources that affect *Borak*'s holding. Therefore, the general rule of stare decisis will be followed and *Borak* will not be overruled.

The problem with this attempted distinction is that neither *Rodriguez* nor *McMahon* strongly focused on the change in the SEC's regulatory authority as a rationale for overruling *Wilko*. The majority opinions in both *McMahon* and *Rodriguez* focused more on the Court's changing attitude toward arbitration than on the change in the SEC's authority. The regulatory changes appear to have been an afterthought. *Rodriguez* barely mentions this argument, simply incorporating *McMahon*'s discussion by reference.[119]

In addition, as Justice Blackmun's dissent in *McMahon* points out, neither increased SEC oversight nor subsequent changes to securities arbitration procedures corrected any of the problems with arbitration perceived by the *Wilko* majority.[120] Thus, the changed circumstances argument is factually suspect, and hardly a sufficient basis for distinguishing *Wilko* from *Borak*.

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114. *Id.* at 220-21.

115. See cases cited in *id.* at 219-21.

116. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 233-34 (1986).

117. *Id.* at 233.

118. *Id.* at 234.

119. And in *McMahon* we explained at length why we rejected the *Wilko* Court's aversion to arbitration as a forum for resolving disputes over securities transactions, especially in light of the relatively recent expansion of the Securities and Exchange Commission's authority to oversee and to regulate those arbitration procedures. We need not repeat those arguments here.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989)(citation omitted).

120. Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 257-66 (1986)(Blackmun, J., concurring in part and dissenting in part).

B. *Wilko*'s Inconsistency with *McMahon*

A second possible distinction between *Wilko* and *Borak* is that *Wilko*'s demise was compelled by conflicting precedent in a way in which *Borak*'s demise is not. When *Rodriguez* was decided, overruling *Wilko*, *McMahon* already had held that claims pursuant to the 1934 Act were arbitrable. There was a strong argument in the opinion that *Wilko*'s inconsistency with *McMahon* made the overrule of *Wilko* inevitable:

> It also would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side. Their inconsistency is at odds with the principle that the 1933 and 1934 Acts should be construed harmoniously because they "constitute interrelated components of the federal regulatory scheme governing transactions in securities." In this case, for example, petitioners' claims under the 1934 Act were subjected to arbitration, while their claim under the 1933 Act was not permitted to go to arbitration, but was required to proceed in court. That result makes little sense for similar claims, based on similar facts, which are supposed to arise within a single federal regulatory scheme. In addition, the inconsistency between *Wilko* and *McMahon* undermines the essential rationale for a harmonious construction of the two statutes, which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another.[121]

According to the Court, *Wilko* had to be overruled to correct this inconsistency.

In the case of *Borak*, on the other hand, there is no directly inconsistent precedent relating to securities private rights of action. Therefore, the argument goes, there is no corresponding need to overrule *Borak*.

The problem with this distinction is that it fails to explain why *McMahon* itself was decided as it was.[122] If *McMahon* made the demise of *Wilko* inevitable, then *McMahon* itself effectively overruled *Wilko*.[123] The Supreme Court overruled *Wilko* in two steps rather than one. But this does not destroy the parallel. It merely moves the parallel back one step—if *McMahon* overruled *Wilko*, will the Supreme Court similarly overrule *Borak*? If it wished, the Supreme Court could just as easily reject *Borak* in a similar, two-step process. It could begin, for example, by holding that there is no private right of action pursuant to section 17(a) of the 1933 Act, then, using an argument that section 17(a) of the 1933 Act and section 14(a) of the 1934 Act should be construed similarly, overrule *Borak* based on the section 17(a) precedent.

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121. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-85 (1989)(citation omitted). This inconsistent precedent rationale is one of the common arguments for overruling. *See* Israel, *supra* note 113, at 223-25.

122. *See generally* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 87 (1960)(If a precedent can no longer be regarded as good authority because of some later case, the later case itself overruled the precedent).

123. For an argument that this is the case, *see generally* Bradford, *supra* note 62.

C. The Supreme Court's Other Proxy Fraud Opinions

Another possible difference between *Wilko* and *Borak* is that the Supreme Court has dealt with other section 14(a) private rights of action since *Borak* was decided. Twice, it decided section 14(a) cases without expressing any disapproval of *Borak*. The Court did not revisit the question of arbitration of 1933 Act claims until it overruled *Wilko*. Thus, it could be argued, the *Borak* holding is built on a stronger foundation than *Wilko* and is less likely to be overruled.

The Supreme Court has dealt with two section 14(a) private rights of action since it decided *Borak*. First, in 1970, in *Mills v. Electric Auto-Lite Co.*,[124] the Court held that proof of reliance was not a necessary element to recover in a section 14(a) cause of action and also that section 14(a) plaintiffs are, at least in some cases, entitled to recover their litigation expenses and attorneys' fees. Then, in *TSC Industries, Inc. v. Northway, Inc.*,[125] the Court established a test for determining whether omitted or misstated facts were material.[126] Both of these cases were private actions, so they involve at least an implicit reaffirmation of *Borak*. Thus, *Borak* has broader support in the Court's cases than *Wilko* did when it was overruled.

