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In recent years, the Supreme Court has addressed a number of issues related to securities regulation. This comment focuses on the Court’s resolution of the issues raised in two recent cases. The comment expresses no opinion about the “correctness” of the Court’s holdings. Rather, the comment exposes the flaws in the Court’s current method of resolving securities issues.¹

This comment identifies two recent trends in the Supreme Court’s securities opinions. First, the Court uses selective provisions of the Securities Act of 1933² (the “Securities Act”) and the Securities Exchange Act of 1934³ (the “Exchange Act”) to find an interlocking scheme aimed toward one purpose. Viewing the Acts as a single regulatory structure, the Court then proceeds to apply principles embodied in one of the Acts to a situation governed by the other Act. Although both Acts contain anti-deception and disclosure provisions, the goals, the scope and the terms of the Acts are not identical. The Court fails to acknowledge the unique features of each Act and to justify application of principles from one Act to situations arising under the other.

¹. As the scope of this comment is limited, discussion of the Court’s rationale is confined generally to the majority or plurality opinion issued in each case.
³. 15 U.S.C. §§ 78a-78ll.
Second, the Court follows a similar pattern in reviewing various claims stated under the Exchange Act. The Court assumes the claims are sufficiently similar that principles applicable to one are equally relevant to any other. Here too, the Court fails to acknowledge that the various causes of action within the Acts are distinct and serve different purposes. As a result, the Court fails to justify properly cross-application of principles underlying the various sections of the Exchange Act.

In 1933, Congress enacted the Securities Act to protect those who invest in securities.\(^4\) The Securities Act is "chiefly concerned with disclosure and fraud in connection with offerings of securities."\(^5\) The Act requires certain persons connected with the sale of a security to "make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale."\(^6\) Various sections of the Act define the requisite extent of disclosure and provide for enforcement through private causes of action.\(^7\)

The Exchange Act, enacted in 1934, also contains anti-deception provisions\(^8\) designed to induce sellers to disclose certain information. However, the Exchange Act is "chiefly concerned with the regulation of post-distribution trading on the Nation's stock exchanges and securities trading markets."\(^9\) Congress stated that:

> a national public interest makes it necessary to provide for regulation and control of [transactions conducted upon securities exchanges and over-the-counter markets], to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system.\(^10\)

Congress also noted that prices established by the markets are widely relied upon and are "susceptible to manipulation and control."\(^11\) The Exchange Act, therefore, is intended primarily to regulate the securities exchanges and the transactions involving securities registered on those exchanges.

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6. Wilko, 346 U.S. at 431 (citing Preamble to Securities Act, 48 Stat. 74 (1933)).
In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Supreme Court addressed the enforceability of clauses requiring parties to arbitrate future controversies which might give rise to claims under the Securities Act. Overruling *Wilko v. Swan*, the Court held that predispute arbitration clauses are enforceable under the Securities Act. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, the Court read the statute of limitations expressly stated by Congress in section 9 of the Exchange Act into section 10(b) of the Exchange Act, which does not contain its own limitations provision. While the exact issues of these cases differ, the incomplete analysis employed by the Court to resolve each case is similar.

This comment reviews the *Rodriguez de Quijas* and *Lampf* decisions and exposes the flaws in the Court’s resolution of these cases. First, the cases central to an understanding of the current state of law are set forth briefly in chronological order. Next, this comment criticizes the Court’s analogies between the Securities Act and the Exchange Act. Finally, this comment attacks the Court’s tendency to dispense with the differences among distinct causes of action available under the Acts.

I. BACKGROUND

A brief review of the Supreme Court’s opinions in several securities cases aids in the analysis of *Rodriguez de Quijas* and *Lampf*.

