

NOTE

THE MAGNUSON-MOSS WARRANTY ACT, THE FEDERAL ARBITRATION ACT, AND THE FUTURE OF CONSUMER PROTECTION

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INTRODUCTION

At the intersection of administrative law and product liability law stands the conflict between the Magnuson-Moss Warranty Act (MMWA)¹ and the Federal Arbitration Act (FAA).² One commentator has dubbed the conflict between these two acts the “Clash of the Federal Titans.”³ At the heart of this conflict lies the tension between two major doctrines of statutory interpretation: the doctrine of agency deference arising from the *Chevron* line of cases and the doctrine of the federal policy favoring arbitration arising out of the *McMahon* line of cases. One scholar has called *Chevron*⁴ “foundational” and “a quasi-constitutional text.”⁵ The *McMahon*⁶ line of cases that sprung out of the FAA in the 1980s has created significant controversy in the area of alternative dispute resolution, and commentators have questioned whether binding arbitration provides a fair forum for consumer disputes.⁷ The Supreme Court has found that the FAA requires binding arbitration under a variety of laws, including the Racketeer Influenced and Corrupt Organization Act (RICO), Sherman Antitrust Act, Securities Act of 1933, and Securities Exchange Act of 1934.⁸

Recent case law and scholarly literature are deeply split as to how courts should properly resolve this clash. Some have argued that applying the *McMahon* factors⁹ requires clear evidence that Congress intended to preclude enforcing the national policy favoring arbitration.¹⁰ Others have argued that Congress provided such a re-

¹ Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2000)).

² 9 U.S.C. §§ 1–16 (2000).

³ Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act v. the Magnuson-Moss Warranty Act: Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 4 (2001).

⁴ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For further discussion of *Chevron*, see *infra* Part I.C.

⁵ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

⁶ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). For further discussion of *McMahon*, see *infra* Part I.B.

⁷ See, e.g., Paul D. Carrington, *Self-Deregulation, the “National Policy” of the Supreme Court*, 3 NEV. L.J. 259, 276 (2002–2003) (“It is fanciful to speak of [predispute arbitration clauses in consumer transactions] as contractual for they are anything but an expression of mutual assent.”); Guerin, *supra* note 3, at 33 (discussing the importance of a “day in court”).

⁸ See Katie Wiechens, Note, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1464 (2001).

⁹ See *McMahon*, 482 U.S. at 227.

¹⁰ See, e.g., *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475 (5th Cir. 2002); Wiechens, *supra* note 8, at 1476–78.

peal in the MMWA.¹¹ Similarly, in the area of administrative law, some have argued that the Federal Trade Commission (FTC) is clearly entitled to *Chevron* deference because Congress has either implicitly or explicitly delegated to the FTC the power to regulate both the contents of consumer warranties and the “informal dispute resolution mechanisms” provided by warrantors.¹² Others have argued that the FTC is not so entitled because Congress clearly spoke to the issue.¹³

The debate regarding the MMWA’s relationship to the FAA laid dormant for many years after Congress passed the MMWA. The FAA never compelled binding arbitration under a federal law that provided a judicial remedy until *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁴ in 1985, ten years after the MMWA became law.¹⁵ The first case to encounter the MMWA and FAA clash, *Wilson v. Waverlee Homes, Inc.*,¹⁶ investigated the legislative history to discern Congress’s intent toward arbitration.¹⁷ The court only briefly discussed the FTC regulations and never addressed *Chevron*.¹⁸

This Note argues that the MMWA and its interpretation by the FTC preclude binding arbitration agreements. The text, legislative history, and purpose of the MMWA clearly indicate that Congress did not intend the FAA presumption in favor of arbitration to apply to the MMWA under the *McMahon* test.¹⁹ Furthermore, this Note argues that the courts owe *Chevron* deference to the FTC in this area because Congress provided for notice-and-comment rulemaking and explicitly delegated power to the FTC to promulgate rules for “informal dispute settlement procedures” under the MMWA. Finally, this Note demonstrates that the FTC regulations under the MMWA pass both prongs of the *Chevron* test and that courts should not subsume the *McMahon* factors under either prong.

¹¹ See, e.g., Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173, 174–75, 231 (2003).

¹² See, e.g., *Walton*, 298 F.3d at 480–92 (King, C.J., dissenting); *Rickard v. Teynor’s Homes, Inc.*, 279 F. Supp. 2d 910, 919–22 (N.D. Ohio 2003); Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: the Quintessential Chevron Case*, 16 LOY. CONSUMER L. REV. 1, 18–19 (2003).

¹³ See, e.g., *Walton*, 298 F.3d at 475; Wiechens, *supra* note 8, at 1476.

¹⁴ 473 U.S. 614, 625–26 (1985).

¹⁵ The MMWA became law on January 4, 1975. See Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2000)).

¹⁶ 954 F. Supp. 1530 (M.D. Ala. 1997), *aff’d*, 127 F.3d 40 (11th Cir. 1997), *abrogated by* *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002).

¹⁷ See *id.* at 1537–40.

¹⁸ See *id.* at 1538–39.

¹⁹ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (stating the standard for rebutting the presumption favoring arbitration); Lamis, *supra* note 11, at 174–75.

Part I of this Note provides background on the MMWA, the FAA, the *McMahon* doctrine, the *Chevron* doctrine, and recent attempts by courts and scholars to resolve the conflict in this area. Part II analyzes the interplay between the two conflicting statutes and the two conflicting doctrines, and argues that courts should apply the *McMahon* test before the *Chevron* test. Part II then uses the *McMahon* factors to show that Congress intended to preclude binding arbitration. Part III argues that, for any remaining questions regarding the contours of arbitration, courts should give *Chevron* deference to the FTC interpretation of the MMWA because Congress clearly delegated to the FTC the power to interpret the MMWA.²⁰ Part IV applies the *Chevron* framework to the MMWA regulations and demonstrates that the FTC interpretation deserves deference under both prongs of the framework. This Note concludes by arguing that, when read properly in light of both *McMahon* and *Chevron*, the MMWA precludes binding arbitration.

I

BACKGROUND OF STATUTES, CASES, AND SCHOLARSHIP

A. Magnuson-Moss Warranty Act

In 1967, Senators Warren Magnuson and Carl Hayden introduced federal legislation designed to improve consumer warranties.²¹ During the late 1960s, the federal government undertook a number of studies analyzing the effectiveness of consumer warranties.²² An FTC study concluded that automobile warranty coverage provided by manufacturers was inadequate and that issues of quality control endangered public safety.²³ In 1974, seven years after Magnuson and Hayden introduced legislation and four years after the FTC issued its final report on automobile warranties, Representative John E. Moss asked the staff of the House Subcommittee on Commerce and Finance to investigate the steps that various industries had taken to remedy the problems identified in the FTC report.²⁴ The staff found that manufacturers of a wide range of consumer products provided warranties that were lengthy and difficult to understand.²⁵ Ultimately, Congress enacted and President Ford signed the Magnuson-Moss War-

²⁰ See *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 481, 490 (5th Cir. 2002) (King, C.J., dissenting); Lloyd, *supra* note 12, at 18–21, 27.

²¹ See 2 BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* § 14:2 (2d ed. 2002).

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See 120 CONG. REC. 31,304, 31,318 (1974); CLARK & SMITH, *supra* note 21, § 14:2.

ranty—Federal Trade Commission Improvement Act into law on January 4, 1975.²⁶

Studies during this period showed not only that existing warranties fell short of consumers' expectations but also that manufacturers were creating new express warranties during the middle of the twentieth century that were even less effective than the implied warranties available under common and statutory law.²⁷ As the House Report for the MMWA noted, "[a]nother growing source of resentment has been the inability to get many of these products properly repaired and the developing awareness that the paper with the filigree border bearing the bold caption 'Warranty' or 'Guarantee' was often of no greater worth than the paper it was printed on."²⁸ The report discussed that prior subcommittee hearings exposed four major areas in which consumer warranties needed improvement: first, making the language easier to understand; second, clearly defining classes of "full" and "limited" warranties; third, providing "safeguards against the disclaimer or modification of" implied warranties; and fourth, "providing consumers with access to reasonable and effective remedies" for breaches of warranties.²⁹

The MMWA addressed these problems by delegating to the FTC the power to establish rules that govern the content of warranties.³⁰ Congress directed the FTC to consider a long list of topics that warranties should address, including: "what the warrantor [would] do in the event of a defect, malfunction, or failure to conform with such written warranty";³¹ when the warrantor would perform its obligations;³² and which parts of the product the warranty did not cover.³³ Additionally, the MMWA invested the FTC with the authority to require that warrantors use "words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty."³⁴

The MMWA also delegated power to the FTC to prescribe rules governing consumer remedies.³⁵ The FTC may prescribe rules requiring the warrantor to provide a "step-by-step procedure" detailing the

²⁶ See Pub. L. No. 93-637, 88 Stat. 2183 (1974) (codified at 15 U.S.C. §§ 2301–2312 (2000)); CLARK & SMITH, *supra* note 21, § 14:2.

