ARTICLE

THE GOVERNMENT'S POWER TO BRING TRANSNATIONAL SECURITIES FRAUDSTERS TO ACCOUNT: DODD-FRANK RENDERED *MORRISON* IRRELEVANT

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ABSTRACT

The real engine of the Supreme Court's blockbuster decision in Morrison v. National Australia Bank Ltd. was not the Court's much-discussed invigorated presumption against extraterritoriality. On the ground, what matters to investors, companies, and judges is the oft-ignored second Morrison ruling: the creation of a "focus" analysis for separating actionable "domestic" section 10(b) claims from foreclosed "extraterritorial" suits. Applying this analysis, the Court determined that the site of the transaction at issue determines whether a section 10(b) case can proceed: section 10(b) only covers "transactions in securities listed on [U.S.] domestic exchanges" or "domestic transactions in other securities."

Morrison*'s second ruling has attracted relatively little scholarly attention. This Article's first contribution, then, is to start a conversation regarding the bona fides of the Court's focus analysis and its resultant transactions test for securities claims. It plumbs the voluminous case law in which courts have struggled to apply the transactions test in transnational securities fraud cases. This review demonstrates that the* Morrison *transactions test is not capable of meeting the Court's aims in* Morrison*: it yields arbitrary results, and in many cases, it is incapable of stable and predictable application. Thus, it does not further congressional objectives in securities regulation, nor does it efficiently allocate cases to the jurisdiction with the greatest sovereign interest.*

This Article's second contribution is to proffer a novel framing and analysis to show that Congress displaced the Morrison *test in government-initiated cases under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Just days after* Morrison *was decided, Congress passed Dodd-Frank, in which it amended the jurisdictional authorization for SEC- and DOJ-initiated section 10 (b) cases to incorporate a conduct-and-effects test that courts of appeals had employed for decades but which the* Morrison *Court spurned in favor of its flawed transactions test. The* Morrison *Court had ruled that its transactions test limited the scope of section 10(b) itself and was not a question of subject-matter jurisdiction, as courts of appeals had long held. Because Congress chose to amend the jurisdiction section rather than section 10(b), the overwhelming*

majority of commentators believe that Congress's effort to replace the transactions test with the traditional conduct-and-effects test in government-initiated cases might be ineffective. The question of whether the SEC and DOJ can fill the regulatory gap left by Morrison*'s limitations on private enforcement is critically important in light of the volume of transnational securities trading and concomitant fraud.*

This Article demonstrates that the scholarly consensus is wrong. It proposes a more appropriate framing—that is, a focus on the amended jurisdictional statute rather than Morrison*. This framing reveals that Congress wished to endorse the lower courts' approach prior to* Morrison *both by reinstating the conduct-and-effects test for extraterritoriality in government-initiated cases and by codifying the treatment of extraterritoriality as a jurisdictional question. The posited analysis, unlike much of what is currently being aired in courtrooms and law reviews, disentangles this knotty question in a way that is consistent with relevant principles of statutory construction. This Article concludes that Congress successfully replaced the transactions test with a jurisdictional conduct-and-effects test in government-initiated section 10(b) actions.*

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INTRODUCTION

The headline to emerge from the Supreme Court's blockbuster decision in *Morrison v. National Australia Bank*[1] was that, applying a reinvigorated presumption against extraterritoriality,[2] the Court reversed forty years of courts of appeals precedent in ruling that section 10(b) of the Securities and Exchange Act of 1934[3] does not apply outside U.S. territory. This Article focuses on the second, and most practically consequential, part of the *Morrison* analysis: The Court's newly forged "focus" analysis for determining what constitutes a cognizable "domestic" case as opposed to an action that is foreclosed because it represents an "extraterritorial" application of section 10(b). Applying this analysis, the *Morrison* Court determined that the site of the transaction at issue determines whether a section 10(b) case can proceed: section 10(b) only covers "*transactions* in securities listed on [U.S.] domestic exchanges" or "domestic *transactions* in other securities."[4]

Morrison's second ruling has inexplicably attracted little scholarly attention. This Article's first contribution, then, is to start a conversation regarding the bona fides of the Court's "focus" analysis and its resultant transactions test for securities claims. It plumbs the voluminous case law in which courts have struggled to apply the transactions test in transnational securities fraud cases. This review demonstrates that the *Morrison* transactions test is not, in practice, capable of meeting the two ends the Court identified in crafting it: providing rational and bright-line rules for determining which transnational causes of action serve Congress's goals in

1. 561 U.S. 247 (2010).

2. *See* Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1046–49 (2018) (demonstrating that the Court had not applied the presumption with any consistency until *Morrison*).

3. 15 U.S.C. § 78j(b).

4. *Morrison*, 561 U.S. at 267 (emphasis added); *see also id.* at 269–70 ("The transactional test we have adopted—whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange—meets that requirement."); *id.* at 273 ("Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.").

regulating securities; and efficiently allocating fraud cases to the jurisdiction with the greatest sovereign interest.

The transactions test is flawed first because it yields arbitrary results—that is, results that are not rationally related to furthering the goals of securities regulation. Congress has a variety of aims in policing securities fraud, among them: protecting American investors; enhancing investor confidence; preventing the export of fraud; deterring corporate misconduct; conserving U.S. enforcement resources; and minimizing conflict with foreign states.[5] The *Morrison* test is not able to efficiently serve any of these interests.

The test's focus on the site of the transaction may, in an untold number of cases, result in the arbitrary allocation of private rights of action because the site of an exchange transaction has no necessary significance in the 24-hour, global, wired securities marketplace. Investors often will not know where their buy or sell order has actually been executed, and thus cannot protect themselves in the event of fraud. Further, in securities transactions not conducted on an exchange, the results of the test generally turn on when a given transaction is deemed, as a contractual matter, to have become irrevocable; this means that the vagaries of contractual drafting control the allocation of causes of action rather than any factors relevant to congressional goals.

The part of the test applicable to securities transactions conducted on exchanges is largely bright-line, if arbitrary, in its application; although it seems to further one of the Court's goals in this context, it also gives fraudsters a game-plan for evading accountability. But the portion of the test applied in non-exchange transactions is not, at least at present, capable of providing market participants and sovereign regulators the predictability and stability the Supreme Court was seeking. The arbitrary and sometimes unpredictable nature of the test undermines section 10 (b)'s deterrent power and investor confidence.

The *Morrison* transaction test is not designed to prevent the export of fraud or to protect U.S. investors who knowingly or unknowingly transact in foreign markets. Because, under the *Morrison* Court's test, section 10(b)'s availability turns only on the location of the securities transaction, it abandons any inquiry into whether the fraud was committed in the United States and makes the fraud's effect on U.S. investors irrelevant to whether a damages suit may proceed. According to the Supreme Court, the entirety of the securities fraud can take place in the United States, the perpetrators can be U.S. citizens and the victims can be Americans; but if the relevant securities transaction is conducted on a foreign exchange or is formally concluded on foreign territory, the fraudsters are immune from accountability under section 10(b).

> By ignoring the fraud's genesis or effect and focusing instead on the technical transaction, *Morrison* creates not just an easy escape for foreign fraudsters

5. *Id.* at 283–84 (Stevens, J., concurring in the judgment).

> [who prey on U.S. investors], but an open invitation: Come to the United States to commit securities fraud and feel free to negatively impact the United States with that fraud – so long as you don't list your securities on an American exchange, you may never have to repay any of the investors you victimized.[6]

The *Morrison* majority knew this result would flow from its novel test—Justice Stevens laid the certain consequences out in his separate opinion.[7] But the majority's evident distaste for the sort of private securities action that the Court itself created,[8] its solicitude for foreign regulators' prerogatives, and its desire for a bright-line test apparently made the protection of these populations expendable.

Finally, the arbitrary results of the *Morrison* test do not efficiently serve the last of the *Morrison* Court's primary goals: avoiding conflict with other sovereign regulators. The test only coincidentally allocates transactions to the regulatory body with the greatest interest in, or capacity to address, the alleged fraud.

Having demonstrated that the Court's "transactions" test for separating allowably "domestic" from foreclosed "extraterritorial" suits is fatally flawed in Part I, I turn in Part II to the critical question that concerns this Article: whether the U.S. government can pick up the slack left by the *Morrison* Court's misguided test narrowing private securities fraud enforcement. Can the U.S. government vindicate the interests of Americans defrauded by foreign fraudsters, or protect domestic and foreign investors from schemes largely engineered on U.S. soil, through enforcement actions by the Securities and Exchange Commission ("SEC") and criminal prosecutions by the U.S. Department of Justice ("DOJ")? The issue is of huge potential import given the volume of transnational securities investment. Although it is notoriously difficult to document that volume,[9] it is agreed that "[c]ross-border holdings of securities between the United States and the rest of the world are growing in size and importance."[10] The dramatic increase in cross-border securities transactions carries with it a dramatically enhanced threat of fraud.

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6. U.S. SECS. & EXCH. COMM'N, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934, at 51 (2012), https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf [hereinafter SEC STUDY] (quoting comment letter from London Pensions Fund, et al.).

7. *See Morrison*, 561 U.S. at 285 (Stevens, J., concurring in the judgment).

8. *See id.* at 270 (majority opinion) ("While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."); *id.* at 286 (Stevens, J., concurring in the judgment) ("'I respectfully dissent,' once again, 'from the Court's continued campaign to render the private cause of action under § 10(b) toothless.'" (quoting Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 175 (2008) (Stevens, J., dissenting))).

9. *See, e.g.*, William L. Griever, Gary A. Lee & Francis E. Warnock, *The U.S. System for Measuring Cross-Border Investment in Securities: A Primer with a Discussion of Recent Developments*, 87 FED. RSRV. BULL. 633, 643 (Oct. 2001).

10. CAROL C. BERTAUT & RALPH W. TRYON, BD. OF GOVERNORS OF THE FED. RSRV. SYS., INT'L FIN. DISCUSSION PAPERS NO. 910, MONTHLY ESTIMATES OF U.S. CROSS-BORDER SECURITIES POSITIONS 3 (Nov.