A. *Wilko v. Swan*

In 1953, the Supreme Court was asked to decide in *Wilko v. Swan* whether or not a predispute arbitration clause in an agreement relating to the purchase of securities executed between a brokerage firm and its customers could be enforced consistent with the Securities Act. The customers filed a claim in district court alleging that the firm had made misrepresentations about the value of certain stock in violation of section 12(2) of the Securities Act. The brokerage firm had moved in the lower court for a

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17. *Id.* at 428-29. Section 12(2) of the Securities Act provides:
stay of the proceedings, claiming that the dispute should be submitted to arbitration in accordance with the agreement. The Wilko Court held that section 14 of the Securities Act, which prohibits waivers of certain provisions of the Act, operated to void enforcement of the arbitration clause. 18 Reasoning that an agreement to arbitrate disputes was a ‘stipulation’ for purposes of section 14, the Court stated that “the right to select the judicial forum is the kind of ‘provision’ [of the Securities Act] that cannot be waived.” 19

The Court supported its decision by referring to the purposes and goals of the Securities Act. The Court first noted that section 12(2) would govern the dispute regardless of the forum in which the dispute was resolved. 20 It also stated that the Securities Act, drafted to protect buyers, granted buyers particular advantages not available under common law; the Act gives buyers a broader choice of court and venue and shifts to sellers the burden of proof regarding a seller’s culpability. 21 In addition, the Court found no meaningful opportunity existed for judicial review of an arbitration award. 22 Finally, the Court noted that the buyer, in executing an

Any person who —

(2) offers or sells a security (whether or not exempted by the provisions of section [3] 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.

20. Id. at 434.  
21. Id. at 435.  
22. See id. at 436-37.
agreement containing a predispute arbitration clause, relinquishes
the advantages provided by the Act at a time when the buyer “is
less able to judge the weight of the handicap the Securities Act
places on [the buyer’s] adversary.”23 The Court therefore decided
that the policies embodied in the Securities Act evidenced Congres-
sional intent to supersede other statutory provisions favoring arbi-
tration.24

B. Ernst & Ernst v. Hochfelder

In Ernst & Ernst v. Hochfelder,25 the Supreme Court consid-
ered the plaintiff’s burden in proving a defendant’s culpability in
an action under section 10(b) of the Exchange Act26 and under
Rule 10b-527 promulgated by the Securities and Exchange Com-
misson (“SEC”). The Court rejected the argument that proof of
negligence, sufficient to support a claim under section 12(2) of the
Securities Act, is also sufficient to support a claim arising under

23. Id. at 435.
24. Id. at 438.
26. Section 10(b) provides:
   It shall be unlawful for any person, directly or indirectly, by the use
   of any means or instrumentality of interstate commerce or of the mails, or of
   any facility of any national securities exchange —

   (b) To use or employ, in connection with the purchase or sale of
   any security registered on a national securities exchange or any security not so
   registered, any manipulative or deceptive device or contrivance in contravention
   of such rules and regulations as the Commission may prescribe as necessary
   or appropriate in the public interest or for the protection of investors.
27. Rule 10b-5 states:
   It shall be unlawful for any person, directly or indirectly, by the use
   of any means or instrumentality of interstate commerce, or of the mails or of
   any facility of any national securities exchange,

   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to
   state a material fact necessary in order to make the statements made, in the
   light of the circumstances under which they were made, not misleading, or
   (c) To engage in any act, practice, or course of business which
   operates or would operate as a fraud or deceit upon any person,
   in connection with the purchase or sale of any security.

While neither section 10(b) nor Rule 10b-5 contains an express cause of action, a
cause of action has been implied under these sections since 1946. See Kardon v. Na-
section 10(b) of the Exchange Act and Rule 10b-5. After discussing the differing purposes served by the Securities Act and the Exchange Act, the Court observed that the Acts "constitute interrelated components of the federal regulatory scheme governing transactions in securities." The Court then reasoned that procedural restrictions governing a section 12(2) suit, but not applicable in a 10(b) claim, indicated that the causes of action are not interchangeable. The Court therefore concluded that the differences between section 12(2) and section 10(b) justified different levels of scienter for the two claims.

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

In Shearson/American Express, Inc. v. McMahon, the Court considered whether a predispute arbitration clause was void under the Exchange Act. Plaintiffs, clients of a brokerage firm, asserted claims under section 10(b) and under Rule 10b-5. The Court, construing language similar to section 14 of the Securities Act, decided that section 29 of the Exchange Act prohibited waiver only of compliance with a duty created under the Exchange Act. Because the right to sue in federal court relates to procedure and creates no duty with which sellers must comply, the right to choose a forum could be waived.