²⁷ See CURTIS R. REITZ, CONSUMER PRODUCT WARRANTIES UNDER FEDERAL AND STATE LAWS § 1.03 (2d ed. 1987).

²⁸ H.R. REP. NO. 93-1107, at 24 (1974).

²⁹ *Id.* at 29.

³⁰ See 15 U.S.C. § 2302 (2000).

³¹ *Id.* § 2302(a)(4).

³² See *id.* § 2302(a)(10).

³³ See *id.* § 2302(a)(12).

³⁴ *Id.* § 2302(a)(13).

³⁵ See *id.* § 2310.

actions consumers must take to force warrantor performance.³⁶ Furthermore, the FTC may prescribe rules requiring the warrantor to provide “[i]nformation respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.”³⁷

In a separate section of the MMWA, Congress explicitly delegated to the FTC the power to “prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of [the MMWA] applies.”³⁸ The MMWA also requires the FTC to provide in these rules for “participation in such [informal dispute settlement] procedure by independent or governmental entities.”³⁹

Soon after the passage of the MMWA, the FTC promulgated rules that specifically prohibited binding arbitration in settlement procedures governed by the MMWA.⁴⁰ These rules prohibited binding arbitration based on the FTC’s view that binding arbitration was contrary to the intent of Congress and that, even if it was not contrary to such intent, the FTC was “not . . . convinced that any guidelines which it set out could ensure sufficient protections for consumers.”⁴¹ The Code of Federal Regulations contains rules governing “Informal Dispute Settlement Procedures”⁴² which provide that “[d]ecisions of the Mechanism shall not be legally binding on any person.”⁴³ Furthermore, the regulations require that the persons deciding disputes must disclose to consumers the decision, the warrantors’ intended actions, and the consumers’ rights to pursue legal remedies if they are dissatisfied with either the decision or intended actions.⁴⁴

B. Federal Arbitration Act

Congress intended to address a different need when it passed the Federal Arbitration Act than when it passed the Magnuson-Moss Warranty Act.⁴⁵ The FAA requires that “[a] written provision in . . . a

³⁶ See *id.* § 2302(a)(7).

³⁷ *Id.* § 2302(a)(8).

³⁸ *Id.* § 2310(a)(2).

³⁹ *Id.*

⁴⁰ See Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60,210–11 (Dec. 31, 1975).

⁴¹ *Id.*

⁴² 16 C.F.R. pt. 703 (2006).

⁴³ *Id.* § 703.5(j).

⁴⁴ See *id.* § 703.5(d)(4), (g)(1).

⁴⁵ See Guerin, *supra* note 3, at 7–8 (explaining that Congress passed the FAA “in an effort to dispel judiciary hostility towards arbitration based on the view that it was a displacement of the judiciary function”).

contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable.”⁴⁶

Although Congress passed the Federal Arbitration Act in 1925, the Act lay dormant for many years.⁴⁷ In *Wilko v. Swan*,⁴⁸ the Court limited the scope of the FAA by holding that a party cannot validly waive the right to select a judicial forum.⁴⁹ The Court resurrected the FAA through a series of cases beginning in the mid-1980s with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*.⁵⁰ In *Mitsubishi*, the Court held that an agreement to arbitrate did not impermissibly limit the substantive rights of a party.⁵¹ The Court further held that even statutory rights were subject to arbitration.⁵² The Court declared that this trade between a judicial and arbitral forum was procedural rather than substantive.⁵³ A party that agreed to arbitration traded the “procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”⁵⁴

In *Shearson/American Express, Inc. v. McMahon*, the Court articulated the test for determining whether a statute precluded binding arbitration under the FAA.⁵⁵ The Court began by addressing the scope of the FAA, citing two of its prior decisions, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* and *Dean Witter Reynolds Inc. v. Byrd*, that, respectively, declared the existence of a “federal policy favoring arbitration”⁵⁶ and stated that the Court would “‘rigorously enforce agreements to arbitrate.’”⁵⁷ The *McMahon* Court explained that it would look to the “text, history, or purposes of the statute” to determine whether Congress intended to preclude arbitration under the FAA.⁵⁸ After articulating this test, the Court explicitly limited the reach of *Wilko* by declaring that “the mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time.”⁵⁹

⁴⁶ 9 U.S.C. § 2 (2000).

⁴⁷ See Guerin, *supra* note 3, at 7–8 (explaining that courts initially resisted the FAA).

⁴⁸ 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

⁴⁹ See *id.* at 437; Guerin, *supra* note 3, at 8.

⁵⁰ 473 U.S. 614 (1985); see also Guerin, *supra* note 3, at 8 (discussing the Court’s early applications of the FAA).

⁵¹ See 473 U.S. at 628.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ *Id.*

⁵⁵ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

⁵⁶ *Id.* at 226 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

⁵⁷ *Id.* (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

⁵⁸ *Id.* at 227.

⁵⁹ *Id.* at 233.

C. *Chevron*

Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc., has become one of the most frequently cited cases in American law.⁶⁰ Courts use the so-called *Chevron* two-step to determine whether to uphold an agency interpretation under delegated powers from Congress.⁶¹

Recently, the most controversial issue in the *Chevron* jurisprudence has been whether courts should apply the “*Chevron* two-step” procedure at all.⁶² The key question is whether a promulgated rule has the “force of law” and therefore is entitled to *Chevron* deference or whether it is not promulgated under either an implicit or explicit congressional delegation and therefore is only entitled to more limited deference corresponding to the agency’s expertise.⁶³ This inquiry is often called “*Chevron* step zero.”⁶⁴ Cass Sunstein argues that whether courts should apply the *Chevron* framework has become one of the most confusing questions in administrative law.⁶⁵ He argues that the Court ought to avoid the question of *Chevron* deference when it can; when it cannot avoid the question, however, it should more frequently apply *Chevron* and defer to the agency interpretation.⁶⁶

The Court recently addressed the scope of *Chevron* in *United States v. Mead*.⁶⁷ In *Mead*, the Court articulated the test for whether a rule would be entitled to *Chevron* deference as whether it “appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”⁶⁸ The Court pointed to two agency powers exercised pursuant to a delegation from Congress, adjudication and notice-and-comment rulemaking, as examples of evidence that Congress intended the agency’s interpretation of a statute to have the force of law.⁶⁹

⁶⁰ See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823, 823 (2006) (calling *Chevron* “one of the most important rulings in the past quarter century in American public law”).

⁶¹ See Sunstein, *supra* note 5, at 190–91.

⁶² See *id.* at 191.

⁶³ See *United States v. Mead*, 533 U.S. 218, 226–27, 234 (2001).

⁶⁴ This term was coined by Thomas W. Merrill and Kristin E. Hickman. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001). It is also the title of an article by Cass Sunstein. See Sunstein, *Chevron Step Zero*, *supra* note 5.

⁶⁵ See Sunstein, *supra* note 5, at 190–91.

⁶⁶ See *id.* at 191–92.

⁶⁷ 533 U.S. 218.

⁶⁸ *Id.* at 226–27.

⁶⁹ See *id.* at 227.

D. The Clash: *Chevron* Meets *McMahon*

Following the creation of the *McMahon* doctrine and the strengthening of the FAA, lower federal courts and state courts faced for the first time the issue of whether the FTC regulation prohibiting binding arbitration under the MMWA was invalid due to the FAA and its federal policy favoring arbitration. In the first case that raised this issue, *Wilson v. Waverlee Homes, Inc.*,⁷⁰ the court did not reach the “issues of whether the FAA and arbitration agreements in general are unenforceable as to all claims based on the Magnuson-Moss Act.”⁷¹ The court held that the FAA did not apply in this case because a contract involving an arbitration clause had only been established between the purchaser and retailer, and the manufacturer did not have standing to enforce this contract.⁷² The court held that even if the manufacturer had standing to enforce the arbitration clause, the clause would have been invalid because the MMWA precluded the manufacturer from including a binding arbitration clause in a warranty agreement.⁷³ The court reasoned that the manufacturer did not include such a clause in its contracts with consumers because of the clarity of the MMWA and the FTC regulations.⁷⁴ The court declared that it would not allow Waverlee Homes to “do by surrogate or vicarious means what it [wa]s forbidden to do on its own behalf.”⁷⁵ The court decided that it would not uphold binding arbitration clauses under the MMWA and found that such a result would be “profoundly inequitable.”⁷⁶

To bolster its argument that the MMWA clearly indicated Congress’s intent to preclude binding arbitration, the district court carefully reviewed the legislative history of the MMWA and the history of the regulations.⁷⁷ The court found that the history of the MMWA clearly prohibited binding arbitration and pointed to Congressman Moss’s statement that the dispute resolution mechanisms of the MMWA were a prerequisite to suit.⁷⁸ The court also noted that the House Report explicitly stated that “[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding.”⁷⁹

⁷⁰ 954 F. Supp. 1530 (M.D. Ala. 1997), *aff’d*, 127 F.3d 40 (11th Cir. 1997), *abrogated by* *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002).