The content of the Supreme Court's *Morrison* decision will be traced in greater depth in Part I.A, below. For purposes of simply laying out the issue around which this Article revolves, it suffices to know, first, that in deciding that section 10(b) does not apply extraterritorially, the *Morrison* Court rejected the test that had been unanimously applied by the courts of appeals for decades. That test looked at whether there was sufficient wrongful *conduct* occurring on U.S. territory or whether the fraudulent overseas conduct had substantial pernicious *effects* on American investors. This conduct-and-effects test was far from arbitrary. It was founded on international law's recognition that a sovereign has a bedrock right to exercise its legislative power over its territory, which at the time was defined under American standards to include both "conduct that, wholly or in substantial part, takes place within its territory" and "conduct outside its territory that has or is intended to have substantial effects within its territory."[11]

Second, as noted above, in responding to the argument that *Morrison* involved a domestic application of the statute because some of the fraudulent conduct occurred on U.S. territory, the Court created its "focus" test: In order for a securities fraud claim with transnational elements to be "domestic"—that is, not an extraterritorial application of the statute—it must involve "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[12]

Finally, and crucially for purposes of this Article, the Supreme Court held in *Morrison* that the courts of appeals had been wrong to treat extraterritoriality as a question going to the courts' subject-matter jurisdiction. The Court noted that federal courts have subject-matter jurisdiction to hear section 10(b) claims by virtue of the general jurisdictional grant in 15 U.S.C. § 78aa. Because § 78aa did not in its terms address the extraterritorial reach of the statute, the Court ruled that section 10(b) itself is limited in scope to territorial claims. As a result, it was assumed that the SEC and the DOJ would be similarly constrained in pursuing transnational fraud in enforcement and criminal actions founded on the self-same statute.[13]

While *Morrison* was under consideration by the Court, the House and Senate had both passed bills that would eventuate in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[14] The legislative history of the relevant section of Dodd-Frank is traced in Part II.B. The source of the controversy

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2007), https://www.federalreserve.gov/pubs/ifdp/2007/910/ifdp910.pdf; *see also* Griever et al., *supra* note 9, at 633, 640 (underscoring the "skyrocket[ing]" volume of cross-border securities transactions over the past decade).

11. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a), (c) (AM. L. INST. 1987); *see also generally* O'Sullivan, *supra* note 2, at 1029–34 & nn.28–52, 1053 & nn.180–81, 1057–59 & nn.212–21. Note that the American Law Institute, which has recently issued its fourth Restatement of the Foreign Relations Law of the United States, no longer includes "effects" as a subset of territorial jurisdiction, describing it instead as a discrete jurisdictional basis. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(1)(b), 408, 409 (AM. L. INST. 2018).

12. *Morrison*, 561 U.S. at 267.

13. *See, e.g.*, United States v. Vilar, 729 F.3d 62, 72–74 (2d Cir. 2013) (rejecting the government's argument that *Morrison* only applies to civil suits brought by private plaintiffs and does not apply to criminal cases).

14. Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1865 (2010) (codified at 15 U.S.C. § 78aa).

over Dodd-Frank's effect is Congress's decision to amend the jurisdictional provision governing section 10(b)—15 U.S.C. § 78aa—rather than amending section 10 (b) "on the merits" to incorporate the conduct-and-effects test for government-initiated securities fraud enforcement actions.

Commentators have almost universally opined that Congress likely made a mistake in amending the jurisdiction provision underpinning the securities fraud prohibition (§ 78aa) in Dodd-Frank instead of amending section 10(b) itself, and that thus congressional efforts to establish the DOJ's and SEC's power to bring transnational cases under the conduct-and-effects test were likely to be ineffective.[15] The commentators arrive at this conclusion by starting with *Morrison*: Because the Supreme Court read its transaction test into the substantive language of section 10

15. Some commentators have concluded that § 929Y, the section of Dodd-Frank that amended § 78aa, did not change the *Morrison* test because of its placement in the jurisdictional provision. *See, e.g.*, Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO L.J. 537, 571 (2011); John Chambers, Note, *Extraterritorial Private Rights of Action: Redefining the Transactional Test in* Morrison v. National Australia Bank, 31 REV. BANKING & FIN. L. 411, 428–29 (2011); Yuliya Guseva, *The SEC and Foreign Private Issuers: A Path to Optimal Public Enforcement*, 59 B.C. L. REV. 2055, 2111–12 (2018); Hugh B. Hamilton III, Note, *At the Water's Hedge: International Insider-Trading Enforcement After* Morrison, 68 DUKE L.J. 1003, 1036–37 (2019); Nathan Lee, *The Extraterritorial Reach of United States Securities Actions After* Morrison v. National Australia Bank, 13 RICH. J. GLOB. L. & BUS. 623, 631 (2015); A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 142 (2011); Andrew Rocks, Note, *Whoops! The Imminent Reconciliation of U.S. Securities Laws with International Comity After* Morrison v. National Australia Bank *and the Drafting Error in the Dodd-Frank Act*, 56 VILL. L. REV. 163, 192 (2011); Jacob True, Note, *What Counts as a Domestic Transaction Anymore: The Second Circuit and Other Lower Courts' Struggles in Interpreting the Supreme Court's Intent in* Morrison v. National Australia Bank *When Dealing with Derivative Securities Transactions*, 10 HASTINGS BUS. L.J. 513, 527 (2014).

Others have raised serious doubts but have not resolved the issue. *See, e.g.*, Thomas A. Dubbs, Morrison v. National Australia Bank*: The US Supreme Court Limits Collective Redress for Securities Fraud*, *in* EXTRATERRITORIALITY AND COLLECTIVE REDRESS 335, 336 (Duncan Fairgrieve & Eva Lein eds., 2012); Meny Elgadeh, Morrison v. National Australia Bank*: Life After Dodd-Frank*, 16 FORDHAM J. CORP. & FIN. L. 573, 594 (2011); Nidhi M. Geevarghese, Note, *A Shocking Loss of Investor Protection: The Implications of* Morrison v. National Australia Bank, 6 BROOK. J. CORP. FIN. & COM. L. 235, 250 (2011); Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to* Morrison v. National Australia Bank *and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 4 (2011); Margaret V. Sachs, *Unintended Consequences: The Link Between Judge Friendly's* Texas Gulf Sulphur *Concurrence and Recent Supreme Court Decisions Misconstruing Rule 10b-5*, 71 SMU L. REV. 947, 963–64 (2018); Stephen R. Smerek & Jason C. Hamilton, *Extraterritorial Application of United States Law After* Morrison v. National Australia Bank, 5 DISP. RESOL. INT'L, no. 1, May 2011, at 23–24; Mark I. Steinberg & Kelly Flanagan, *Transnational Dealings*—Morrison *Continues to Make Waves*, 46 INT'L LAW. 829, 837, 841 (2012); Raphael G. Toman, Note, *The Extraterritorial Reach of the U.S. Securities Laws and Non-Conventional Securities: Recent Developments After* Morrison *and Dodd-Frank*, 14 N.Y.U. J.L. & BUS. 657, 678 (2018); Yen-Te Wu, *A Contemporary Challenge for Securities Fraud Litigation After the* Morrison v. Nat'l Australia Bank *Case*, 9 NAT'L TAIWAN U. L. REV. 233, 246 (2014).

Very few believe that section 929P was effective in supplanting *Morrison*. *See, e.g.*, Eric C. Chaffee, *A Call for Legislative Reform: Expanding the Extraterritorial Application of the Private Rights of Action Under Federal Securities Law While Limiting the Scope of Relief Available*, 22 STAN. J.L. BUS. & FIN. 1, 20 (2017); Junsun Park, *Global Expansion of National Securities Laws: Extraterritoriality and Jurisdictional Conflicts*, 12 U.N.H. L. REV. 69, 78 (2014); Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After* Morrison*: Correcting the Supreme Court's "Transactional Test*,*"* 52 VA. J. INT'L L. 405, 439 (2012).

(b) and because Congress did not alter that language, it is argued, the Court's limitation persists despite Congress's obvious endorsement of the conduct-and-effects test that the *Morrison* Court spurned. Litigants have largely accepted this framing, and much of the controversy surrounding the likely effect of Dodd-Frank concerns whether the Dodd-Frank amendment is "truly" jurisdictional and, if so, whether it can legitimately be read as a gloss on the substantive reach of section 10(b). As I discuss in Part II.D.1, framed this way, it seems to me that the commentators are correct: Dodd-Frank's jurisdictional amendment cannot be transformed through statutory construction into an amendment of section 10(b) itself.

The question of whether the SEC and DOJ must ignore frauds perpetrated on U.S. soil and those targeting American investors unless there is a "domestic" securities transaction is an important one, given the volume of cross-border trading and the volume of victims seeking relief in U.S. courts. But it is also of "academic" concern because the way this question is framed illustrates the extent to which the legal community is apt to let the Supreme Court's interpretation of statutes dominate the judicial-legislative conversation, making the actual content of a superseding statute relevant only insofar as it jibes with judicial construction. It is my belief that the reverse should be true, especially in regulatory contexts such as this one where Congress, not the Court, has the capacity to explore the full complexity of the extraterritoriality issue and to resolve competing policy considerations. This framing is important and indeed may be outcome-determinative with respect to the jurisdictional issue under consideration in this article. As will be revealed in Part I. B, the Supreme Court's decision that the site of the securities transaction is the only relevant fact in determining whether victims can pursue fraudsters in federal courts is flawed. To make the Supreme Court's guess as to the relevant scope of the federal securities fraud statutes the standard against which Congress's efforts must be judged would simply add insult to injury.

As may be clear, I do not accept the above framing—that is, that Congress's efforts must be judged against the *Morrison* opinion, as if the Supreme Court's guess about the intent of Congress in section 10(b) is the equivalent of an amendment of the language of that section. One of the contributions of this Article is to propose a new framing and interpretive approach that resolves this tangle in a way that is, unlike the alternatives, entirely consistent with standard principles of statutory construction. As demonstrated in Part II.D.2, the analysis need go no further than the plain language of Dodd-Frank itself—that is, the amended § 78aa—because a straightforward application of interpretive canons to that section yields the conclusion that Congress was successful in its efforts to ensure that government-initiated transnational suits be judged under the conduct-and-effects test. Congress passed a statute that took effect after the *Morrison* decision came down, and that statute ought to be interpreted according to its plain text: the conduct-and-effects test determines the scope of section 10(b)'s transnational application in government-initiated (but not private plaintiffs') cases, and this threshold question goes to the court's subject-matter jurisdiction.