The McMahon Court harmonized its decision with Wilko by distinguishing the setting in which arbitration arose. It viewed Wilko as involving a situation where arbitration was inadequate to redress grievances. A corollary to that rule would hold Wilko inapposite where arbitration is adequate for resolving grievances. Thus, determination of the waiver issue turned on the adequacy of arbitration. Since Wilko had been decided, Congress had granted

29. Id. at 206.
30. Id. at 210.
31. Id. at 210-11.
33. See supra note 18. The relevant portion of section 29 of the Exchange Act provides, "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." Exchange Act § 29(a), 15 U.S.C. § 78cc(a).
34. 482 U.S. at 228.
35. Id.
36. Id. at 229.
37. Id.
the SEC broad powers to regulate arbitration procedures employed by self-regulatory organizations ("SRO"). The agreement at issue in McMahon required arbitration to be conducted according to the rules of one of the SROs. The Court reasoned that "where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement [of the arbitration clause] does not effect a waiver." Therefore the Court refused to extend Wilko to the Exchange Act in light of the SEC's expanded statutory power.

D. Rodriguez de Quijas v. Shearson/American Express, Inc.

In Rodriguez de Quijas v. Shearson/American Express, Inc., the Court again addressed the enforceability of predispute arbitration clauses under the Securities Act. Plaintiffs filed suit against their broker asserting claims under section 12(2) of the Securities Act and under three sections of the Exchange Act. The district court ordered the Exchange Act claims submitted to arbitration (per McMahon) and ordered the section 12(2) claim tried in court (per Wilko). The Court of Appeals for the Fifth Circuit reversed after concluding that Wilko had been reduced to "obsolescence" by subsequent Supreme Court decisions. The Supreme Court granted certiorari.

The Rodriguez de Quijas Court overruled Wilko, holding that predispute arbitration clauses could be enforced consistent with the

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40. Id. at 234.
42. Id.
43. Id.
44. Rodriguez de Quijas v. Shearson/Lehman Bros., Inc., 845 F.2d 1296, 1299 (5th Cir. 1988).
Securities Act. Writing for the Court, Justice Kennedy advanced a number of justifications for the decision, including (1) a determination that the Wilko decision "rested on suspicion of arbitration as a method of weakening the protections afforded in the [Securities Act]" and (2) a conclusion that the coexistence of Wilko and McMahon would undermine the principle of harmonious construction of the Securities Act and the Exchange Act.

Addressing the contention that Wilko should be upheld, the Court observed that to the extent that the Wilko decision rested on a suspicion of the adequacy of arbitration, the decision was not aligned with current statutory and judicial support of arbitration. The Court referred to its rationale for rejecting the inadequacy of arbitration argument in McMahon as being partially grounded in the SEC's power to regulate the procedures employed in securities arbitration. However, the Rodriguez de Quijas Court refused to repeat the arguments supporting McMahon, and it stated that the petitioners had failed to carry their burden of showing that arbitration clauses were not enforceable.

The Court then proceeded to discuss its position that overruling Wilko was justified by the disparity between that decision and McMahon. The Rodriguez de Quijas Court stated:

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 [Securities] and [Exchange] Acts should be construed harmoniously because they "constitute interrelated components of the federal regulatory scheme governing transactions in securi-

46. Rodriguez de Quijas, 490 U.S. at 485.
47. Id. at 481.
48. Id. at 484-85.
49. Id. at 481.
50. Id. at 483.
51. Id. The Court did not address the brokerage firm's burden of persuading the Court to overrule precedent. Compare Justice Kennedy's view of precedent in Rodriguez de Quijas with his opinion on the subject in another case:

We have said that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, the legislative power is implicated, and Congress remains free to alter what we have done.