⁷¹ *Id.* at 1538 n.2.

⁷² *See id.* at 1538–39.

⁷³ *See id.* at 1539.

⁷⁴ *See id.* at 1538–39.

⁷⁵ *Id.* at 1539.

⁷⁶ *Id.* at 1540.

⁷⁷ *See id.* at 1538–39.

⁷⁸ *See id.* at 1538 (citing 119 CONG. REC. 926, 972 (1973)).

⁷⁹ *Id.* (quoting H.R. REP. NO. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723).

The district court found that the regulations promulgated by the FTC after the passage of the MMWA provided additional support for the position that the MMWA prohibited binding arbitration.⁸⁰ The regulations explicitly stated that “‘decisions of the mechanism shall not be legally binding on any person.’”⁸¹ In looking at the history of the regulations, the court noted that the commission responded to industry comments favoring binding arbitration by maintaining that Congress had a contrary intent and that it could not promulgate guidelines for binding arbitration that would offer sufficient protection to the consumer.⁸²

For several years after *Wilson*, federal courts unanimously agreed that the MMWA prohibited binding arbitration clauses.⁸³ After five years of unanimity, however, two federal courts of appeals addressed the issue and held the exact opposite—that the FAA overrode the MMWA. In *Walton v. Rose Mobile Homes LLC*⁸⁴ and *Davis v. Southern Energy Homes, Inc.* respectively,⁸⁵ the Fifth and Eleventh Circuits found binding arbitration clauses enforceable under the MMWA in spite of the FTC regulations. The two courts both found that the MMWA failed the *McMahon* test.⁸⁶ A vigorous dissent in *Walton* called for *Chevron* deference to the FTC regulations and refused to apply *McMahon*.⁸⁷

Both courts engaged in fairly similar *McMahon* analyses. The courts laid out the *McMahon* factors and argued that neither the MMWA’s text, legislative history, nor purpose addressed the question of binding arbitration of disputes.⁸⁸ Both courts found that Congress did not address binding arbitration at all based on a reading of the words “informal dispute resolution mechanisms” in the MMWA.⁸⁹ Thus, they found that the statute failed the *McMahon* analysis.⁹⁰

The two courts differed greatly, however, in their *Chevron* analyses. The Fifth Circuit based its finding—that Congress had spoken to the issue in the FAA and thus the FTC regulations were not entitled to

⁸⁰ See *id.*

⁸¹ *Id.* (quoting 16 C.F.R. § 703.5(j)).

⁸² See *id.* at 1539 (discussing Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975)).

⁸³ NATIONAL CONSUMER LAW CENTER, CONSUMER WARRANTY LAW § 13.4.6.3 (Carolyn L. Carter et al. eds., 3d ed. 2006); see also *Pitchford v. Oakwood Mobile Homes*, 124 F. Supp. 2d 958 (W.D. Va. 2000); *Raesley v. Grand Hous., Inc.*, 105 F. Supp. 2d 562 (S.D. Miss. 2000).

⁸⁴ 298 F.3d 470, 479 (5th Cir. 2002).

⁸⁵ 305 F.3d 1268, 1280 (11th Cir. 2002).

⁸⁶ See *id.*; *Walton*, 298 F.3d at 478.

⁸⁷ See 298 F.3d at 480 (King, C.J., dissenting).

⁸⁸ See *Davis*, 305 F.3d at 1273; *Walton*, 298 F.3d at 475.

⁸⁹ See *Davis*, 305 F.3d at 1274; *Walton*, 298 F.3d at 475–76.

⁹⁰ See *Davis*, 305 F.3d at 1273–77 (using a factor-by-factor analysis); *Walton*, 298 F.3d at 478.

deference—on the first prong of *Chevron*.⁹¹ The Eleventh Circuit, agreeing with the dissent in the Fifth Circuit as to the crux of the problem but differing in the outcome, found that the FTC regulations were not reasonable.⁹² The Eleventh Circuit found the FTC regulations unreasonable because they were based on hostility toward arbitration as disadvantageous to consumers, a hostility that the Supreme Court later abandoned.⁹³ The Eleventh Circuit criticized the Fifth Circuit dissent because the Eleventh Circuit saw the reference to congressional intent in the new regulations as being insignificant compared to the original rationale of hostility to arbitration on the basis of its perceived disadvantages for consumers.⁹⁴

The Fifth Circuit dissent found the FTC's reading to be reasonable based on the two considerations given in the original materials accompanying the regulations in the Federal Register—the FTC's interpretation of legislative intent based on a commerce subcommittee staff report and the FTC's concern over the effect of binding arbitration on consumer rights.⁹⁵ The dissent differentiated the MMWA from RICO, the statute at issue in *McMahon*, by noting that the FTC's regulatory review of the statute confirmed that the FTC based the original regulations on its independent reading of the statute, not on the Supreme Court's perceived hostility toward binding arbitration.⁹⁶ The dissent noted that the FTC's recent regulatory review confirmed that the FTC still believed that the MMWA precluded binding arbitration even in light of *Wilko* and subsequent Supreme Court endorsements of arbitration.⁹⁷

The Fifth Circuit majority never reached the second prong of the *Chevron* test because it found under the first prong of *Chevron* that Congress had already addressed the question at issue—whether the MMWA permitted binding arbitration—in the then-fifty-year-old FAA.⁹⁸ Therefore, the court moved to consider whether the MMWA evinces an intention contrary to Congress's intent as expressed in the FAA.⁹⁹ The court applied the *McMahon* test and found that Congress had not expressed a contrary intention.¹⁰⁰

⁹¹ See *Walton*, 298 F.3d at 475.

⁹² See *Davis*, 305 F.3d at 1278–79; *Walton*, 298 F.3d at 483 (King, C.J., dissenting).

⁹³ See *Davis*, 305 F.3d at 1279–80.

⁹⁴ See *id.*

⁹⁵ See *Walton*, 298 F.3d at 486–87 (King, C.J., dissenting) (discussing Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,167, 60,210 (Dec. 31, 1975)).

⁹⁶ See *id.* (King, C.J., dissenting).

⁹⁷ See *id.* at 487–88 (King, C.J., dissenting).

⁹⁸ See *id.* at 475.

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 475–78.

Responding to the majority, the Fifth Circuit dissent noted the contradiction in determining that Congress expressed intent in the FAA with regard to binding arbitration in the MMWA.¹⁰¹ The dissent agreed that words in a statute should be read in context and that in cases such as *FDA v. Brown & Williamson Tobacco Corp.* the Supreme Court had looked to the use of the word “injury” in statutes addressing tobacco regulation, the area of law at issue in that case.¹⁰² The dissent also acknowledged that the interpretation of a later statute may give meaning to words in a prior statute.¹⁰³ As the dissent pointed out, however, the majority incorrectly claimed that “Congress ha[d] ‘directly spoken to the precise question’ of how to interpret § 2310 of the MMWA on a general policy expressed in a *prior, less specific* statute.”¹⁰⁴ The dissent then noted that “[t]he Supreme Court ha[d] never invoked similar reasoning in applying the first prong of the *Chevron* inquiry.”¹⁰⁵ The dissent concluded that “[n]either the text of § 2310 nor the statutory context . . . conclusively indicates whether § 2310 applies to arbitration proceedings.”¹⁰⁶

After these decisions by the Fifth and Eleventh Circuits, only one federal court outside of those circuits has addressed whether binding arbitration clauses are enforceable under the MMWA. In *Rickard v. Teynor's Homes, Inc.*,¹⁰⁷ the district court agreed with the Fifth Circuit dissent that Congress had “‘delegated authority to the agency generally to make rules carrying the force of law’”¹⁰⁸ and that the FTC’s interpretation was “a reasonable construction of the statute.”¹⁰⁹

E. Scholars Enter the Fray

Scholarly articles vary as to whether they consider the *McMahon* test or the *Chevron* test to be determinative.¹¹⁰ Most articles consider the *McMahon* test to be the primary test.¹¹¹ These articles are split on whether the MMWA indicated that the intent of Congress was to prohibit binding arbitration. Two of these articles argue that the FTC

¹⁰¹ See *id.* at 482–85 (King, C.J., dissenting).