I. *MORRISON* AND ITS "TRANSACTION" TEST FOR DETERMINING THE SCOPE OF SECTION 10(B) ACTIONS

A. Morrison

In *Morrison v. National Australia Bank Ltd.*,[16] respondent National Australia Bank ("NAB"), a non-U.S. bank whose common shares were not traded on any U. S. exchange, purchased respondent HomeSide Lending, a company headquartered in Florida. A few years after this purchase, NAB had to write down the value of HomeSide's assets, causing a drop in NAB's share price. Petitioners, foreign investors who purchased NAB's stock before the write-downs, sued respondents—NAB, HomeSide, and officers of both companies—in federal district court for violations of section 10(b)[17] and section 20(a)[18] of the Securities and Exchange Act of 1934 as well as SEC Rule 10b-5.[19] Petitioners claimed that HomeSide and its officers, with the knowledge of NAB and its chief executive, manipulated financial models to make the company appear more valuable than it was; this information was transferred to Australia where it was incorporated into NAB's financials.

Morrison, then, was what was known as a "foreign-cubed"[20] securities fraud case, in which foreign parties were suing a foreign issuer for alleged fraud in connection with shares that were not traded on a U.S. exchange and (critically for the Court's purposes) were purchased on an Australian exchange. The DOJ filed an amicus brief containing the views of the SEC in support of NAB. Federal securities regulators, as well as a lengthy list of amici that included several sovereign states, believed such foreign-cubed actions had no place in U.S. courts. The tricky question was how to achieve this end while maintaining remedies for those victims Congress sought to protect under section 10(b).

The district court dismissed for want of subject-matter jurisdiction, concluding that the acts alleged in the United States were, "at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad."[21] The Second Circuit affirmed because the acts performed in the United States did not "compris [e] the heart of the alleged fraud."[22] The Supreme Court reversed, making three critical rulings.

First, up until *Morrison*,[23] all the circuits treated extraterritoriality as a question of the courts' subject-matter jurisdiction in securities and other cases. In *Morrison*, however, the Supreme Court made clear for the first time that extraterritoriality

16. 561 U.S. 247 (2010).
17. 15 U.S.C. § 78j(b).
18. *Id.* § 78t(a).
19. 17 C.F.R. § 240.10b-5.
20. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 175 (2d Cir. 2008), *aff'd*, 561 U.S. 247.
21. *In re* Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537(BSJ), 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006), *aff'd sub nom. Morrison*, 547 F.3d 167, *aff'd*, 561 U.S. 247.
22. *Morrison*, 547 F.3d at 175–76.
23. 561 U.S. 247 (2010).

was a question going to the scope of the statute, rather than jurisdiction, *unless Congress clearly indicated otherwise*.[24] It explained:

> [T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, "refers to a tribunal's '"power to hear a case."'" It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief. The District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to [NAB]'s conduct.[25]

This ruling has important procedural implications.[26] It is also a central thesis of this Article that in Dodd-Frank, Congress reinstated the treatment of extraterritoriality as a jurisdictional issue in securities fraud cases initiated by the SEC and the DOJ.

Second, the Supreme Court, again overruling decades of lower court cases, held that section 10(b) does not apply beyond the shores of the United States after applying a strong presumption against extraterritoriality. Until *Morrison*, the circuits had decided whether they had jurisdiction over securities fraud claims that involved transnational elements by applying a so-called "conduct-and-effects" test.[27] The circuit courts, in each securities case, asked "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens."[28] The object was to determine whether "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."[29]

The conduct-and-effects test ensured that some U.S. investors who made investments on foreign exchanges could pursue accountability in U.S. courts for fraud, as could some foreign investors who were targeted by U.S.-based fraudsters.

> The consensus view among the courts that considered the issue was that Congress would not have wanted wrongdoers offshore to be free to cause harm in the United States, or for the United States to be used as a base for fraudulent schemes directed at foreigners, even if the actual transaction affected by the fraud took place overseas.[30]

The *Morrison* Court perceived the conduct-and-effects test as fundamentally inconsistent with the Court's supposedly traditional application of the presumption

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24. *See id*. at 253–54.

25. *Id*. at 254 (quoting Union Pac. R.R. Co. v. Locomotive Eng'rs, 558 U.S. 67, 81 (2009)).

26. *See infra* notes 291–299 and accompanying text.

27. *Morrison*, 561 U.S. at 275 (Stevens, J., concurring).

28. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 171 (2d Cir. 2008) (quoting SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003)), *aff'd*, 561 U.S. 247.

29. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975) (Friendly, J.), *abrogated by Morrison*, 561 U.S. 247.

30. SEC STUDY, *supra* note 6, at 10.

against extraterritoriality.[31] The Court reasoned that the presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters," and accordingly stressed that "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'"[32]

At the Supreme Court, much of the briefing by the parties and various amici curiae focused on the policy arguments supporting or opposing the traditional conduct-and-effects test.[33] The *Morrison* Court largely refused to consider these policy arguments in ruling on section 10(b)'s extraterritoriality. The Court focused on the fact that the test was not based on the text of the statutes or actual legislative intent,[34] but rather on speculation as to what "Congress would have wanted" had it considered the application of the securities laws in a given context[35] and on "matters of policy."[36] The Court did, however, cite to those who criticized the conduct-and-effects test as "complex in formulation and unpredictable in application."[37] Ultimately it concluded:

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31. 561 U.S. at 261. *But see* O'Sullivan, *supra* note 2, at 1046–49 (demonstrating that the Court had not applied the presumption with any consistency up until *Morrison*).

32. 561 U.S. at 255 (first quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993); then quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

33. As the SEC summarized the debate:

> The plaintiffs and their supporting amici argued, among other things, that: (1) there is an inherent U.S. interest in ensuring that even foreign purchasers of globally traded securities are not defrauded, because the prices that they pay for their securities will ultimately impact the prices at which the securities are sold in the United States; (2) foreign issuers that cross-list in the United States benefit from the prestige and increased investor confidence that results from a U.S. listing, and thus it is reasonable to hold these foreign issuers to the full force of the U.S. securities laws regardless of where the particular transaction occurs; (3) without the cross-border application of Section 10(b) afforded by the conduct and effects tests, there generally would be no legal options for redress open to the foreign victims of frauds committed by persons residing in the United States; and (4) eliminating the conduct and effects tests could be a significant factor weighing against further or continued foreign investment in the United States.
>
> The defendants and their supporting *amici* . . . argued, among other things, that: (1) the uncertainty and lack of predictability resulting from the conduct and effects tests discourage investment in the United States and capital raising in the United States, which would not occur with a bright-line test limiting Section 10(b) only to transactions within the United States; (2) application of Section 10(b) private liability to frauds resulting in transactions on foreign exchanges would result in wasteful and abusive litigation, cause the United States to become a leading venue for global securities class actions, and subject foreign issuers to the burdens and uncertainty of extensive U.S. discovery, pre-trial litigation, and perhaps trial before plaintiffs' claims can be dismissed under the conduct and effects tests; and (3) different nations have reached different conclusions about what constitutes fraud, how to deter it, and when to prosecute it, and the cross-border application of U.S. securities law would interfere with those sovereign policy choices.

SEC STUDY, *supra* note 6, at ii–iii.

34. 561 U.S. at 258, 267 n.9.

35. *Id*. at 257.

36. *Id*. at 259.

37. *Id*. at 256.

> The [scholarly and judicial] criticisms [of the conduct-and-effects test] seem to us justified. The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.[38]

The Court then looked at the language and history of section 10(b), concluding that there was "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially" and thus nothing to rebut the presumption against extraterritoriality.[39]

Having lost the battle of extraterritoriality, the petitioners attempted to win the war by arguing that they sought only *domestic* application of section 10(b). The *Morrison* Court's final holding, then, related to the question of when a given case could be deemed extraterritorial, and thus precluded, as opposed to territorial or domestic, in which case it could proceed. Petitioners contended that, given that the fraud was hatched, and false statements made, in Florida, the fraud was committed in the United States.[40] Perhaps surprisingly, the Supreme Court has only once before been asked to come up with a test for "territoriality" in a case with transnational elements. In 2005, the Court addressed the question of what constitutes a "domestic" as opposed to an "extraterritorial" application of the wire fraud statute in *Pasquantino v. United States*.[41] That case was a criminal case in which the Court applied a different method of analysis.

In *Pasquantino*, the defendants smuggled large quantities of liquor from the United States into Canada, depriving the Canadian government of excise taxes imposed on imports. The Court took the case to decide whether the defendants' conviction for wire fraud could stand based on issues peculiar to the statute. The question whether this was an extraterritorial application of the wire fraud statute was not pressed or passed upon below and was "raised only as an afterthought in petitioners' reply brief."[42] The Court affirmed the wire fraud convictions and briefly addressed the belatedly raised extraterritoriality claim. It did not apply a presumption against extraterritoriality and did not decide whether the wire fraud statute applied overseas. Instead, the Court determined that this was a domestic, not an extraterritorial, application of the wire fraud statute by using an elements analysis; no inquiry into statutory "focus" was made.

The wire fraud statute has only two elements: a scheme to defraud and an interstate wiring in furtherance of that scheme.[43] It does not require that the scheme be consummated, that a discrete false statement be proven, or that damage to the

38. *Id.* at 261.
39. *Id.* at 265.
40. *Id.* at 266.
41. 544 U.S. 349, 353, 371 (2005).
42. *Id.* at 371 n.12.
43. *See, e.g.*, Pereira v. United States, 347 U.S. 1, 8 (1954).

defendant ensue.[44] The *Pasquantino* scheme was apparently hatched in the United States, and the Court held that the offense "was complete the moment [the defendants] executed the scheme in the United States" through the defendants' domestic use of interstate wires; specifically, their use of the telephone in New York to place orders with liquor stores in Maryland.[45] The Court referred to the defendants' use of U.S. interstate wires—the *actus reus* of the crime—as the "domestic element of [their] conduct [that] the Government is punishing."[46]

Pasquantino exhibited significant transnational circumstances. The victim was a foreign sovereign, the object of the fraud was the Canadian tax revenues due, and the actual fraud concerned misrepresentations made to Canadian officials. But none of these circumstances are elements of the crime. The Court focused on where the elements of the crime occurred, deeming all of them (that is, formation of a scheme to defraud and wirings in furtherance thereof) to have been completed in the United States. Where all the elements of an offense take place in the United States, it will be deemed a domestic application of the statute requiring no further inquiry into the statute's extraterritorial reach.[47]

The *Morrison* Court acknowledged that it "is a rare case of prohibited extraterritorial application that lacks *all* contact with United States territory."[48] In determining what contacts were necessary or sufficient to constitute a domestic invocation of a U.S. statute, however, the *Morrison* Court did not cite or distinguish *Pasquantino* and ignored that case's elements-based approach. Instead, the *Morrison* Court made up, out of whole cloth, a new "focus" test, which asks what conduct is the "object[] of the statute's solicitude," to determine whether a given case involved territorial as opposed to extraterritorial conduct.[49] This test looks to "those transactions that the statute seeks to 'regulate,'" and the parties that the "statute seeks to 'protec[t].'"[50]

The *Morrison* Court identified the "focus" of section 10(b) by looking to statutory text and policy. With respect to text, the Court determined that:

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44. *See, e.g.*, Neder v. United States, 527 U.S. 1, 23–25 (1999) (finding that fraud statutes do not require proof of reliance or damages and that a completed fraud need not be shown); Carpenter v. United States, 484 U.S. 19, 24 (1987) (finding that fraud exists where there is concealment in the face of a duty to disclose).