In this case, for example, petitioners' claims under the [Exchange] Act were subjected to arbitration, while their claim under the [Securities] 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.\footnote{52}

E. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson

In 1991, the Court decided Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, which raised the issue of which statute of limitations to apply to causes of actions implied under section 10(b) and Rule 10b-5.\footnote{53} The Court decided that a uniform statute of limitations was preferable to application of various state law statutes of limitation.\footnote{54} It then held that the statute of limitations expressly set forth in section 9 of the Exchange Act was the appropriate statute to apply to a section 10(b) claim.\footnote{55} Therefore, actions under section 10(b) and Rule 10b-5 must be commenced within one year of discovery of the violation, but no later than three years after the conduct which constituted the alleged violation.\footnote{56}

The Court justified its decision by relying on congressional intent. First, the Court observed that Congress provided for two statutes of limitations in the Exchange Act which involved the one year from discovery/three years from conduct scheme.\footnote{57} [Section] 9, pertaining to the willful manipulation of stock prices, and [section] 18, relating to misleading filings, target the precise dangers that are the focus of [sec-

\footnote{52. 490 U.S. at 484-85 (citation omitted) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976)).}
\footnote{53. 111 S. Ct. 2773, 2777 (1991). For the text of § 10(b) and Rule 10b-5 and a summary of the cause of action implied in them, see supra notes 26-27.}
\footnote{54. Lampf, 111 S. Ct. at 2780.}
\footnote{55. Id. at 2780-81.}
\footnote{56. Id. at 2782.}
\footnote{57. Id. at 2781.}
tion] 10(b). Each is an integral element of a complex web of regulations. Each was intended to facilitate a central goal: "to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges."

Second, the Court noted that Congress amended the Securities Act when it enacted the Exchange Act. The amendments adopted a similar one year/three year scheme for causes of action arising under sections 11 and 12 of the Securities Act. Extension of this scheme to the Securities Act bolstered the Court's decision.

Reasoning that Congress had provided express limitation provisions elsewhere in the Exchange Act, the Court refused to analyze whether the statutes of limitation applicable to state law causes of action similar to a section 10(b) claim were the more appropriate statutes to apply. Because the section 9 and section 18 limitation clauses "differ slightly in terminology," the Court selected the language of section 9 to apply to section 10(b) claims.

58. Id. at 2781 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976)).
59. Id. at 2780.
60. Id. Section 13 of the Securities Act provides:

No action shall be maintained to enforce any liability created under section [11] or section [12(2)] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section [12(1)] , unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section [11 or section 12(1)] more than three years after the security was bona fide offered to the public, or under section [12(2)] more than three years after the sale.

61. Lampf, 111 S. Ct. at 2780.
63. Id. at 2782 n.9. Compare Exchange Act § 9(e), 15 U.S.C. § 78i(e) ("No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.") with id. § 18(e), 15 U.S.C. § 78r(e) ("No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.").
II. ANALYSIS

The remainder of this comment uses the foregoing cases to demonstrate the shortcomings of the current Supreme Court's analysis of securities law. First, this section exposes the inappropriate analogies drawn between the Securities Act and the Exchange Act. This discussion focuses on the Rodriguez de Quijas decision and its forerunners. Second, the flawed analogies drawn between distinct claims within each Act are illustrated by analyzing the Lampf Court's reliance on section 9 of the Exchange Act to decide an issue presented under section 10(b) of the Exchange Act. The comment then concludes that the Supreme Court's practice blurs the distinctions which are meant to exist between the Acts and the claims that can be stated under them.

A. Comparisons of the Securities Act and the Exchange Act

As previously stated, in Rodriguez de Quijas the Supreme Court overruled precedent and held that predispute arbitration clauses are enforceable under the Securities Act. The Court rested its conclusion on two grounds: (1) the McMahon Court had adequately disposed of the Wilko Court's belief that arbitration was an inadequate forum in which to resolve securities disputes and (2) the inconsistency between the Wilko and McMahon decisions was undesirable under an enforcement scheme intended to be construed harmoniously. Each of these justifications arise from incomplete comparisons of the Securities Act and the Exchange Act.

With respect to the bias against arbitration underlying Wilko, the Rodriguez de Quijas Court stated:

[W]e explained at length [in McMahon] 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 [SEC]'s authority to oversee and to regulate those arbitration procedures.