¹⁰² See *id.* at 482–83 (King, C.J., dissenting).

¹⁰³ See *id.* at 483 (King, C.J., dissenting).

¹⁰⁴ *Id.* (King, C.J., dissenting).

¹⁰⁵ *Id.* (King, C.J., dissenting).

¹⁰⁶ *Id.* at 485 (King, C.J., dissenting).

¹⁰⁷ 279 F. Supp. 2d 910 (N.D. Ohio 2003).

¹⁰⁸ *Id.* at 920 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

¹⁰⁹ *Id.* at 921.

¹¹⁰ Compare Lamis, *supra* note 11 (prioritizing *McMahon*), with Wiechens, *supra* note 8 (arguing that while *McMahon* is not applicable, courts should apply *Chevron*).

¹¹¹ See generally Lamis, *supra* note 11 (prioritizing *McMahon*); Marc E. Gunter, Note, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483 (2000) (prioritizing *McMahon*); Recent Case, *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002), 116 HARV. L. REV. 1201 (2003) (proposing that courts should limit the *Chevron* analysis in favor of the *McMahon* analysis).

regulation ought to be upheld because Congress clearly indicated in the MMWA its intent to preclude binding arbitration.¹¹² Andrew Lamis employs the three-prong *McMahon* test in an attempt to show that the *Walton* and *Davis* courts were wrong in their application of the test.¹¹³ Lamis's article looks carefully at the meaning of the words "informal dispute settlement procedure" and concludes that at the time of the MMWA, this language encompassed arbitration.¹¹⁴ In discussing the MMWA's legislative history, the article points to several instances in which Congress clearly considered only two different types of remedies available to consumers: legal remedies in courts and private remedies including arbitration.¹¹⁵ Finally, the article argues that the MMWA's purpose is to protect consumers who are forced into involuntary agreements that they cannot negotiate, a purpose totally incompatible with voluntary arbitration.¹¹⁶

The articles arguing that the MMWA fails the *McMahon* test generally address the test similarly to how the courts in *Walton* and *Davis* applied it. One comment carefully followed the *Walton* court in first investigating the *Chevron* test, finding that Congress had spoken to the issue, and then applying the *McMahon* test.¹¹⁷ Raising the issue of implied repeal, another piece argues that courts generally construe statutory language so as to avoid a situation in which Congress would repeal another law by implication.¹¹⁸ This piece continues by arguing that because Congress "cannot delegate to an agency the authority to override congressional statutes," the FTC must claim that the MMWA created a partial implied repeal of the FAA that is clear from the text of the statute.¹¹⁹ A partial implied repeal may only arise if Congress's intent is "clear and unambiguous."¹²⁰ The piece points out, however, that the FTC must first find Congress's intent regarding arbitration to be ambiguous to even reach *Chevron*'s second prong.¹²¹ The piece argues that to resolve this difficult situation, the FTC should interpret the MMWA so as to not conflict with the FAA and thus not create a situation in which it is arguing for an implied repeal, something "strongly disfavored" by the courts.¹²²

¹¹² See Lamis, *supra* note 11, at 176–84; Gunter, *supra* note 111, at 1486.

¹¹³ See generally Lamis, *supra* note 11 (arguing that Congress intended to preclude binding arbitration).

¹¹⁴ See *id.* at 189–94.

¹¹⁵ See *id.* at 211.

¹¹⁶ See *id.* at 235–37, 239–41.

¹¹⁷ See Wiechens, *supra* note 8, at 1470–72.

¹¹⁸ See Recent Case, *supra* note 111, at 1205–06.

¹¹⁹ *Id.* at 1205.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 1205–06.

Only Daniel Lloyd addresses this issue predominantly in the context of the *Chevron* test.¹²³ He considers the test mainly in the context of the recent decisions in *Mead* and *Barnhart v. Walton*.¹²⁴ Lloyd does not, however, frontally address whether the *McMahon* test would trump *Chevron* deference (other than to distinguish the MMWA from some of the prior statutes that the Court considered in the context of the MMWA), nor does he address whether courts should apply the *McMahon* test under either prong of *Chevron*.¹²⁵

II

WHICH TEST TO APPLY FIRST?

A. *McMahon* Before *Chevron*: Delegation Problems

In general, if Congress passes a statute that applies broadly to areas many agencies have regulated and that is in direct tension with those agencies' interests, only the courts, and not any particular agency, have the authority to interpret the statute.¹²⁶ Nor may administrative agencies claim power to interpret statutes where Congress did not delegate to them such power.¹²⁷ Given the breadth of the FAA and its interpretation under *McMahon*, the first question presented is whether Congress intended to carve out a separate regime precluding binding arbitration when it passed the MMWA.¹²⁸ The *McMahon* Court itself considered an SEC regulation that barred binding arbitration.¹²⁹ Given that the FAA is an act of Congress and not a regulation, it would raise serious questions of implied repeal if Congress delegated power to an agency to repeal a broadly applicable law of Congress's own making.¹³⁰ In fact, after noting the existence of the "federal policy favoring arbitration,"¹³¹ the *McMahon* Court acknowledged the supremacy of Congress in its control of the law when it stated that "the Arbitration Act's mandate may be overridden by a contrary congressional command."¹³² In answering the question of applying the FAA to the MMWA, the *McMahon* test provides that an

¹²³ See generally Lloyd, *supra* note 12 (arguing that *Chevron* is the determinative test).

¹²⁴ See *id.* at 4, 10–13.

¹²⁵ See *id.* at 21–24.

¹²⁶ See Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev'd*, 489 U.S. 749 (1989).

¹²⁷ See *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996).

¹²⁸ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . .").

¹²⁹ See *McMahon*, 482 U.S. at 234 n.3.

¹³⁰ See *Recent Case*, *supra* note 111, at 1205.

¹³¹ *McMahon*, 482 U.S. at 226 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

¹³² *Id.*

exception to the FAA is discernible from the “text, history, or purposes of the statute.”¹³³

B. The Text, Legislative History, and Purpose

1. *The Text*

The text of the statute itself provides significant support for the interpretation that Congress intended to preclude binding arbitration. Throughout the statute, the text assumes that informal dispute settlement procedures, including arbitration, will be offered as prerequisites, and not bars, to suit in court. For example, the statute instructs the FTC to promulgate rules that require the manufacturer/warrantor to provide in the warranty “[i]nformation respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.”¹³⁴

Most significantly, in the section detailing the right of warrantors to require the use of informal dispute settlement procedures, the MMWA explicitly considers these procedures to only be prerequisites to suit.¹³⁵ The MMWA states,

If—(A) a warrantor establishes such a procedure, (B) such procedure, and its implementation, meets the requirements of such rules [promulgated by the FTC], and (C) he incorporates in a written warranty a requirement that the consumer resort to such procedure *before* pursuing any legal remedy under this section respecting such warranty, then (i) the consumer may not commence a civil action . . . under subsection (d) of this section unless he initially resorts to such procedure¹³⁶

In discussing the commission’s power to review the operation of informal dispute settlement procedures, the MMWA states that “[t]he Commission on its own initiative may . . . review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section.”¹³⁷ If the drafters intended to allow warrantors to establish binding arbitration procedures, they would not have discussed the commission’s authority to regulate those procedures in terms of procedures to be used prior to pursuing a lawsuit. The drafters could not have intended warrantors to be able to establish both binding and nonbinding arbitration but then allow the FTC to only regulate non-

¹³³ *Id.* at 227.

¹³⁴ 15 U.S.C. § 2302(a)(8) (2000).

¹³⁵ *See id.* § 2310(a)(3).

¹³⁶ *Id.* (emphasis added).

¹³⁷ *Id.* § 2310(a)(4).

binding arbitration when binding arbitration would obviously be much more dangerous to consumers.