45. *Pasquantino*, 544 U.S. at 371.

46. *Id.*

47. *See* Eur. Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 142 (2d Cir. 2014) ("If domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States."), *reh'g en banc denied*, 783 F.3d 123 (2d Cir. 2015), *rev'd on other grounds*, 579 U.S. 325 (2016); *see also* Repub. of the Phil. v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988) (analyzing the domestic effects of wire fraud in the RICO context).

48. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).

49. *Id.* at 266–67.

50. *Id.* at 267 (alteration in original) (quoting Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12, 10 (1971)).

> The primacy of the domestic exchange is suggested by the very prologue of the Exchange Act, which sets forth as its object "[t]o provide for the regulation of securities exchanges . . . operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges." We know of no one who thought that the Act was intended to "regulate" *foreign* securities exchanges—or indeed who even believed that under established principles of international law Congress had the power to do so.[51]

With regard to securities not registered on domestic exchanges, the Court concluded that the text of section 30(a) and (b) of the Securities Exchange Act of 1934,[52] as well as the Securities Act of 1933, made clear that Congress's concern was with *transactions* in securities, meaning its "exclusive focus [was] on *domestic* purchases and sales."[53] The Court reasoned that section 10(b) does not "punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'"[54] Thus, the Court concluded, section 10(b) applies "only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities";[55] all other cases constitute improper extraterritorial applications of the statute.

A large number of foreign organizations and governments had filed amicus briefs "complain[ing] of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urg[ing] adoption of a clear test that will avoid that consequence."[56] The Court believed that "[t]he transactional test we have adopted—whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange—meets that requirement."[57] Courts have rationalized the *Morrison* test in part because of its clarity, as it theoretically lends some predictability to the application of U.S. regulations to securities transactions. As one court has since explained:

> *Morrison* makes clear that in overturning a generation of Second Circuit precedent, despite the preeminence of its pedigree and however well-established in its grounding in other circuit case law, the Supreme Court sought to strike at the complexity, vagueness, inconsistency and unpredictability engendered by the conduct and effect analysis in many cases. Instead, as also evident in its majority opinion, the Court manifested an intent to weed the doctrine at its roots and replace it with a new bright-line transactional rule embodying the

51. *Id.* (quoting the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934)).
52. 15 U.S.C. § 78dd(a), (b).
53. *Morrison*, 561 U.S. at 268.
54. *Id.* at 266 (quoting 15 U.S.C. § 78j(b)).
55. *Id.* at 267.
56. *Id.* at 269.
57. *Id.* at 269–70.

> clarity, simplicity, certainty and consistency that the tests from the Second and other circuits lacked.[58]

Finally, the Court rejected the view of the U.S. Solicitor General ("SG") and the SEC that this kind of bright-line "transactional" test would produce "arbitrary results, including denying a Section 10(b) private action even when the fraud was hatched and executed in the United States and the injured investors were in the United States if the transactions induced by fraud were executed abroad."[59] Because *Morrison* was a case that raised the question of how much—or what kind of—"conduct" must occur in the United States, and was not founded on alleged U.S. "effects," the SG focused on the conduct piece of the traditional conduct-and-effects test. But the Court spurned the test suggested by the SG: "[A] transnational securities fraud violates [section] 10(b) when the fraud involves significant conduct in the United States that is material to the fraud's success."[60] The Solicitor General pressed for this standard, which she asserted was in accord with "the approach taken by the SEC in administrative adjudications, and . . . [was] therefore entitled to deference."[61]

The SG contended that:

> [This] standard advances Section 10(b)'s goals of ensuring high ethical standards in the securities industry and protecting investors, and it conserves American judicial and law enforcement resources for regulation of conduct that presents substantial domestic concerns. A more restrictive standard for Section 10(b) coverage would risk permitting the United States to become a base for orchestrating securities fraud for export. That approach would erode ethical standards in the securities industry and undermine investor confidence, and it could lead to diminished protections for United States citizens targeted by foreign fraudsters.[62]

Under this standard, the SG argued, the *Morrison* suit should be dismissed.

The Court explained first that the SG's suggested test had no basis in the statute, concluding that "[i]t is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve."[63] In any case, the Court reasoned, even if one were to consider

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58. Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 624 (S.D.N.Y. 2010) (citation omitted).

59. SEC STUDY, *supra* note 6, at iii.

60. *Morrison*, 561 U.S. at 270.

61. Brief for United States as Amicus Curiae Supporting Respondents at 6–7, *Morrison*, 561 U.S. 247 (No. 08-1191).

62. *Id.* at 6. To further narrow the requisite standard, the SG argued that the causation requirement in private section 10(b) suits should be read to require the plaintiff to prove that his injury "was a direct result of the component fraud that occurred in the United States." *Id.* at 7. The SG argued that this direct-injury requirement would reduce the risk of conflict with foreign regulations and would "alleviate[] the danger that the resources of the United States courts will be diverted to redress harms having only an attenuated connection to this country." *Id.*

63. *Morrison*, 561 U.S. at 270.

the desirable consequences of such a test, one should also be "repulsed by its adverse consequences."[64] The Court was plainly skeptical that American fraudsters were preying on foreign investors, noting without evidence that there "is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets."[65] At the same time, and again without empirical support, the Court seemingly embraced the fear that the United States has become "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[66]

These quotations from Justice Scalia's majority opinion reflect the Court's recent hostility to private anti-fraud enforcement actions. *Morrison*'s analysis, much of it novel, resulted in a profoundly pro-business and anti-accountability decision. The Court's strong—and for the most part outcome-determinative—presumption against extraterritoriality is a relatively recent innovation; it was not the dominant analysis for much of our history.[67] And it is fair to say that the Court had been, until *Morrison*, very inconsistent in invoking such a presumption.[68] The headline to come out of *Morrison* was the Court's use of this reinvigorated presumption to significantly circumscribe the applicability of private U.S. securities fraud remedies.[69]

Although it has received far less scholarly attention, the *Morrison* Court's novel "focus" test likely will be even more consequential in limiting the reach of federal statutes. It, too, narrows the scope of important federal regulatory statutes by allowing courts to isolate one element of a claim as determinative of whether a case with transnational elements may proceed. And it is of critical importance because its application, not the presumption against extraterritoriality, ultimately determines the scope of the statute. As Justice Stevens, concurring in the judgment in *Morrison*, correctly noted, "[t]he real motor of the Court's opinion, it seems, is not the presumption against extraterritoriality but rather the Court's belief that transactions on domestic exchanges are 'the focus of the Exchange Act' and 'the objects of [its] solicitude.'"[70]

The "focus" test is problematic in theory and, as the next section demonstrates, in practice. It was novel and without any precedential support when adopted in *Morrison*.[71] It is also difficult to apply with any objectivity. Legislators are not in

64. *Id*.
65. *Id*.
66. *Id*.
67. *See* O'Sullivan, *supra* note 2, at 1037–48.
68. *See id*. at 1048–52.
69. The use of the presumption has now reverberated far beyond securities fraud cases. This strong presumption has since been used by the Court to find that a number of other consequential statutes—including the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68, and the Alien Tort Statute (ATS), 28 U.S.C. § 1350—have little or no extraterritorial purchase. *See, e.g*., RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016); Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 115–16 (2013).
70. 561 U.S. at 284 (Stevens, J., concurring) (quoting *id*. at 266, 267 (majority opinion)).
71. *See* O'Sullivan, *supra* note 2, at 1059 & n.223.

the habit of identifying the "focus" of an enactment, thus giving license to the courts to pick and choose what constitutes a domestic application of the statute. This difficulty is highlighted by the *Morrison* Court's determination to focus only on transactions, and disregard the fraud, even though the cause of action is *securities fraud*. As Justice Scalia himself argued with respect to the analogous mail fraud statute, "it is mail fraud, not mail and fraud, that incurs liability."[72] Indeed, the primary act outlawed by statute is the unlawful use of any manipulative or deceptive device or contrivance.[73] In criminal law terms, the use of the fraudulent device or contrivance is the *actus reus* of the crime, and the "in connection with the purchase or sale of any security" element might be termed only an attendant circumstance.[74] It is difficult to see, then, why the primary element of the offense should be irrelevant, leaving the site of the transaction to control.

B. The Court's Transactional Test for Domesticity—Transactions Involving "The Purchase or Sale of a Security Listed on an American Stock Exchange, and the Purchase or Sale of any Other Security in the United States"—is Flawed

The *Morrison* Court ultimately held that the only private section 10(b) actions that may be entertained in federal court are those arising out of (1) transactions in securities listed on domestic exchanges, and (2) domestic transactions in other securities.[75] The transactional test was supposed to serve at least three aims: furthering the "focus" or ends Congress was pursuing in enacting the anti-fraud provision; articulating an administrable standard that would yield predictable and consistent results; and ensuring that U.S. securities suits do not interfere with foreign officials' prerogatives in regulating their own markets. At present, it appears that the test fails on all three counts, as the following examination of the caselaw demonstrates.

1. Prong One Is Predictable but Arbitrary in Its Allocation of Causes of Action and Does Not Efficiently Serve Congressional Aims in Securities Regulation

Prong 1 of the *Morrison* transactional test provides that section 10(b) suits based on "transactions in securities listed on domestic exchanges" can proceed. As we shall see, this is the only part of the test that can be said to draw a relatively bright, if not a literal, line.[76] Courts are agreed that the purchase or sale of a security on a

72. Schmuck v. United States, 489 U.S. 705, 723 (1989) (Scalia, J., dissenting).

73. 15 U.S.C. § 78j(b).

74. *See id.*

75. *See Morrison*, 561 U.S. at 267.