64. See supra text accompanying notes 41-52.
66. Id. at 481.
67. Id. at 484-85.
68. Id. at 483.
It then refused to repeat those arguments. An analysis of the McMahon decision and of the differences between the Acts highlights the defects of the Supreme Court’s analysis.

In McMahon, the Supreme Court chose to decide whether Wilko, which prohibited enforcement of predispute arbitration clauses for claims under the Securities Act, should be extended to claims under the Exchange Act. The McMahon Court noted that recently enacted SEC powers led to a conclusion about the adequacy of arbitration at variance with the finding in Wilko. Where the SEC had statutory authority to ensure the adequacy of the SRO arbitration procedures, enforcement of predispute arbitration clauses did not undermine enforcement of claims under the Exchange Act. The Rodriguez de Quijas Court, by referring to its discussion of arbitration in McMahon, presumably meant to subsume all elements of its argument in the McMahon decision into the Rodriguez decision.

The Court’s failure to restate the McMahon arguments is unfortunate for two reasons. First, the exercise of restating the arguments may have caused the Court to realize that features distinct to the Exchange Act were dispositive in McMahon. Second, if the Court had recognized the distinction between the Exchange Act and the Securities Act, it would have been forced to justify properly its reversal of Wilko.

The Wilko Court offered a number of reasons for its determination that arbitration was an inadequate basis for redressing grievances arising under the Securities Act. The Rodriguez de Quijas Court did not expressly address the shortcomings identified in Wilko, assuming instead that arguments about the inadequacy of arbitration to resolve securities conflicts were disposed of in McMahon. The McMahon decision, however, considered claims brought under the Exchange Act by a customer against its brokerage firm, and it emphasized the SEC’s power to regulate SRO rules. Though the facts in Wilko were similar, the claims assert-

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69. Id.
71. Id.
72. See Rodriguez de Quijas, 490 U.S. at 483 (“We need not repeat those arguments here”). See supra text accompanying notes 32-40 for the major elements of the McMahon argument.
73. See supra text accompanying notes 16-24.
74. See McMahon, 482 U.S. at 222. While the Exchange Act grants the SEC authority to regulate the rule-making ability of SROs, Exchange Act § 19, 15 U.S.C. § 78s, the
ed arose under the Securities Act.

The Court does not seem to realize that not every securities transaction must involve an SRO or an arbitration clause that incorporates SRO rules. As a result, the McMahon reasoning is underdeveloped, especially in the context of the Securities Act under which a plaintiff need not be involved with an SRO. Because the Rodriguez de Quijas Court failed to acknowledge the differences between the Securities Act and the Exchange Act, it also failed to take the next logical step and reconcile these differences in a manner justifying a complete expansion of the McMahon decision to a dispute arising under the Securities Act, typically under section 12(2) of that Act.

Rodriguez de Quijas seems to dictate enforcement of an arbitration clause related to a section 12(2) claim, which does not require the security at issue to be registered. While it may be assumed that most brokerage firm contracts will incorporate by reference in the arbitration clause the rules of an SRO, it is also conceivable that a transaction involving unregistered securities would not involve an SRO. In addition, the purchase agreement relating to an unregistered security could contain a predispute arbitration clause which does not specify application of SRO rules. Is the latter a situation in which arbitration would be inadequate and an arbitration clause therefore unenforceable? McMahon rested on the Court’s belief that SEC oversight of SRO arbitration rules was sufficient to ensure the adequacy of arbitration conducted pursuant to such rules. Instead of expanding McMahon narrowly so that it applies to those claims arising under the Securities Act in which certain facts suggest the adequacy of arbitration, the Rodriguez de Quijas Court blithely expanded McMahon to all disputes arising under the Securities Act.

SEC does not have the power to review application of SRO rules in any particular arbitration. See id. at 265 (Blackmun, J., dissenting). Thus, implicit in McMahon’s reliance on SEC oversight are the presumptions that SRO rules will be properly applied and, even more fundamentally, that SRO rules will be chosen to govern an arbitration. The arbitration clauses at issue in both Rodriguez de Quijas and McMahon specified that the rules of a particular SRO would apply in an arbitration proceeding. Rodriguez de Quijas, 490 U.S. at 478; McMahon, 482 U.S. at 223. Whether the Court’s analysis would change if the arbitration clause did not require application of SRO rules remains an issue.