The meaning of the term “informal dispute settlement procedure”—which is defined nowhere in the MMWA—and arbitration’s status as such a procedure are at the center of the debate because the Fifth and Eleventh Circuit decisions held that arbitration is a “formal” type of settlement procedure and thus not covered by the MMWA.¹³⁸ Both circuits went on to strike down the FTC rule, holding that it either failed prong one or prong two of the *Chevron* test because the rule conflicted with the FAA.¹³⁹ If the phrase “informal dispute settlement procedure” included “arbitration,” then the Fifth and Eleventh Circuit readings of the MMWA would not make sense, and one could only read the MMWA as expressing Congress’s clear intent to preclude binding arbitration¹⁴⁰ and to delegate power to the FTC to regulate any form of arbitration under the MMWA.¹⁴¹

As Lamis argues, reading the MMWA as not addressing binding arbitration at all would render many provisions of the MMWA “nonsensical.”¹⁴² According to Lamis, during the period that Congress passed the MMWA, the Supreme Court lumped together “negotiation, mediation, voluntary arbitration, and conciliation” as “dispute settlement procedures.”¹⁴³ Lamis also notes that the American Arbitration Association gave its *Dictionary of Arbitration and Its Terms* the subtitle “A Concise Encyclopedia of Peaceful Dispute Settlement.”¹⁴⁴ *The Columbia Encyclopedia* at the time defined “industrial arbitration” as a “method of settling disputes.”¹⁴⁵

However, the word “informal” is more difficult to define.¹⁴⁶ If arbitration is an “informal dispute settlement procedure,” then the MMWA dictates, as shown above, that arbitration may only serve as a prerequisite to suit. As the Fifth Circuit pointed out, arbitration is normally thought of as a formal procedure and an alternative to litiga-

¹³⁸ See *Davis v. S. Energy Homes*, 305 F.3d 1268, 1275–76 (11th Cir. 2002); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475–76 (5th Cir. 2002).

¹³⁹ See *Davis*, 305 F.3d at 1280; *Walton*, 298 F.3d at 475.

¹⁴⁰ See, e.g., *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997) (discussing the text and legislative history of the MMWA but not reaching the question of whether the MMWA precludes binding arbitration under the FAA due to the lack of contractual relationship between Wilson and Waverlee Homes), *aff'd*, 127 F.3d 40 (11th Cir. 1997), *abrogated by Davis*, 305 F.3d 1268.

¹⁴¹ Cf. *Walton*, 298 F.3d at 480 (King, C.J., dissenting) (arguing that courts are bound to defer to the FTC’s interpretation of the MMWA).

¹⁴² Lamis, *supra* note 11, at 182.

¹⁴³ *Id.* at 190 (citing *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 143, 148–50 (1969)).

¹⁴⁴ *Id.* at 192 & n.68.

¹⁴⁵ *Id.* at 192 n.69 (quoting *THE COLUMBIA ENCYCLOPEDIA* 95 (3d ed. 1964)).

¹⁴⁶ See *id.* at 193.

tion.¹⁴⁷ Under this reading, litigation itself would be a dispute settlement procedure of sorts and the distinction would be between formal and informal dispute settlement procedures. The Eleventh Circuit has also adopted this view.¹⁴⁸ It rested this interpretation on a reference to “formal arbitration” in the Senate Report considering an early version of the MMWA.¹⁴⁹ From this reference the court concluded that the Senate viewed arbitration as a “formal” method of dispute settlement that was not included as an “informal dispute settlement procedure” that the FTC was delegated power to regulate.¹⁵⁰

This view, however, does not accurately describe the understanding of the words “formal” and “informal” at the time Congress passed the MMWA.¹⁵¹ As then-Chief Judge Carolyn Dineen King pointed out in her dissent, arbitration was generally viewed at that time as an informal procedure.¹⁵² By contrast, the current view of arbitration is as a binding and relatively formal alternative to litigation. Chief Judge King pointed to several commentators who described arbitration as “informal” and who described the shift as from more informal arbitration that prevailed prior to the Supreme Court’s “revitaliz[ation]” of the FAA to more formal arbitration that came into existence after that time.¹⁵³ The most plausible reading of the words “formal arbitration” in the 1969 Senate Report is that they were to describe court-annexed or judicial arbitration.¹⁵⁴ Judicial arbitration was just being implemented about a decade before the 1969 Senate Report.¹⁵⁵ While considering an earlier version of the MMWA, several senators classified the word “arbitration” as a subspecies of “voluntary settlement procedures,” demonstrating that the senators understood arbitration as being delegated for regulation to the FTC along with other informal dispute settlement procedures.¹⁵⁶ Thus, along with these other procedures, arbitration would be a prerequisite, not a bar, to suit. The FTC

¹⁴⁷ See *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475–76 (5th Cir. 2002).

¹⁴⁸ See *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002).

¹⁴⁹ See *id.* (quoting S. REP. NO. 91-876, at 22–23 (1970)).

¹⁵⁰ See *id.*

¹⁵¹ See *Lamis*, *supra* note 11, at 207.

¹⁵² See *Walton*, 298 F.3d at 484 (King, C.J., dissenting).

¹⁵³ See *id.*

¹⁵⁴ See *Lamis*, *supra* note 11, at 207.

¹⁵⁵ See *id.*

¹⁵⁶ *Id.* at 206. Senator Marlow W. Cook, a member of the Senate Subcommittee that considered the bill, proposed an amendment that asked the National Institute for Consumer Justice to conduct a study of “existing and potential voluntary settlement procedures, including arbitration.” *Id.* (quoting S. REP. NO. 92-269, at 63 (1971)) (emphasis omitted). Senator Robert Joseph Dole, speaking in favor of the amendment, asked for more data on the “‘effectiveness of existing procedures such as small claims courts, class actions, and private dispute settlement techniques, including arbitration in resolving consumer grievances.’” *Id.* (quoting 117 CONG. REC. 39,590, 39,626 (1971)) (emphasis omitted).

chairman also demonstrated this understanding during his testimony.¹⁵⁷

2. *Legislative History*

The MMWA's legislative history demonstrates that it would be inconsistent to construe the MMWA as not addressing arbitration but as addressing informal dispute settlement procedures and litigation. Chief Judge King's dissent pointed to several important places in the legislative history where Congress was thinking of a dichotomy between all forms of private dispute settlement and litigation.¹⁵⁸ Furthermore, the Conference Committee gave broad meaning to the words in the MMWA when it used the term "informal dispute settlement procedures" interchangeably with "internal or other private dispute settlement procedures."¹⁵⁹

A couple of important points in the legislative history support the proposition that Congress intended arbitration to be a prerequisite to suit. In fact, the House Report on the MMWA explicitly makes this point, stating that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding."¹⁶⁰ This statement is the most explicit consideration of whether Congress intended these procedures to be binding; the statement pointedly rejects such a possibility. The sentence concludes by noting that

the decision reached in any informal dispute settlement procedure relating to any matter considered in such procedure would be admissible in any civil action arising out of a warranty on a consumer product if the procedure complies with the FTC's rules and is incorporated as a part of a written warranty pertaining to consumer products.¹⁶¹

Such a statement regarding the admissibility of findings of an informal proceeding in court would be unnecessary if the informal proceeding itself ultimately decided the issue.

Furthermore, in the debates themselves, Congressman Moss clearly opined that the dispute settlement procedures did not bar suit. In the debates surrounding an earlier version of the bill, he stated, "[T]he bill is further refined so as to place a minimum extra burden on the courts by requiring as a prerequisite to suit that the purchaser

¹⁵⁷ See *id.* at 208. FTC Chairman Miles W. Kirkpatrick referred to the informal dispute settlement procedures being discussed as an "arbitration remedy." See *id.* (emphasis omitted).

¹⁵⁸ See *Walton*, 298 F.3d at 491 (King, C.J., dissenting).

¹⁵⁹ See *id.* (King, C.J., dissenting) (quoting S. REP. NO. 93-1408, at 26 (1974) (Conf. Rep.)).

¹⁶⁰ H.R. REP. NO. 93-1107, at 41 (1974).

¹⁶¹ *Id.*

give the [warrantor] reasonable opportunity to settle the dispute out of court, including the use of a fair and formal dispute settlement mechanism.”¹⁶² With this statement, Congressman Moss was noting that the bill intended to balance the interests of consumers and warrantors by providing arbitration but not making it binding.

3. Purpose

The purpose of the MMWA conflicts with the purpose of the FAA. While the purpose of the MMWA is to provide consumers with efficient and affordable ways to resolve warranty disputes,¹⁶³ the FAA seeks to overcome judicial antagonism toward arbitration agreements.¹⁶⁴ The MMWA, through carefully regulating arbitration and providing attorneys’ fees to prevailing plaintiffs, aims to create proconsumer remedies in contrast to the promerchant remedies of the FAA.¹⁶⁵

C. Unique Problems with the Application of *McMahon* to the MMWA

Applying the *McMahon* test to the MMWA presents several unique problems. First, the MMWA went into effect twenty-one years after *Wilko*¹⁶⁶ and eleven years before the resurrection of the FAA in *Mitsubishi*.¹⁶⁷ Although it might make sense to apply the FAA to statutes enacted only a few years later, such as the 1933 and 1934 Acts (despite the principle of *stare decisis*),¹⁶⁸ such application makes no sense when the intervening court decisions greatly limited the FAA’s reach.