76. Although this prong of the test may be capable of consistent application, a number of questions have arisen. One recurring issue is whether a transaction involving a security listed on a "domestic exchange" includes securities traded on domestic over-the-counter ("OTC") markets. *Compare, e.g.*, United States v. Georgiou, 777 F.3d 125, 135 (3d Cir. 2015) (securities traded OTC are not traded on a "national securities exchange" for

foreign exchange is extraterritorial,[77] but the application of this prong is not without controversy.

Most notably, the wording of prong 1 seems to suggest that transactions in securities that are cross-listed on a U.S. and a foreign exchange should be deemed domestic even if the actual transaction was concluded on the foreign exchange. The *Morrison* opinion, readers will recall, says that transactions in securities "listed" on U.S. exchanges are domestic. But the Second Circuit declined to read this language literally in *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*.[78] In that case, a foreign security was cross-listed on the New York Stock Exchange but was purchased on a foreign exchange. The Second Circuit concluded that such a case was not a "domestic transaction" under *Morrison*, even if it did involve "a transaction in a security listed on a domestic exchange."[79] The Second Circuit explained that "*Morrison*'s emphasis on '*transactions* in securities listed on domestic exchanges,' makes clear that the focus of both prongs was domestic transactions of any kind, with the domestic listing acting as a proxy for a domestic transaction."[80] Although most courts have followed the Second Circuit in focusing on where the securities involved were actually bought

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purposes of *Morrison*), *and In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., No. 3:15-md-02672-CRB, 2017 WL 66281, at *4 (N.D. Cal. Jan. 4, 2017), *and In re* Poseidon Concepts Secs. Litig., No. 13-cv-1213 (DLC), 2016 WL 3017395, at *12 (S.D.N.Y. May 24, 2016), *and In re* Petrobras Secs. Litig., 150 F. Supp. 3d 337, 340 (S.D.N.Y. 2015), *with* United States v. Isaacson, 752 F.3d 1291, 1299 (11th Cir. 2014) (noting that OTC markets are "similar to" the NYSE and NASDAQ and thus qualify as domestic securities exchanges). *See also* Stoyas v. Toshiba Corp., 896 F.3d 933, 945 (9th Cir. 2018) (reserving issue); Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 66 n.3 (2d Cir. 2012) (same).

Transactions involving American Depositary Receipts ("ADRs") have also been subject to repeated scrutiny. Courts that have addressed the issue have found that ADRs that are traded on a stock exchange, such as the New York Stock Exchange, are "traded on a domestic exchange" within the meaning of *Morrison*. *See, e.g.*, United States v. Martoma, No. S1 12 Cr. 973(PGG), 2013 WL 6632676, at *3–4 (S.D.N.Y. Dec. 17, 2013); *In re* Vivendi Universal, S.A. Secs. Litig., 765 F. Supp. 2d 512, 527, 532–34 (S.D.N.Y. 2011), *aff'd sub nom. on other grounds*, *In re* Vivendi, S.A. Secs. Litig., 838 F.3d 223 (2d Cir. 2016); *In re* Royal Bank of Scot. Grp. PLC Secs. Litig., 765 F. Supp. 2d 327, 337–38 (S.D.N.Y. 2011); *In re* Elan Corp. Secs. Litig., No. 08 Civ. 8761(AKH), 2011 WL 1442328, at *1 (S.D.N.Y. Mar. 18, 2011); Stackhouse v. Toyota Motor Co., No. CV 10-0922 DSF (AJWx), 2010 WL 3377409, at *2 (C.D. Cal. July 16, 2010). One court has held that transactions in ADRs that trade in the United States on over-the-counter-markets do not qualify as domestic, based on the economic reality that a trade in ADRs is "a predominantly foreign securities transaction." *In re* Société Générale Secs. Litig., No. 08 CV 2495(RMB), 2010 WL 3910286, at *6 (S.D.N.Y. Sept. 29, 2010) (quoting Copeland v. Fortis, 685 F. Supp. 2d 498, 506 (S.D.N.Y. 2010)). Other courts concur that ADRs purchased over the counter do not satisfy the first prong of the *Morrison* test. *See, e.g.*, *Stoyas*, 896 F.3d at 945; *Volkswagen*, 2017 WL 66281, at *3–5.

77. *See, e.g.*, *Vivendi*, 765 F. Supp. 2d at 531; Plumbers' Union Loc. No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 178–79 (S.D.N.Y. 2010); *Société Générale*, 2010 WL 3910286, at *5–6; *In re* Alstom SA Secs. Litig., 741 F. Supp. 2d 469, 471–72 (S.D.N.Y. 2010); Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 625–26 (S.D.N.Y. 2010).

78. 752 F.3d 173 (2d Cir. 2014).

79. *Id.* at 180–81.

80. *Id.* at 180 (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010)).

rather than where they are listed,[81] this reading is not inevitable either under a plain language approach or from a policy perspective.

Looking to the opinion's language, one could argue that the *Morrison* Court, which had already used the word "domestic" twice in articulating its test, could have required "*domestic* transactions in securities listed on domestic exchanges" but chose not to do so. Indeed, Justice Scalia used the phrase "securities listed on domestic exchanges" three times, "which logically implies that he meant what he said."[82]

Commentators have also argued that this is a questionable result in terms of regulatory policy. One amicus argued that "it makes little sense to apply a rule that artificially seeks to sever purchases abroad from purchases within the territorial United States" because securities prices are set by information and trading that "transcends national boundaries," and thus "there is an inherent American interest in ensuring that even foreign purchasers are not defrauded, because the prices they pay for their securities will ultimately impact the prices at which securities are sold in America."[83] Further, according to a letter submitted to the SEC by a group of law professors:

> [A] compelling reason why [foreign] issuers . . . list securities on a U.S. exchange, and voluntarily subject themselves to filing periodic reports with the Commission, is that they increase the value of their securities globally by doing so. Issuers benefit by signaling their intention to comply with, and be subject to, U.S. securities laws.[84]

These professors concluded that because these foreign issuers benefit from their U.S. listing, they should be accountable under U.S. standards regardless of the location of the transaction.[85] Nonetheless, the Second Circuit's rule has taken hold,

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81. *See, e.g.*, *In re* Petrobras Secs., 862 F.3d 250, 262 (2d Cir. 2017), *cert. denied*, 140 S. Ct. 338 (2019); *In re* Satyam Computer Servs. Ltd. Secs. Litig., 915 F Supp. 2d 450, 475 (S.D.N.Y. 2013); *Royal Bank*, 765 F. Supp. 2d at 336; *Vivendi*, 765 F. Supp. 2d at 527–31; *Alstom*, 741 F. Supp. 2d at 471–72; *In re* UBS Secs. Litig., No. 07-11225 (RJS), 2011 WL 4059356, at *4–6 (S.D.N.Y. Sept. 13, 2011*), aff'd sub nom.* City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173 (2d Cir. 2014); Sgalambo v. McKenzie, 739 F. Supp. 2d 453, 487 (S.D.N.Y. 2010); *In re* Celestica Inc. Secs. Litig., No. 07 CV 312(GBD), 2010 WL 4159587, at *1 n.1 (S.D.N.Y. Oct. 14, 2010), *rev'd on other grounds sub nom.* New Orleans Emps. Ret. Sys. v. Celestica, Inc., 455 F. App'x 10 (2d Cir. 2011).

82. Beyea, *supra* note 15, at 563.

83. Brief of Alecta pensionsförsäkring et al. as Amici Curiae Supporting Petitioners at 23–25, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191).

84. Letter from Forty-Two Law Professors to Elizabeth Murphy, Sec'y, Secs. & Exch. Comm'n, at 9 (Feb. 18, 2011) ("Murphy Letter"), https://www.sec.gov/comments/4-617/4617-28.pdf.

85. *Id.*; *see also Vivendi*, 765 F. Supp. 2d at 529 ("When a foreign issuer decides to access U.S. capital markets by [cross-listing on a domestic exchange] . . . , it subjects itself to SEC reporting requirements, and it would not be illogical to subject that company to the antifraud provisions of the Exchange Act at least where there is a sufficient nexus to the United States."); Guseva, *supra* note 15, at 2110 ("When a company cross-lists its securities in the United States, the market reacts positively, in part because cross-listing ordinarily signals firms' reputation, transparency, and commitment to better practices and legal institutions. Not only the market, but also the regulators, equally view cross-listings as a quality signal." (footnote omitted)). *See also generally*

apparently under the assumption that "[o]therwise, Section 10(b) after *Morrison* would have a broader extraterritorial reach than ever before, the exact opposite of what the Supreme Court clearly intended."[86]

One may conclude from the above that prong 1 of the *Morrison* test is, although not issue-free, more manageable than the conduct-and-effects test. But many experts and industry insiders argue that the Court's focus on the site of a given securities transaction will, in an untold number of cases, result in the arbitrary allocation of private rights of action, given the international, wired nature of modern financial markets and the difficulty of identifying the locus of non-exchange transactions.[87] Critics contend that the test is arbitrary in practice and unfairly reflects not investor choice but only market circumstances.[88] As Professor William J. Moon has explained:

> Territorially tethering the scope of domestic statutes is a particularly undesirable method for regulating financial transactions. Given unprecedented capital mobility and the ubiquity of online transactions, private actors can easily shift the locus of their transactions outside the territory of any jurisdiction. When a transaction takes place either in multiple places or electronically, fixing the location of that transaction is bound to result in arbitrary and inconsistent decisions. At worst, it creates loopholes for private actors to opt out of mandatory laws of the United States that are designed to safeguard the general public's interest at large.[89]

Sixty-nine pension funds submitted comments to the SEC in the course of the SEC's congressionally required study on the wisdom of overruling *Morrison* in private securities cases.[90] They argued that:

> "[T]he *Morrison* test fails to recognize the realities of today's modern trading environment, and it is punitive to investors who often do not know whether

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Beyea, *supra* note 15, at 562–70 (discussing *Morrison*'s implications for dual- and cross-listed companies and for U.S. investors purchasing shares in foreign companies).