However, this gives more weight to *Mills* and *TSC* than is due. Neither involved a challenge to the existence of a private right of action under section 14(a). Each refers to *Borak*'s recognition of a private right of action, but only in a cursory manner, more as background.[127] These cases merely took *Borak*'s holding as a given in the same way that cases arising after *Wilko* took *Wilko*'s holding as a given. *Mills* and *TSC* provide no additional foundation to support *Borak*'s holding.

More importantly, *Mills* and *TSC*, decided in 1970 and 1976 respectively, predate the Supreme Court cases redefining the test for implication of private rights of action. When they were decided, the Court had not yet challenged the *Borak* analysis. The question is whether, given the subsequent parallel change in the legal standard, the Court will treat *Borak* as it did *Wilko*. *Mills* and *TSC* cannot be viewed as strengthening *Borak* against a challenge that did not exist when they were decided, particularly since neither case expressly dealt with the basic private right of action question. Again, there is no convincing reason to distinguish the *Borak* history from the *Wilko* history.

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124. 396 U.S. 375 (1970).
125. 426 U.S 438 (1976).
126. *Id.* at 449.
127. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 377 (1970); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976). The Court in *Mills* refers to or quotes from *Borak* several times, but never in a way that could be considered a reaffirmation or reconsideration of *Borak's* holding. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381, 382, 383, 392 (1970).

VII. CONCLUSION

Borak, like *Wilko*, is the product of another era. For the last ten years, *Borak* has stood in the same position that *Wilko* did prior to *Rodriguez*—its rationale rejected, but its holding seemingly intact. It is clear that a decision under today's standard would not produce a private right of action under section 14(a), but *Borak*'s direct holding remains unchallenged. Jennings and Marsh indicate that "[i]t has not been questioned since the *Borak* case that a private right of action exists under Section 14(a) for a violation of the Proxy Rules."[128]

The jurisprudential parallel between *Wilko* and *Borak* is overwhelming, and attempted distinctions unconvincing. Will *Borak* be cast aside in the same way that the Supreme Court rejected its long-standing *Wilko* ruling? Or will the Court be more selective in its willingness to overrule and reaffirm *Borak* in spite of the obvious parallel to what it did in *Rodriguez*? No one has directly attacked *Borak*, but a challenge will certainly come. When that challenge comes, if the Supreme Court acts as it has in the past, *Borak* will not survive.

VIII. POSTSCRIPT

After this Article went to press, the United States Supreme Court decided *Virginia Bankshares, Inc. v. Sandberg*.[129] *Sandberg* held that statements of opinion could be actionable under section 14(a) and Rule 14a-9, but that causation requirements were not met where the misleading statements were made to minority shareholders whose votes were not necessary to authorize the transaction giving rise to the claim.

Justice Souter's majority opinion did not directly challenge *Borak*. According to Justice Souter,

> The object of our enquiry does not extend further to question the holding of either J.I. Case Co. v. Borak or Mills v. Electric Auto-Lite Co. at this date, any more than we have done so in the past, see Touche Ross & Co. v. Redington. Our point is simply to recognize the hurdle facing any litigant who urges us to enlarge the scope of the action beyond the point reached in Mills. [130]

Justice Souter recognized that, since *Borak*, the Supreme Court had said that recognition of a private right of action must rest on congressional intent to provide such a remedy.[131] He indicated that the Court "would have trouble" inferring any congressional intent to allow private rights of action under section 14(a)[132] and used that as an argu-

128. R. JENNINGS & H. MARSH, JR., SECURITIES REGULATION: CASES AND MATERIALS 886 (6th ed. 1987).
129. No. 89-1448 (U.S. June 27, 1991)(WESTLAW, 1991 WL 111132).
130. *Id.*, slip op. at 12 n. 11 (citations omitted).
131. *Id.*, slip op. at 11.
132. *Id.*, slip op. at 12.

ment for refusing to expand the scope of the section.[133] In a separate opinion, Justice Kennedy challenged the majority opinion as "a sort of guerilla warfare to restrict a well-established implied right of action."[134]

Sandberg essentially leaves unanswered the question raised in this Article. *Sandberg* implicitly accepted an implied private right of action under section 14(a), but its support of the *Borak* holding was tenuous at best. *Sandberg* may be read either as a reluctant reaffirmation of *Borak* or as a tentative first step toward overruling *Borak*. Only time will tell.

133. *Id.*, slip op. at 9-14.
134. *Id.*, slip op. at 17 (Kennedy, J., concurring in part and dissenting in part).