Furthermore, the MMWA created an entirely separate regime of arbitration. While the FAA aims to ensure that courts enforce private agreements to arbitrate,¹⁶⁹ the MMWA attempts to protect consumers from predatory practices and to provide them with efficient and affordable remedies to enforce their rights under a warranty.¹⁷⁰ The MMWA lays out in detail the requirements for the arbitration procedures so as to protect consumers from unfair procedures.¹⁷¹

¹⁶² 119 CONG. REC. 926, 972 (1973).

¹⁶³ See 15 U.S.C. § 2302 (2000).

¹⁶⁴ See 9 U.S.C. § 2 (2000).

¹⁶⁵ Compare 15 U.S.C. §§ 2302, 2310, with 9 U.S.C. § 2.

¹⁶⁶ 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

¹⁶⁷ 473 U.S. 614 (1985).

¹⁶⁸ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Blackmun, J., dissenting) (noting that the “issue decided today has been kept alive inappropriately by this Court” and that the reasoning of *Wilko* had been abandoned).

¹⁶⁹ See 9 U.S.C. § 2.

¹⁷⁰ See 15 U.S.C. §§ 2302, 2310(1); see also *id.* § 2310(d)(2) (allowing the successful consumer to recover costs, including attorneys’ fees).

¹⁷¹ See *id.* § 2310.

D. The *McMahon* Precedents Do Not Support Binding Arbitration for MMWA Claims

None of the precedents under *McMahon* are analogous to the MMWA and the FTC regulations promulgated under it. Throughout its opinion, the Eleventh Circuit cited several cases in the *McMahon* line.¹⁷² In two of the cases, the Supreme Court applied the FAA because the statute conferred jurisdiction to federal courts and prohibited waiver of rights but did not address arbitration anywhere in its text.¹⁷³ In another case, the argument against application of the FAA stemmed from the “‘importance of the private damages remedy.’”¹⁷⁴

The remaining cases in the *McMahon* line fail to support a finding that the MMWA does not preclude binding arbitration.¹⁷⁵ In its interpretation of the Securities Act in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹⁷⁶ the Court found that the language that conferred concurrent jurisdiction on state courts was nearly identical to that which conferred exclusive jurisdiction in the Exchange Act, which *McMahon* interpreted as not precluding binding arbitration.¹⁷⁷ The Court also found that concurrent jurisdiction would be even more favorable to an interpretation that Congress did not intend to preclude binding arbitration because concurrent jurisdiction would allow forum-selection clauses similar to those in agreements to arbitrate.¹⁷⁸

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that a contract signed as a condition of employment was subject to binding arbitration under the FAA.¹⁷⁹ The Court decided that granting concurrent jurisdiction to federal courts to hear cases involving the Age Discrimination in Employment Act (ADEA) was insufficient to preclude binding arbitration agreements entered into voluntarily.¹⁸⁰ Furthermore, the Court found that granting jurisdiction to the Equal Employment Opportunity Commission (EEOC) to enforce the ADEA was not sufficient to preclude binding arbitration.¹⁸¹ In one place, the ADEA does address arbitration and requires that “[b]efore instituting any action under [the ADEA], the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with

¹⁷² See *Davis v. S. Energy Homes*, 305 F.3d 1268, 1273–77 (11th Cir. 2002).

¹⁷³ See *Lloyd*, *supra* note 12, at 24.

¹⁷⁴ *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985)).

¹⁷⁵ See *id.* at 23–25.

¹⁷⁶ 490 U.S. 477 (1989).

¹⁷⁷ See *id.* at 482.

¹⁷⁸ See *id.* at 482–83.

¹⁷⁹ 500 U.S. 20 (1991).

¹⁸⁰ See *id.* at 28–29.

¹⁸¹ See *id.* at 28.

the requirements of [the ADEA] through informal methods of conciliation, conference, and persuasion.”¹⁸² The Court pointed to this language in *Gilmer* to show that the ADEA actually encouraged arbitration.¹⁸³ However, the ADEA only addresses arbitration in terms of the EEOC and does not establish a structure that creates arbitration as a prerequisite while explicitly reserving the right to pursue other legal remedies.¹⁸⁴ Furthermore, although the ADEA gives an individual plaintiff the right to file a civil action, nowhere does the ADEA address arbitration in the context of the individual plaintiff.¹⁸⁵ Unlike the MMWA, the ADEA does not establish a separate regime regulating the methods of informal settlement, indicating the importance of this regulation to the framers of the MMWA.

The decision in *Green Tree Financial Corp.-Alabama v. Randolph*,¹⁸⁶ which the Eleventh Circuit cited for the proposition that arbitration is sufficient to protect consumers,¹⁸⁷ has little bearing on the MMWA because the issue in that case was not whether the Truth in Lending Act (TILA), the statute at issue, itself precluded binding arbitration, but whether the costs of arbitration more generally would make binding arbitration prohibitively expensive for the consumer.¹⁸⁸ The Court did not address whether TILA evinced an intention to prohibit binding arbitration, noting that the respondent did not raise the issue.¹⁸⁹

The final point on which the Eleventh Circuit based its reasoning is a supposed Supreme Court policy favoring arbitration.¹⁹⁰ Extensions of reasoning of this sort are vulnerable to the criticism that they supersede careful statutory interpretation.¹⁹¹ Unlike the MMWA, which explicitly addresses remedies other than litigation,¹⁹² the provisions of the Exchange Act at issue in *McMahon* do not address other remedies but simply confer exclusive jurisdiction on the district courts and preclude the waiver of compliance with any of its substantive provisions.¹⁹³

¹⁸² 29 U.S.C. § 626(b) (2000), held unconstitutional by *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

¹⁸³ See 500 U.S. at 29.

¹⁸⁴ Cf. § 626(b), (d) (establishing enforcement procedures in civil court actions).

¹⁸⁵ See *id.* § 626(d).

¹⁸⁶ 531 U.S. 79 (2000).

¹⁸⁷ See *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002).

¹⁸⁸ See *Randolph*, 531 U.S. at 90.

¹⁸⁹ See *id.*

¹⁹⁰ See *Davis*, 305 F.3d at 1279 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 279 (1995)).

¹⁹¹ See *Lamis*, *supra* note 11, at 245.

¹⁹² See 15 U.S.C. §§ 2302(a), 2310 (2000).

¹⁹³ See 482 U.S. 220, 227–28 (1987).

III

SHOULD THE COURT GIVE *CHEVRON* DEFERENCE?

A. Delegation with the Force of Law

After noting that Congress expressed a clear intent to preclude binding arbitration (or at least binding “informal dispute settlement procedures”), which presumably satisfies the *McMahon* test, several questions remain. The first is whether the FTC can determine the contours of these settlement procedures under *Chevron*. Another question is, if the congressional intent regarding arbitration is not clear enough, whether the FTC can define “informal dispute settlement procedure[s]” to preclude binding arbitration. Finally, some courts take the approach that the Fifth and Eleventh Circuits took and find that the controlling issue is a *Chevron* issue, focusing on whether the FTC has the authority to promulgate regulations under the MMWA which preclude binding arbitration.¹⁹⁴ This Part will address those questions.

Under current interpretations of the *Chevron* doctrine, agency interpretations of congressional statutes deserve deference when Congress delegates interpretative authority to an agency with the intent, either explicit or implicit, that the agency make rules that carry the “force of law.”¹⁹⁵ In *Mead*, the Court noted that authorizing “notice-and-comment rulemaking or formal adjudication” provided good evidence of a delegation to make rules carrying the force of law.¹⁹⁶ Here, Congress delegated broad authority to the FTC to promulgate rules for warranties, and the FTC did in fact engage in notice-and-comment rulemaking.¹⁹⁷ Furthermore, the Court traditionally gives the greatest weight, regardless of whether it gives *Chevron* deference, to agency rules promulgated in an area of agency expertise.¹⁹⁸ Not only does the FTC have a long history of promulgating rules in the area of consumer protection, but it has conducted extensive studies in

¹⁹⁴ See, e.g., *DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577 (Del. Ch. 2004).

¹⁹⁵ See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

¹⁹⁶ See *id.* at 230–31.