75. See supra notes 17, 26.

76. Furthermore, the Rodriguez de Quijas Court never explained why the Wilko Court’s concerns about arbitration were outdated. “Even those who favor the arbitration of securities claims do not contend, however, that arbitration has changed so significantly
In addition, the *Rodriguez de Quijas* Court found that the coexistence of the inconsistent *Wilko* and *McMahon* decisions undermined harmonious construction of interrelated regulatory components. The Court not only misconstrued the *Hochfelder* decision, which it relied upon to reach the harmonious construction conclusion, but it also exhibited a flawed understanding of the interrelationship of the Acts and of the strategies involved in choosing the form a securities action will take.

The *Hochfelder* Court determined the requisite level of scienter a plaintiff must prove to succeed in a section 10(b) action. Starting with the statute itself, the Court held that the language of section 10(b) (and of Rule 10b-5) required the plaintiff to prove more than negligence on the part of the defendant to prevail. While the *Hochfelder* Court reviewed both the Securities and Exchange Acts and stated that the Acts constituted "interrelated components," the Court did not blindly apply the negligence standard of fault required under section 12(2) to claims arising under section 10(b). The *Hochfelder* Court instead concluded that while procedural limitations on a section 12(2) claim justified the lower scienter level for that cause of action, the absence of those limitations in a section 10(b) claim compelled the Court to find that a 10(b) claim required a different, higher level of scienter. The Court refused to extend liability under section 10(b) to negligent wrongdoing. The *Hochfelder* Court reviewed sections of each Act extensively, thoughtfully compared elements of the Acts, analyzed the differences found and justified its decision to require a higher level of scienter for section 10(b) claims despite the similarity of section 10(b) and section 12(2) claims. In contrast, the *Rodriguez de Quijas* Court failed even to inquire whether or not differences between the Acts might justify the co-existence of the seemingly contradictory *Wilko* and *McMahon* decisions. As is apparent from the *Hochfelder* holding, "harmonious construction" does not necessarily require that similar provisions be construed as though they as to eliminate the essential characteristics noted by the *Wilko* Court." *McMahon*, 482 U.S. at 259 (Blackmun, J., dissenting).

77. *See supra* text accompanying note 52.
80. *Id.* at 206, 210.
81. *Id.*
82. *Id.* at 207-09.
The Rodriguez de Quijas Court was also concerned that the coexistence of the two decisions would increase the probability that plaintiffs would manipulate their claims to take advantage of Wilko's prohibition on arbitration of claims under the Securities Act. Admittedly, the Hochfelder Court was also concerned with the possibility of claim manipulation. The Hochfelder Court refused to extend the remedy implied in section 10(b) "to actions premised on negligence" because it feared "[s]uch extension would allow causes of action covered by [sections] 11, 12(2), and 15 [of the Securities Act] to be brought instead under [section] 10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions." The difference between the Rodriguez de Quijas and Hochfelder decisions, however, is a difference of kind.

The Hochfelder Court was concerned that extending liability under section 10(b) to a negligent defendant would eliminate the distinctions drawn by the similar express claims under the Securities Act. A plaintiff, however, can still choose to bring a claim which would satisfy the elements of section 10(b) under section 12(2) instead, so long as the claim also satisfies the elements of the latter section. Should a plaintiff choose a section 12(2) claim, the plaintiff accepts the procedural limitations discussed by the Hochfelder Court. Similarly, should the plaintiff choose to pursue a section 10(b) claim, the plaintiff must establish each element of that claim, including the requisite level of scienter. Variations among the elements of alternate theories of liability and plaintiffs' assessment of the strengths and weaknesses of evidence necessary to establish those elements determine which causes of action will be pursued. The availability of a particular remedy or a specific damage formula or an alternative method of resolving a dispute such as arbitration may influence plaintiffs' choice of actions. Congress and the courts implicitly sanction these decisions when they create rights of action (Congress by statute and the courts by identifying implied rights of action) which have elements overlapping those in other causes of action. For example, the judicially-created 10(b) claim has elements both similar and dissimilar to the express various claims contained in the Securities Act and the

Exchange Act.