86. Painter et al., *supra* note 15, at 11.

87. Murphy Letter, *supra* note 84, at 7.

88. Institutional investors have "roundly criticized" *Morrison*, saying that it would require them to "shift their international investments to the US-listed securities of . . . cross-listed firms" in order to preserve their Rule 10-b5 rights. Robert P. Bartlett III, *Do Institutional Investors Value the Rule 10b-5 Right of Action? Evidence from Investors' Trading Behavior following* Morrison v. National Australia Bank, 44 J. LEGAL STUD. 183, 184 (2015). Professor Bartlett asserts that the evidence gathered after *Morrison* came down showed no such effects, suggesting that "the legal right to bring a Rule 10b-5 private right of action plays a remarkably small role in the trading decisions of large institutional investors." *Id.* at 187; *see also* Beyea, *supra* note 15, at 560–61 ("In practice there are many factors besides antifraud protections that dictate where people invest and where issuers choose to sell their securities, including tax considerations, expertise of regulators, reporting requirements, and even simple geography."). Others disagree. *See, e.g.*, Guseva, *supra* note 15, at 2116 ("Researchers disagree whether stock returns, institutional investors' portfolios, share prices, and liquidity of cross-listed shares have been affected by *Morrison*'s pruning of class actions.").

89. William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 50 (2019) (footnotes omitted).

90. *See* SEC STUDY, *supra* note 6, at 42.

> their respective securities transactions were ultimately executed on a U.S. or foreign exchange." As a result, application of the transactional test may deny investors a private right of action under Section 10(b) without the investors having made any decision to forego such a remedy or even having an awareness that a loss of remedy has occurred.[91]

For example, the United States requires brokers to establish a "best execution policy," which ensures that orders for securities are executed "to the best benefit of the client."[92] Thus, with respect to cross-listed securities, brokers will use the exchange that provides clients with the greatest financial advantage. U.S. investors may use U.S. brokers to purchase U.S. listed securities, then, but the trades may be executed on a foreign exchange. Another reason why investors may not know where their transaction is taking place concerns the policy of at least one major U.S. broker-dealer, which dictates that the firm will place an order on the exchange on which a security experiences the greatest trading volume.[93] As the broker-dealer explained to the SEC, the result is that "[i]f purchasers of shares only have a [Section 10(b) private] cause of action if the trade occurs on a U.S. exchange, the purchaser has no idea at the time of purchase whether U.S. law will protect them, and investor protection becomes a random event."[94]

The transactions test cannot efficiently separate those cases that warrant a federal remedy given the locus of the actual fraud, the location of the parties, and the economics of the transaction from those that ought to be left to regulation by foreign actors. This may in many cases lead to regulation by roulette, meaning that regulators with a valid interest in a case may be unable to proceed, and those the test gives primacy will be disinterested in pursuing it. The actual victims may, through the happenstance of execution policies over which they have little control, be foreclosed from any effective remedy either in federal court or in whatever country the "transaction" test identifies.

To the extent that the assignment of causes of actions is even somewhat random given the realities of modern 24-hour online trading, it is impossible to say with any certainty that U.S. persons will invest with confidence in U.S. securities—another paramount congressional goal in securities regulation—because if the transaction is permeated with fraud they may not be able to seek relief in U.S. courts through no fault of their own. This certainly is not what Congress had in mind in attempting a rational system of securities fraud regulation.

Even if the circumstances of modern trading were to prove less problematic than these experts fear, the Court's narrow focus on the site of securities transactions is ill-suited to protect constituencies that are of congressional concern. The Court's rejection of the "effects" test and concern only with the site of the securities

91. *Id.* at 42–43 (quoting Letter from AGEST Superannuation Fund et al.).
92. *Id.* at 43 (same).
93. *Id.* at 44 (quoting Letter from Cal. State Ret. Sys. et al.).
94. *Id.* (alterations in original) (quoting Letter from Cal. State Ret. Sys. et al.).

transaction, for example, means that if a security is purchased on a foreign exchange, no private cause of action can be maintained even if a foreign fraudster solicited the investment in the United States,[95] the buy order was placed in the United States[96] by a U.S. national,[97] through a U.S. broker,[98] the security was issued by a U.S. company or a company regulated by the SEC,[99] or was listed on a domestic U.S. exchange.[100] Certainly, this lack of concern for American victims is inconsistent with the congressional intent manifest in Dodd-Frank, which affirms that Congress wishes the SEC and the DOJ to protect American investors from fraudulent "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[101]

Similarly, by rejecting the "conduct" test, the *Morrison* Court rendered American fraudsters who restrict themselves to foreign exchange transactions and foreign transactions in other securities immune from accountability to their victims. This may well enhance, rather than deter, the export of fraud from America. For example, under *Morrison*, the fact that the fraudulent conduct occurred in the United States is irrelevant.[102] It does not matter if the scheme was hatched and

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95. One district court hinted that a domestic investor's purchase of foreign securities on a foreign exchange may be deemed a "domestic transaction" if the fraudsters intentionally solicited those victims in the United States. *See* Stackhouse v. Toyota Motor Co., No. CV10-0922 DSF (AJWx), 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010). Another district court, however, dismissed this notion on the grounds that *Morrison* did not define a domestic transaction by reference to "the locus of solicitation." Cascade Fund, LLP v. Absolute Cap. Mgmt. Holdings Ltd., No. 08-cv-01381-MSK-CBS, 2011 WL 1211511, at *6 (D. Colo. Mar. 31, 2011). The latter court has the better reading of *Morrison*, given *Morrison*'s rejection of any inquiry into the location of the objectionable conduct in this context. *See* Absolute Activist Value Master Fund Ltd. v. Ficento, 677 F.3d 60, 69 (2d Cir. 2012).

96. *See, e.g.*, Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 177 (S.D.N.Y. 2010) (collecting cases).

97. *See, e.g.*, *In re* Petrobras Secs., 862 F.3d 250, 262 (2d Cir. 2017); *Absolute Activist*, 677 F.3d at 69; Sullivan v. Barclays PLC, No. 13-cv-2811 (PKC), 2017 WL 685570, at *29 (S.D.N.Y. Feb. 21, 2017); *Cascade Fund*, 2011 WL 1211511, at *5; *In re* Vivendi Universal, S.A. Secs. Litig., 765 F. Supp. 2d 512, 522 (S.D.N.Y 2011), *aff'd sub nom. on other grounds*, In re Vivendi, S.A. Secs. Litig., 838 F.3d 223 (2d Cir. 2016); Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 624 (S.D.N.Y. 2010).

98. *Absolute Activist*, 677 F.3d at 68; *Petrobras*, 862 F.3d at 262; *Sullivan*, 2017 WL 685570, at *29. Nor does it matter that the alleged fraud was committed by a U.S. intermediary, such as a broker-dealer. *See, e.g.*, SEC v. Goldman Sachs & Co. 790 F. Supp. 2d 147, 150–51, 158 (S.D.N.Y. 2011).

99. *Absolute Activist*, 677 F.3d at 68; *see also* John C. Coffee, Jr., *What Hath* 'Morrison' *Wrought?*, N.Y. L.J., Sept. 16, 2010 ("*Morrison* . . . will by its terms bar even private actions by American investors who purchase the securities of American issuers on a foreign exchange.").

100. *See, e.g.*, *Petrobras*, 862 F.3d at 262; *In re* Satyam Comput. Servs. Ltd. Secs. Litig., 915 F. Supp. 2d 450, 475 (S.D.N.Y. 2013); *In re* Royal Bank of Scot. Grp. PLC Secs. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011); *Vivendi*, 765 F. Supp. 2d at 527–31; *In re* Alstom SA Secs. Litig., 741 F. Supp. 2d 469, 471–72 (S.D.N.Y. 2010); *In re* UBS Secs. Litig., No. 07-11225, 2011 WL 4059356, at *4–6 (S.D.N.Y. Sept. 13, 2011), *aff'd sub nom.* City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173 (2d Cir. 2014); Sgalambo v. McKenzie, 739 F. Supp. 2d 453, 487 (S.D.N.Y. 2010); *In re* Celestica Inc. Secs. Litig., No. 07-312, 2010 WL 4159587, at *1 n.1 (S.D.N.Y. Oct. 14, 2010), *rev'd on other grounds sub nom.* New Orleans Emps. Ret. Sys. v. Celestica, Inc., 455 F. App'x 10 (2d Cir. 2011).

101. 15 U.S.C. § 78aa(b)(2).

102. The fact that the defendant corporation and the defendant's employees were located in the United States is viewed as "irrelevant." *Absolute Activist*, 677 F.3d at 69–70; *see also* City of Pontiac Policemen's & Firemen's

brought to fruition domestically.[103] And although the *Morrison* Court discounted this concern, this category of cases is not insignificant.[104] As the SEC informed Congress, "[t]o the extent that the *Morrison* decision can be understood to suggest that the perpetration of securities frauds from the United States on investors in other countries is not a significant problem, this view is not supported by … Commission enforcement actions."[105]

Finally, to the extent that prong 1 provides the advantages of a reasonably bright-line—even if arbitrary—rule, it also bears the disadvantages of such rules: those operating in bad faith can easily manipulate their transactions to stay on the impunity side of the rule.[106] This reality seriously undermines another

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Ret. Sys. v. UBS AG, 752 F.3d 173, 181 (2d Cir. 2014); Arco Cap. Corp. v. Deutsche Bank AG, 949 F. Supp. 2d 532, 541 (S.D.N.Y. 2013); *Petrobras*, 862 F.3d at 262; *Cornwell*, 729 F. Supp. 2d at 625–26. The fact that monies were wired to the United States to pay for the fraudulent investment is generally not determinative. *See, e.g.*, MVP Asset Mgmt. (USA) LLC v. Vestbirk, No. 2:10-cv-02483-GEB-CKD, 2012 WL 2873371, at *7 (E.D. Cal. July 12, 2012); *Cascade Fund*, 2011 WL 1211511, at *7. However, the transfer of funds to the United States is the point of irrevocable liability if the contract so provides. *See Arco Cap.*, 949 F. Supp. 2d at 543.

103. *Absolute Activist*, 677 F.3d at 69; *see also Arco Cap.*, 949 F. Supp. 2d at 541 ("While potentially relevant under [the] conduct and effects test, courts have found such pleadings that 'some acts that ultimately result in the execution of the transaction abroad [took] place in the United States amounts to nothing more than the reinstatement of the conducts test.'" (quoting Pope Invs. II, LLC v. Deheng Law Firm, No. 10-cv-6608, 2012 WL 3526621, at *8 (S.D.N.Y. Aug. 15, 2012))); Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., 798 F. Supp. 2d 533, 537 (S.D.N.Y. 2011); SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 158–59 (S.D.N.Y. 2011); *Cornwell*, 729 F. Supp. 2d at 625–26. *See also* United States v. Coffman, 574 F. App'x 541, 557 (6th Cir. 2014) (reserving the issue).