¹⁹⁷ See § 2302(a), (b) (authorizing the FTC to prescribe rules on the content of warranties); § 2309(a) (requiring that the FTC allow oral presentation of comments in addition to normal notice-and-comment procedures); *id.* § 2310 (delegating to the FTC broad authority to create standards for the informal dispute settlement procedures created by the MMWA); Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60,190 (Dec. 31, 1975) (stating that the FTC engaged in notice-and-comment procedures in accordance with the MMWA, including the requirement of providing opportunity for oral presentations).

¹⁹⁸ See *Lloyd*, *supra* note 12, at 27 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948), *cited for same proposition in United States v. Mead Corp.*, 533 U.S. 218, 251 n.4 (2001) (Scalia, J., dissenting)).

the area of warranties, laying the groundwork for the MMWA and providing data for its own rulemaking.¹⁹⁹

B. Delegation: Express or Implied?

The delegation to the FTC under the MMWA is an express delegation. The statutory language gives the FTC broad power to “prescribe rules setting forth minimum requirements for any informal dispute settlement procedure.”²⁰⁰ Only a limited reading would suggest that Congress intended the delegation to encompass mediation and other dispute resolution methods, but not arbitration.²⁰¹

As noted above, the MMWA does not define the term “informal dispute settlement mechanism.”²⁰² However, given the MMWA’s legislative history and the use of the term at the time, the drafters probably intended the term to encompass any nonjudicial remedy, including arbitration.²⁰³

Even if there is not an express delegation, there is an implied delegation because the agency has a duty to regulate the content of the warranties and the procedures themselves.²⁰⁴ Thus, there is a gap in the statute that the agency, given its broad power to regulate in this area, may fill.²⁰⁵ Furthermore, the agency may promulgate regulations in this area even if “‘Congress did not actually have an intent’ as to a particular result” for the specific question at issue.²⁰⁶

C. Statutory Language

One of the more disputed questions in the literature and the court cases is whether Congress intended to delegate power to the FTC to regulate arbitration, including binding arbitration, in addition to or as a part of its delegation of power to regulate informal dispute settlement procedures.²⁰⁷ With both a broad delegation of powers to regulate warranties and an ambiguity in the statute, this seems to be

¹⁹⁹ See CLARK & SMITH, *supra* note 21, § 14:2; Lloyd, *supra* note 12, at 26 n.190.

²⁰⁰ § 2310(a)(2).

²⁰¹ The majority in *Walton* avoided this problem by holding that the statute does not address binding arbitration at all and thus Congress spoke to the issue when it passed the FAA. See 298 F.3d 470, 475 (2002). The dissent in *Walton* pointed to the circularity of a reading that states that Congress spoke to an issue in a prior statute when the application of that same prior statute to the later statute is the legal question. See *id.* at 483–84 (King, C.J., dissenting).

²⁰² See *supra* Part II.B.

²⁰³ See *id.*

²⁰⁴ See §§ 2302, 2310.

²⁰⁵ See *United States v. Mead*, 533 U.S. 218, 229 (2001).

²⁰⁶ *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984)).

²⁰⁷ See *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1275–76 (11th Cir. 2002); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475–76 (5th Cir. 2002).

the classic case for *Chevron* deference under either an express or implied delegation theory.²⁰⁸

D. Substantive Considerations: *Brown & Williamson*

FDA v. Brown & Williamson Tobacco Corp. held that a court must read statutory language in the context of broader statutory schemes to determine whether statutory terms are ambiguous for the purposes of a *Chevron* inquiry.²⁰⁹ The Supreme Court determined that “[a] court must . . . interpret the statute ‘as a symmetrical and coherent regulatory scheme’ . . . and ‘fit, if possible, all parts into a [] harmonious whole.’”²¹⁰ The Court next noted that the “meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”²¹¹ The final consideration in determining whether to give *Chevron* deference is the likelihood that certain policy decisions are of such a magnitude that Congress would not delegate them to an administrative agency.²¹² This inquiry is “guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”²¹³ Thus, three important canons of statutory construction emerge from *Brown & Williamson*: courts should interpret a current statute to fit into an administrative scheme; courts may use subsequent statutes to interpret language in a prior statute; and courts should not generally presume Congress to delegate policy decisions of great national importance to an administrative agency.²¹⁴

In her dissent in *Walton*, Chief Judge King noted that the canons of construction articulated in *Brown & Williamson* clearly favor the idea that Congress has never spoken to this issue and that there is no substantive reason for not giving *Chevron* deference.²¹⁵ In fact, as Chief Judge King pointed out, the *Walton* majority’s use of the FAA to interpret the meaning of the MMWA is anomalous and inconsistent with the basic tenets of *Brown & Williamson* and other Supreme Court juris-

²⁰⁸ See *Walton*, 298 F.3d at 482–85 (King, C.J., dissenting). Chief Judge King explicitly maintained that although the legislative history leaned toward concluding that arbitration was included in the delegation to regulate informal dispute settlement procedures, there was insufficient basis to make that conclusion and the agency was therefore entitled to *Chevron* deference. See *id.* at 485 (King, C.J., dissenting).

²⁰⁹ See 529 U.S. 120, 132–33 (2000).

²¹⁰ *Id.* at 133 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

²¹¹ *Id.*

²¹² See *id.*

²¹³ *Id.*

²¹⁴ See *id.*

²¹⁵ See 298 F.3d 470, 483 (5th Cir. 2002) (King, C.J., dissenting).

prudence.²¹⁶ Specifically, the Supreme Court has never used “a *prior, less specific* statute” to determine that Congress has “directly spoken to the precise question” and then used that prior statute to create a general policy on the issue.²¹⁷

The FTC should receive deference under the first and third tenets of *Brown & Williamson*: the interpretation of the administrative scheme and the matters of great national importance. Nearly fifty years separate the FAA from the MMWA.²¹⁸ The MMWA was the first piece of major consumer warranty legislation,²¹⁹ not a piece of legislation in a long line of federal regulation of consumer products.²²⁰ The texts of the two statutes are sufficiently different to indicate different regulatory schemes. The FAA broadly applies to “maritime transactions” and “commerce,” and does not grant an administrative agency power to interpret or implement the Act.²²¹ The MMWA, on the other hand, applies specifically to “consumer products” and warranties sold along with these products,²²² and delegates power to the FTC to regulate the content of these warranties and the remedies for enforcement.²²³ Finally, Congress clearly delegated to the FTC substantial control over the informal dispute settlement procedures. Therefore, unless these words clearly exclude arbitration, the only reasonable conclusion is that Congress did not consider this to be a matter of such national importance that an agency should not decide it.

IV

APPLYING THE *CHEVRON* TEST TO THE FTC REGULATIONS

Once a court determines that it owes *Chevron* deference to an agency interpretation, the *Chevron* test has two classic prongs: whether Congress has spoken to the issue and whether the agency’s determination was reasonable.²²⁴ This Note argues that Congress has not directly spoken to the issue and that the FTC’s interpretation is reasonable and consistent with congressional intent and other federal legislation.

²¹⁶ See *id.* (King, C.J., dissenting).

²¹⁷ *Id.* (King, C.J., dissenting).

²¹⁸ Congress passed the FAA in 1925, see Pub. L. No. 68-401, 43 Stat. 883 (1925), and the MMWA in 1974, see Pub. L. No. 93-637, 88 Stat. 2183 (1974).

²¹⁹ See CLARK & SMITH, *supra* note 21, § 14:1.

²²⁰ See *id.*

²²¹ See 9 U.S.C. § 1 (2000).

²²² See 15 U.S.C. § 2301 (2000).

²²³ See *id.* §§ 2302(a), 2310.

²²⁴ The Court has engaged in analysis to determine whether Congress delegated to the agency the ability to promulgate rules having the force of law and thus whether the Court will give *Chevron* deference. See *United States v. Mead*, 533 U.S. 218, 226–27 (2001); *supra* Part II. The *Chevron* two-step is articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

A. Has Congress Directly Spoken to the Issue?

The majority in *Walton* concluded that Congress, in passing the FAA nearly fifty years before the MMWA, had “directly spoken to the precise question at issue” of whether warranties under the MMWA may prohibit binding arbitration.²²⁵ As Chief Judge King noted in her dissent, this interpretation is particularly problematic because Congress’s intent with regard to one statute has never been found in “a prior, less specific statute.”²²⁶ Interpretations that find congressional intent in prior, less specific laws violate two of the basic principles of statutory interpretation: “the primacy of the last enacted statute” and “the rule that the specific statute controls the general.”²²⁷ Furthermore, in its *Chevron* inquiries, the Court often looks to the legislative history to determine whether Congress intended a delegation to an agency to determine a result and whether Congress intended a particular result.²²⁸ Here, there is an express delegation to establish rules for arbitration and thus to determine whether that arbitration is binding.²²⁹ Furthermore, even if there is no express delegation, there clearly is an implied delegation within the broad scope of authority to make settlement-procedure rules and the warranty rules themselves because Congress does not directly address whether these procedures are binding.²³⁰

B. Is the Agency’s Interpretation Reasonable?

The FTC’s interpretation that the statute precludes binding arbitration is entirely reasonable based on the two reasons that the FTC gave to justify its decision: first, the House Subcommittee Staff Report indicated a congressional intent that the proceedings not be binding; and second, the FTC itself felt that it could not promulgate guidelines that would protect consumers in a system of binding arbitration.²³¹

²²⁵ See 298 F.3d 470, 475 (5th Cir. 2002).