The failure of the Rodriguez de Quijas Court to address the distinctions between the Securities Act and the Exchange Act results in an unprincipled holding. While the Hochfelder decision involved extensive analysis of how the Securities Act and the Exchange Act serve as "interrelated components," the Rodriguez de Quijas Court appears to suggest that "interrelated" is equivalent to "identical" and that inconsistencies in applying the Acts to a given situation are patently undesirable. The Hochfelder Court, under a Rodriguez de Quijas-type analysis, should have concluded that section 10(b) requires only that a plaintiff show mere negligence on the part of the defendant and then should have incorporated the procedural limitations associated with a section 12(2) action into a section 10(b) claim. After all, inconsistent procedural treatment "makes little sense for similar claims, based on similar facts, which are supposed to arise within a single federal regulatory scheme." As long as different claims address the same conduct, the Rodriguez de Quijas Court seems to favor similar treatment and similar disposition notwithstanding variations in the applicable law.

B. Different Claims Arising Under the Same Act

Perhaps Rodriguez de Quijas could be viewed as an aberration from the Supreme Court's generally competent analysis and disposition of securities law issues. The Lampf decision, however, appears to remove any doubt that the Rodriguez de Quijas decision was a precursor to incomplete analyses of securities law issues. In the same manner in which the Rodriguez de Quijas Court drew broad comparisons between the Securities Act and the Exchange Act, the Lampf Court drew broad comparisons between two sections of the Exchange Act. The Lampf Court considered the stat-

85. Rodriguez de Quijas, 490 U.S. at 485.

86. A further problem with the Rodriguez de Quijas decision arises from the Court's paternalistic treatment of the plaintiff, whom the Court characterizes as being forced to pursue similar claims based on similar facts in two separate forums. The Court's facially paternalistic statement should not fool the careful reader who recognizes that the plaintiff is precisely the party who wanted to avoid arbitration of all of its claims or, at least, its § 12(2) claim. The Court, without acknowledging the result, in fact aided the defendant who wanted to submit to arbitration all claims arising from the same conduct.

87. Interestingly, Justice Kennedy, who wrote the Rodriguez de Quijas opinion for a nearly unanimous court, dissented from the Lampf decision, attacking primarily the Court's interjection of express limitation provisions from other sections of the Act without reconciling their disparate purposes and rationales. Lampf, Pleva, Lipkind, Prupis &
ute of limitations applicable to a section 10(b) claim, and ultimately held that the limitations provisions expressly stated in section 9 of the Exchange Act would apply to the causes of action implied in section 10 of the same act. Regardless of whether or not one believes the ultimate holding is correct, the reasoning by which the Court reached this holding is seriously flawed.

The Court first stated that both sections 9 and section 18 of the Exchange Act, each of which contain a limitations provision which includes the one year/three year scheme, were intended to serve the same function — protecting investors from manipulation of stock prices by regulating the stock exchanges and requiring intermittent reporting of companies whose stock is listed on those exchanges. Without examining and analyzing the similarities and differences between sections 9 and 10(b), the Court determined that section 10(b) addresses the same dangers and that the section 9 statute of limitations applies to claims under section 10(b) claims as well.

Obvious distinctions exist between sections 9 and 10(b). Section 9 prohibits a wide range of activities, most of which relate to securities listed on a national stock exchange. In contrast, section 10(b) and Rule 10b-5 prohibit fraud and misrepresentations in connection with the purchase or sale of any security, whether or not registered on a national stock exchange. Furthermore, while certain securities are exempted from the provisions of section 9, the explicit limitations provisions in the Securities Act are each unique. But, according to Justice Kennedy, "[i]t is of even greater importance to note that both of the statutes in question relate to express causes of action which, in their purpose and underlying rationale differ from causes of action implied under § 10(b)." Id. at 2789. Apparently, Justice Kennedy holds sacrosanct the express terms of statutory causes of action, but compromises his adherence to express terms when they create differences between the Securities Act and the Exchange Act.

See also supra note 51 for an example of Justice Kennedy's confusing view of precedent.