104. *Compare* SEC v. Benger, No. 09 C 670, 2013 WL 593952, at *2, *12–13 (N.D. Ill. Feb. 15, 2013) (a boiler room scheme engineered by an American in the U.S. targeting elderly foreign investors; the investment was only made available to non-U.S. persons, and under the purchase agreement, seller became irrevocably bound only upon acceptance of the offer to purchase, which took place overseas such that there was no "domestic transaction"), *with* United States v. Mandell, 752 F.3d 544, 549 (2d Cir. 2014) (investors in five private placement offerings were required to submit purchase applications and remit payments to the company in the United States; the company had discretion whether to accept the applications, and thus the transactions were "domestic"), *and* SEC v. Yin Nan Michael Wang, No. LA CV13-07553 JAK (SSx), 2015 WL 12656906, at *12 (C.D. Cal. Aug. 18, 2015) (finding "domestic transactions" even though the investment offered by U.S. actors was only available to non-U.S. persons and the subscription agreements were executed abroad, because the seller reserved the right to reject such agreements and thus irrevocable liability was incurred when the contracts were accepted in the United States).

105. SEC STUDY, *supra* note 6, at 26–27 n.97.

106. As Judge Leval has explained, bright-line rules "suffer from serious defects" in that they invite manipulation:

> [A] bright-line rule would perversely offer safe harbors for fraud. Bright-line rules can be highly beneficial in many circumstances, especially those involving good-faith dealings, because they support predictability and permit good-faith enterprises to plan for allocation of risk. But this same quality makes bright-line rules problematic when employed to govern those who operate in bad faith. Bright-line rules (unless seriously over-inclusive) would permit unscrupulous securities dealers to design their transactions with their victims so as to stay on the side of the line that is outside the reach of the statute. Defrauded victim investors would have no recourse to the law Congress passed to secure the integrity of U.S. securities markets. This would defeat the long-standing principle enunciated by the Supreme Court that § 10(b) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes," and to protect against fraudulent practices, which "constantly vary."

congressional aim in securities regulation—the creation of a powerful and credible deterrent against fraud. An exclusive focus on the site of the actual transaction "provid[es] unscrupulous . . . securities dealers with easy options to escape the coverage of the antifraud statute" simply by confining their activities to foreign securities exchanges.[107]

This is a real concern for the investing community: "[I]nvestors in international issuers [c]ould represent a proverbial common pasture where corporate fraudsters could roam free."[108] The SEC, in the course of its study, heard from a number of commentators that the transactional test "provides a clear roadmap for a fraudster seeking to escape private liability under Section 10(b)—i.e., structure the fraud so that even if its genesis, orchestration, and effects occur domestically, the securities transaction occurs outside the United States."[109] As some pension funds argued:

> *Morrison* tossed aside 40 years of time-tested jurisprudence relating to the "conduct and effects test" in favor of a "transactional" standard that looks solely at the locus of the transaction in question. Alarmingly, under *Morrison* it matters not whether the fraud committed is domestic or what the fraud's domestic impact is, but instead depends upon a hyper-technical inquiry that elevates—above all else—the sole fact of where the transaction took place . . . . Through *Morrison*, the Supreme Court has strayed from the securities laws' underpinnings of investor protection and largely denied investors—both domestic and foreign—the protection of the federal securities laws.[110]

2. Prong Two Is Unpredictable and Arbitrary and Does Not Efficiently Serve Congressional Aims in Securities Regulation

If the transaction is not conducted on an exchange, prong 2 of the *Morrison* transaction test—relating to "domestic transactions in other securities"—comes into play. The Court justified its transactional test in part because it provided a "clear test" for avoidance of unwarranted interference with foreign securities regulation.[111] Although prong 1 may be capable of consistent, if potentially arbitrary,

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Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 220–21 (2d Cir. 2014) (Leval, J., concurring) (citations omitted).

107. *Id.* at 218.

108. Guseva, *supra* note 15, at 2110.

109. SEC STUDY, *supra* note 6, at 51.

110. *Id.* (quoting Letter from London Pension Funds et al.); *see also* Hannah L. Buxbaum, *Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 L. & CONTEMP. PROBS. 161, 172 (2011) (arguing that the irrevocable liability test is subject to manipulation by the contracting party and "can be non-transparent to the other party," because "the seller of securities can simply situate itself outside the United States when formally engaging in an act of acceptance, and thereby avoid the application of U.S. law").

111. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269–70 (2010); *see also* Brief of Amici Curiae Law Professors in Support of Respondents at 21, *Morrison*, 561 U.S. 247 (No. 08-1191) (advocating for a bright-line test).

application, the lower courts have struggled mightily to apply the second prong of the Court's "transactions" test to determine whether private securities suits are domestic, and thus can be heard on the merits, or extraterritorial, in which case they may not. Further, although the conduct-and-effects test was fairly and vigorously criticized for its "unpredictable" and "inconsistent" application,[112] the Court's test for what constitutes a "domestic transaction in other securities" is even worse because the test does not turn on any circumstances traditionally relevant to allocations of regulatory responsibility, namely the identity of the perpetrators and victims and the site of the wrongful conduct. Its results turn on how the contract terms—which are not crafted for this purpose—are interpreted. The results of application of this prong, then, are as arbitrary as those flowing from prong 1 and are subject to the same critiques in terms of the goals of securities regulation. The following, although not exhaustive, illustrates the unpredictable nature of the application of prong 2 of the transactional test and demonstrates the disconnect between the results of that test and the legitimate sovereign interests of regulators, including those sitting in Congress.

As the SEC has noted, "[whether] a transaction constitutes a domestic transaction under prong 2 of the transactional test is perhaps one of the most difficult issues that the courts have been dealing with in the wake of *Morrison*."[113] "While *Morrison* holds that § 10(b) can be applied to domestic purchases and sales, it provides little guidance as to what constitutes a domestic purchase and sale."[114] The SEC has concluded that "[a]ll that can conclusively be said thus far is that the lower federal courts' opinions suggest that the 'bright-line' standard that the Supreme Court hoped to set forth in *Morrison* has proven to be a fact-intensive question in the context of off-exchange transactions."[115]

The leading case on this definitional issue is the Second Circuit's decision in *Absolute Activist Value Master Fund Ltd. v. Ficeto*.[116] In that case, the plaintiffs were nine Cayman Islands-based hedge funds that invested in various types of assets on behalf of investors around the world, including in the United States. The funds sued Absolute Capital Managing Holdings Ltd. ("ACM"), which had acted as the funds' investment manager, and principals of a U.S. broker-dealer for fraud under section 10(b). The alleged fraud was a variation of the classic "pump and dump" scheme, causing the funds extensive losses. The complaint alleged that defendants caused the funds to purchase shares of penny stock companies incorporated in the United States in private over-the-counter transactions.[117]

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112. *Morrison*, 561 U.S at 260–61 (collecting sources); *see also* Brief of Amici Curiae Law Professors, *supra* note 111, at 21–23, *Morrison*, 561 U.S. 247 (No. 08-1191) (laying out the deficiencies of the conduct-and-effects test as applied).

113. SEC STUDY, *supra* note 6, at 33.

114. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012).

115. SEC STUDY, *supra* note 6, at 33–34.

116. 677 F.3d 60 (2d Cir. 2012).

117. *Id*. at 63.

In an effort to show that these non-exchange transactions were "domestic" transactions, the plaintiffs alleged that their transactions were carried out through an SEC-registered broker-dealer based in California, that to invest in the plaintiff hedge funds their investors wired money to a New York bank, and that the hedge funds were heavily marketed in the United States and thus American investors were hurt.[118] The transactions at issue were issued by U.S. companies and registered with the SEC.[119] The *Absolute Activist* court decreed that a "domestic transaction" requires that "the 'purchase' and 'sale' take place when the parties become bound to effectuate the transaction," meaning that "irrevocable liability is incurred or title passes within the United States."[120] The court ultimately dismissed the action for failure to state a claim because the complaint lacked allegations suggesting that the parties became irrevocably bound in the United States or that title was transferred domestically.[121]

The First, Third, and Ninth Circuits have used the *Absolute Activist* test[122] but some lower courts have chosen to pursue a different approach—an inquiry into the "economic reality" of the transaction—in a very important class of cases involving such investments as securities-based swap agreements ("SBSs"), contracts for difference ("CFDs"), and equity linked notes ("ELNs").[123] In this class of cases, the transactional inquiry is complicated by the fact that one can focus either on the derivative transaction or "look through" that derivative to the securities that it references. It is in this sphere that lower courts have been willing in some cases to look to the "economic reality" of the transaction and the policy reasons underlying the *Morrison* test rather than focusing solely on technical questions relating to the passing of title or the moment that irrevocable liability is incurred, as counseled by *Absolute Activist*. Despite widespread agreement that this "economic reality" test is inconsistent with *Morrison*'s bright-line transactional test,[124] no circuit has disavowed it.

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118. *Id*. at 63–64, 70.

119. *Id*. at 70.

120. *Id*. at 67.

121. *Id*. at 70.

122. *See* SEC v. Morrone, 997 F.3d 52, 60 (1st Cir. 2021); United States v. Georgiou, 777 F.3d 125, 135–36 (3d Cir. 2015); Stoyas v. Toshiba Corp., 896 F.3d 933, 948–49 (9th Cir. 2018). District courts around the country have applied the *Absolute Activist* formulation. *See, e.g*., SEC v. Battoo, 158 F. Supp. 3d 676, 693 (N.D. Ill. 2016); SEC v. Yin Nan Michael Wang, No. LA CV13-07553 JAK (SSx), 2015 WL 12656906, at *12 (C.D. Cal. Aug. 18, 2015); SEC v. Funinaga, No. 2:13-CV-1658 JCM (CWH), 2014 WL 4977334, at *7–8 (D. Nev. Oct. 3, 2014), *aff'd*, 696 F. App'x 203 (9th Cir. 2017).

123. *See, e.g*., SEC v. Maillard, No. 13-cv-5299 (VEC), 2014 WL 1660024, at *2–3 (S.D.N.Y. Apr. 23, 2014) (CFDs); SEC v. Compania Internacional Financiera S.A., No. 11 Civ. 4904(DLC), 2011 WL 3251813, at *6–7 (S.D.N.Y. July 29, 2011) (CFDs); Elliott Assocs. v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469, 476 (S.D.N.Y.) (SBSs), *aff'd on other grounds sub nom*. Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198 (2d Cir. 2014). Other courts, however, have rejected this approach. *See, e.g*., Wu v. Stomber, 883 F. Supp. 2d 233, 252–53 (D.D.C. 2012), *aff'd on other grounds*, 750 F.3d 944 (D.C. Cir. 2014).