²²⁶ See *id.* at 483 (King, C.J., dissenting) (emphasis omitted).

²²⁷ See WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 282–83 (2d ed. 2006) (italics omitted).

²²⁸ See *Chevron*, 467 U.S. at 843 n.9 (stating that the Court would use “traditional tools of statutory construction” to determine whether Congress had an intent that precluded the agency interpretation). Normally, legislative history is included among the traditional tools of determining Congress’s intent. See *Walton*, 298 F.3d at 487 (King, C.J., dissenting).

²²⁹ See *supra* notes 200–03 and accompanying text.

²³⁰ See *supra* notes 204–06 and accompanying text.

²³¹ See Rules, Regulations, Statements, and Interpretations Under Magnuson-Moss Warranty Act, 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975). There is some difficulty with the Subcommittee Staff Report. Although the Staff Report clearly indicates that consumers need to be aware of their rights, including their right to pursue litigation, it does not clearly address binding arbitration. See 120 CONG. REC. 31,318 (1974). However, it does clearly state that one of the problems with the current system is that many consumers are at the mercy of the manufacturers because the damage caused by most consumer goods is not worth pursuing in litigation. See *id.* Clearly, the Staff Report is sympathetic to the

The *Davis* majority argued that the FTC justifications amounted to adopting a *Wilko* attitude toward arbitration that the Supreme Court resoundingly rejected in the *McMahon* line of cases.²³² However, as Chief Judge King pointed out in her dissent, the FTC based its reasoning on an independent interpretation of the statute and not on a belief that Congress would be hostile to binding arbitration.²³³ In its recent regulatory review of rules promulgated under the MMWA, the FTC affirmed that it based its decision on the “plain language of the Warranty Act” and that it considered, but rejected, proposals that would have allowed binding arbitration.²³⁴ This reasoning is consistent with the reasoning offered in the original promulgation of the rules and thus may be used to consider whether the FTC was reasonable in promulgating the rule.²³⁵

The Eleventh Circuit concedes that the rationale that the FTC uses will determine whether its rule is reasonable under the second prong of *Chevron*. Given the rarity of a finding of unreasonableness,²³⁶ the FTC’s evidence of congressional intent,²³⁷ other evidence of congressional intent not cited by the FTC,²³⁸ the reaffirmation of findings in a regulatory review,²³⁹ and the expertise of the FTC in this area,²⁴⁰ the FTC is reasonable in prohibiting binding arbitration clauses in warranties governed by the MMWA.²⁴¹

C. Should *McMahon* Be Subsumed Under Either *Chevron* Prong?

The *McMahon* test should not be subsumed under either prong of the *Chevron* test. Subsuming it under the first prong is particularly problematic because doing so assumes that Congress spoke to a specific statutory issue in a prior, less specific statute. This also assumes that Congress spoke to the scope of an agency’s power in a statute that does not even address the agency. As noted above, the Supreme Court has never used “a *prior, less specific* statute” to determine that Congress has “directly spoken to the precise question” and created a

consumer when it states that “the fate of aggrieved consumers usually rests with the seller/manufacturer and its willingness to live up to its promises.” *Id.*

²³² See 305 F.3d 1268, 1279 (11th Cir. 2002).

²³³ See *Walton*, 298 F.3d at 487 (King, C.J., dissenting).

²³⁴ 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999).

²³⁵ See *Walton*, 298 F.3d at 488 n.12 (King, C.J., dissenting). Chief Judge King explained that the Court normally disapproves of “‘post-hoc’ agency justifications” if the original rationale was invalid. *Id.*

²³⁶ See *infra* notes 243–47 and accompanying text.

²³⁷ See *supra* note 231 and accompanying text.

²³⁸ See *supra* Part II.B.

²³⁹ See *supra* note 234–35 and accompanying text.

²⁴⁰ See *supra* note 199 and accompanying text.

²⁴¹ See *supra* notes 231–35 and accompanying text.

general policy interpreting a subsequent statute.²⁴² Subsuming the *McMahon* test under step one of *Chevron* would be an unprecedented extension of the national policy favoring arbitration and would elevate it to an absolute policy compelling arbitration even when there is a clear, contrary congressional intent.

The Eleventh Circuit's use of the reasonableness prong is unusual because courts rarely use that prong to strike down an agency interpretation.²⁴³ The Supreme Court set the bar very low in one of only two cases where it has given guidance regarding what constitutes an unreasonable interpretation of ambiguous language.²⁴⁴ In that case, *AT&T Corp. v. Iowa Utilities Board*,²⁴⁵ the Court found unreasonable the FCC's interpretation of a statute regarding network sharing because the FCC ignored language that required it to consider whether access was necessary for the competitor and whether failure to provide the access would impair the competitor's ability to provide services.²⁴⁶ The FCC simply gave no importance to this language when it allowed "blanket access to incumbents' networks" on an almost "unrestricted" basis.²⁴⁷ In its interpretation of the MMWA, the FTC has given meaning to a series of words in a reasonable way that is consistent with definitions in both the scholarly literature and the legislative history of the time.²⁴⁸ In fact, as some scholars have noted, a possible reason that the Supreme Court has avoided using the reasonableness prong to strike down legislation is that this prong would inject "antidemocratic and under-informed judicial value choices" into the fray.²⁴⁹

The Eleventh Circuit found the FTC rationale unreasonable because the staff subcommittee report was insufficient evidence of congressional intent and because the FTC was relying on *Wilko* in refusing to allow binding arbitration.²⁵⁰ As this Note has argued, several pieces of legislative history indicate Congress's intent that the informal dispute settlement procedures addressed in the MMWA include arbitration and are not to be binding.²⁵¹ Furthermore, the MMWA has a

²⁴² *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 483 (5th Cir. 2002) (King, C.J., dissenting).

²⁴³ See ESKRIDGE ET AL., *supra* note 227, at 328–29.

²⁴⁴ See *id.* at 337–38.

²⁴⁵ 525 U.S. 366 (1999).

²⁴⁶ See ESKRIDGE ET AL., *supra* note 227, at 337.

²⁴⁷ *Id.* at 337–38 (quoting *AT&T Corp.*, 525 U.S. at 390).

²⁴⁸ For a discussion of the meaning of the words and the legislative history, see *supra* Part II.B.

²⁴⁹ ESKRIDGE ET AL., *supra* note 227, at 338.

²⁵⁰ *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1278–79 (11th Cir. 2002).

²⁵¹ For a discussion of why Congress included arbitration under informal dispute settlement procedures, see *supra* Part II.B. For a discussion of congressional intent with regard to the nonbinding nature of the informal dispute settlement procedures, see *id.*

fundamentally different purpose than the FAA.²⁵² The MMWA aims to combat a situation in which consumers have little bargaining power and in which the agreements that consumers sign are less than voluntary.²⁵³ The FAA, alternatively, focuses entirely on voluntary arbitration.²⁵⁴

CONCLUSION

The intersection of the MMWA and the FAA is a battleground where two different doctrines meet: the *Chevron* doctrine regarding judicial deference to agency rulemaking and the *McMahon* doctrine regarding the federal policy favoring arbitration. Applying the *McMahon* framework first, the statute clearly provides that arbitration in this context should not be binding. Any other reading of the statute would turn the statute's language on its head. Even after applying the *McMahon* framework, any further discussion of the statute in the *Chevron* framework clearly establishes that Congress did not intend for arbitration under the MMWA to be binding and that the FTC's delegated power under the MMWA to regulate arbitration is very broad. Therefore, under any reading, the MMWA precludes binding arbitration.

²⁵² See Lamis, *supra* note 11, at 240.

²⁵³ See *id.* at 240–41.

²⁵⁴ See *id.* at 237–39.