88. Lampf, 111 S. Ct. at 2782 n.9.
89. Id. at 2781.
90. Id.
91. Because of the limited scope of this comment, the differences set forth here are demonstrative, not exhaustive.
92. See Exchange Act § 9(a), 15 U.S.C. § 78i(a) (relating to activities which affect national securities exchange stock prices and price-related misrepresentations made to induce sales or purchases); id. § 9(b), 15 U.S.C. § 78i(b) (governing the sales of any put, call, straddle or other option or privilege by use of a national securities exchange).
93. Exchange Act § 10(b), 15 U.S.C. § 78j(b); see also Rule 10b-5, 17 C.F.R. §240.10b-5.
94. Exchange Act § 9(f), 15 U.S.C. § 78i(f). The term "exempted securities" is a
section 10(b) applies to all securities without exception.\textsuperscript{95} Therefore, section 10(b) is not confined to the narrow goal of preventing manipulation of stock prices listed on the national securities exchanges.

Substantial differences also exist between section 18 and section 10(b).\textsuperscript{96} Section 18 prohibits misrepresentations in documents required to be filed pursuant to the Exchange Act.\textsuperscript{97} Section 10(b), in contrast, prohibits all actionable misrepresentations whether or not contained in a document subject to the Act's filing requirements.\textsuperscript{98} Section 18 covers only affirmative statements which are false or which are misleading under the circumstances surrounding the statement;\textsuperscript{99} section 10(b) may apply to mere silence as well.\textsuperscript{100}

As the foregoing comparisons illustrate, the scope of section 10(b) and of Rule 10b-5 is both broader and narrower than sections 9 and 18. The range of transactions or conduct to which section 10(b) and Rule 10b-5 apply extends beyond registered securities, beyond misrepresentations contained in documents filed with the SEC and beyond conduct associated with a stock listed on a national securities exchange. On the other hand, section 10(b) and Rule 10b-5 do not expressly apply to certain conduct prohibited under section 9 if the conduct itself does not involve misrepresentations or a fraudulent scheme.\textsuperscript{101}

The Lamff Court, without acknowledging the existence of these differences or attempting to reconcile the differences with the specific purpose of each section, nonetheless concludes that section 10

\begin{itemize}
\item defined term which includes government securities, municipal securities and certain trust fund interests. Id. § 3(a)(12)(A), 15 U.S.C. § 78c(a)(12)(A).
\item Id. § 10(b), 15 U.S.C. § 78j(b) ("the purchase and sale of any security registered on a national securities exchange or any security not so registered"). See also Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 10 (1971) ("the fact that the transaction is not conducted through a securities exchange or an organized over-the-counter market is irrelevant to the coverage of § 10(b)").
\item Because of the limited scope of this comment, the differences set forth here are demonstrative, not exhaustive.
\item See supra note 27 for the text of Rule 10b-5.
\item See Chiarella v. United States, 445 U.S. 222, 230 (1980) (noting that silence in connection with the sale or purchase of a security is actionable under section 10(b) if a relationship of trust and confidence between the parties gives rise to a duty to disclose).
\item See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 473 (1977) ("The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception.").
\end{itemize}
is directed at the precise evils to which sections 9 and 18 are
directed.102 Further, having decided that the sections serve the
same goal, the Court fails to consider how each section may serve
that same goal in different ways. Because of the Court's simplistic
view of the securities laws, its analysis of issues presented in
Lampf was incomplete and its conclusion unsupported.

The Supreme Court's recent securities decisions reveal its in-
ability or unwillingness to construe the securities laws to effectuate
provisions unique to each but nonetheless similar to companion
laws. Despite the distinctions between the Securities Act and the
Exchange Act and among their respective claims, the Supreme
Court contends that the purposes of the Acts and of the claims are
identical. Further, the Court employs this identical purpose, or
interrelationship, to justify facile decisions in which distinctions
warranting different results among related claims are effectively
interpreted out of existence. One must wonder how much time will
elapse before judicial interpretation effectively merges the two Acts
and their various claims into a single Act containing one claim.

Laurie F Humphrey

102. Lampf, 111 S. Ct. at 2781.