124. *See, e.g*., Christina M. Corcoran, *The Post*-Morrison *Challenge—The Growing Irrelevance of a Transaction-Based Test in an Interconnected World*, 26 N.Y. INT'L L. REV. 77, 89 (2013); Roger W. Kirby, *Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of* Morrison v.

These "economic reality" cases are in the minority, however, and few cases rest on *Absolute Activist*'s inquiry into where "title" passed. The majority of cases litigated under prong 2, then, rest on the question of where the purchase and sale became "irrevocable" under *Absolute Activist*.[125] According to the Second Circuit, irrevocable liability is incurred at "the time when the parties to the transaction are committed to one another," *i.e.*, when "there was a meeting of the minds of the parties; it marks the point at which the parties obligated themselves to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time."[126] The problem courts face is that modern securities transactions are often not completed at one time and at one location.[127] The timing and location at which the sale becomes irrevocable can be particularly difficult to ascertain given the global scope of investing and the ubiquity of online trading.[128] Indeed, "[t]he execution of contracts where two parties physically sit in different cities, states, countries, or continents and exchange a document electronically is now a standard way of doing business."[129]

In the increasingly common case where the parties or the intermediaries are domiciled in different countries and the actions constituting a transaction are scattered, the irrevocable liability inquiry can require a detailed review of the conduct of the transaction and its underlying documentation. This requires as deep a dive into the facts as the conduct-and-effects test necessitated. A wealth of facts "concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money" may be relevant.[130]

In many of these cases courts have delved into the terms of the investment contract to determine the point of irrevocable liability, but with inconsistent results. For example, many contracts specify that the consummation of the transaction is subject to

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National Australia Bank Ltd., 7 HASTINGS BUS. L.J. 223, 252–54 (2011); Thomas J. McCartin, Note, *A Derivative in Need: Rescuing U.S. Security-Based Swaps from the Race to the Bottom*, 81 BROOK. L. REV. 361, 378–82 (2015).

125. 677 F.3d at 68.

126. *Id.* at 67–68 (quoting Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 891 (2d Cir. 1972)).

127. *See, e.g.*, SEC v. Ahmed, 308 F. Supp. 3d 628, 660–61 & n.26 (D. Conn. 2018); SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 154, 158–59 (S.D.N.Y. 2011).

128. *See, e.g.*, Buxbaum, *supra* note 110, at 167–68 ("Determining the location of non-exchange-based transactions has proved quite complicated. Not surprisingly, many investment transactions involve touches with multiple countries or are executed by electronic or other means to which it is difficult to assign a location at all."); *id.* at 173 ("[I]n extending a bright-line test to all forms of investment transactions, the [*Morrison*] Court ignored the substantial variability of such transactions.").

129. Butler v. United States, 992 F. Supp. 2d 165, 178 (E.D.N.Y. 2014).

130. *Absolute Activist*, 677 F.3d at 70; *see also* City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 181 n.33 (2d Cir. 2014) (citing the quoted portion of *Absolute Activist*); Takiguchi v. MRI Int'l, Inc., 47 F. Supp. 3d 1100, 1109–10 (D. Nev. 2014) (examining where investment application and money were received and certificates of investment mailed, noting the Nevada choice of law and forum selection clauses that were part of the contract); SEC v. Benger, No. 09-C-676, 2013 WL 593952, at *9 (N.D. Ill. Feb. 15, 2013) (examining a sale deemed to be foreign that employed US-based escrow agents as intermediaries).

conditions necessary to the closing,[131] such as the approval of government authorities[132] or the clearing and settling of the trade through a trading platform or depositary institution.[133] In examining these contracts for when and where the parties are bound, courts sometimes refuse to consider conditions that are not within the power of either party to control.[134] In other cases, however, courts have chosen to ignore or discount conditions that were within the parties' control.[135] Courts are struggling with the question of what to do when liability is deemed to have become irrevocable at different times for the contractual counterparties because only one party had the power to frustrate the condition precedent to the sale.[136]

Although the courts are attempting to interpret investment contracts, they do not apply choice of law principles to determine which jurisdiction's law ought to prevail when, as is often the case, there is a transborder dispute, nor do courts explore contract law principles in any detail. In fact, it is often a mystery why courts have identified one particular action, out of a transnational series of virtual events necessary to complete a transaction, as the moment when the parties' liability becomes irrevocable.

For example, in *Myun-UK Choi v. Tower Research Capital LLC*,[137] the plaintiffs alleged that defendants, Tower Research Capital LLC ("Tower"), a New York based high-frequency trading firm, injured them by engaging in manipulative "spoofing" transactions on the KRX night market in violation of the Commodity Exchange Act ("CEA"). Plaintiffs, five Korean citizens, transacted on a "night market" of Korea Exchange ("KRX") futures contracts. The KRX is a derivatives and securities exchange headquartered in Busan, South Korea. On the KRX night market, traders enter orders in Korea, when the KRX is closed for business, whereupon their orders are quickly matched with a counterparty by an electronic trading platform called CME Globex located in Aurora, Illinois. The trades are then cleared and settled on the KRX when it opens for business the following morning.

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131. *See, e.g.*, Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 2 F. Supp. 3d 550, 561 (S.D.N.Y. 2014), *aff'd in part, appeal dismissed in part*, 813 F.3d 98 (2d Cir. 2016); Arco Cap. Corps. v. Deutsche Bank AG, 949 F. Supp. 2d 532, 543 (S.D.N.Y. 2013); Liberty Media Corp. v. Vivendi Universal SA, 861 F. Supp. 2d 262, 269 (S.D.N.Y. 2012).

132. *See, e.g.*, Giunta v. Dingman, 893 F.3d 73, 81–82 (2d Cir. 2018).

133. *See, e.g.*, Myun-UK Choi v. Tower Rsch. Cap. LLC, 890 F.3d 60, 66–69 (2d Cir. 2018); *In re* Petrobras Secs., 862 F.3d 250, 272 n.24 (2d Cir. 2017); *In re* Petrobras Secs. Litig., 152 F. Supp. 3d 186, 193 (S.D.N.Y. 2016); *In re* Petrobras Secs. Litig., 150 F. Supp. 3d 337, 341–42 (S.D.N.Y. 2015).

134. *See, e.g.*, *Giunta*, 893 F.3d at 81; *see also Atlantica Holdings*, 2 F. Supp. 3d at 561 ("[A]s a practical matter, Atlantica's and Baltica's liability was irrevocable *by them*, which is sufficient to satisfy the *Absolute Activist* test.").

135. *See, e.g.*, Loginovskaya v. Batratchenko, 764 F.3d 266, 275 (2d Cir. 2014).

136. *See, e.g.,* SEC v. Battoo, 158 F. Supp. 3d 676, 694 (N.D. Ill. 2016); *Atlantica Holdings*, 2 F. Supp. 3d at 561; SEC v. Yin Nan Michael Wang, No. LA CV13-07553 JAK (SSx), 2015 WL 12656906, at *12 (C.D. Cal. Aug. 18, 2015); SEC v. Benger, No. 09 C 676, 2013 WL 593952, at *13 (N.D. Ill. Feb. 15, 2013).

137. 165 F. Supp. 3d 42, 45–46 (S.D.N.Y. 2016), *vacated and remanded,* 890 F.3d 60 (2d Cir. 2018); *see also* Myun-UK Choi v. Tower Rsch. Cap. LLC, 232 F. Supp. 3d 337 (S.D.N.Y. 2017) (ruling on an amended complaint), *vacated and remanded*, 890 F.3d 60 (2d Cir. 2018).

Applying the *Morrison* "domestic transaction" analysis to the CEA, the district court determined that the contracts were not purchased or sold in the United States because the orders needed to "first be placed through the KRX trading system [in Korea]," and because any trades matched on CME Globex in Illinois were final only when settled the following morning in Busan.[138] The Second Circuit reversed, finding "plausible"[139] that irrevocable liability happened in the United States where the trades were "matched" with counterparties even though the trades only took place when they were "cleared and settled" in Korea the next day.[140] The dispute turned on when irrevocable liability kicked in under the rules promulgated by KRX, its website's representations, and other contract issues, not on any factors traditionally relevant to allocation of securities regulatory responsibility—where the harm was perpetrated, the identity of the parties, or where the victims suffered harm.[141]

If this were not complicated enough, the Second Circuit has grafted onto *Morrison*'s transaction inquiry another layer of scrutiny and complexity. In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, the Second Circuit began its analysis with a novel question: "[W]hether, under *Morrison*, a domestic transaction in a security (or a transaction in a domestically listed security)—in addition to being a *necessary* element of a domestic § 10(b) claim—is also *sufficient* to make a particular invocation of § 10(b) appropriately domestic."[142] The Court answered "no," based not on text but on policy:

> [A] rule making the statute applicable whenever the plaintiff's suit is predicated on a domestic transaction, regardless of the foreignness of the facts constituting the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application. It would require courts to apply the statute to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely

138. *Myun-UK Choi*, 165 F. Supp. 3d at 49.

139. Myun-UK Choi v. Tower Rsch. Cap. LLC, 890 F.3d 60, 66 (2d Cir. 2018).

140. *Id*. at 67.

141. Plaintiffs argued that CME Globex comported with the general definition of "exchange" used by the CFTC and various financial publications. The district court, ruling that it was appropriate to use the *Morrison* transactions test in the CEA context, found that CME Globex was not an "exchange" because it was not registered with the CFTC as a domestic contract exchange, rejecting as irrelevant the plaintiffs' assertions that CME Globex was subject to CEA enforcement rules and that the CFTC had in fact subjected conduct on the CME Globex to the CEA. *Myun-UK Choi*, 232 F. Supp. 3d at 340–42. Alternatively, plaintiffs relied on *Morrison*'s second transactional prong, asserting that this transaction had occurred in the United States. The district court also rejected this claim, noting that under KRX rules the trades conducted through CME Globex do not become final until "settled" the next day in Korea. *Id*. at 342. On appeal, the Second Circuit did not feel it necessary to address the question whether CME Global was a domestic exchange under the transaction test's first prong. *Myun-UK Choi*, 890 F.3d at 66. Instead, it ruled that the plaintiffs had plausibly alleged that the transaction was domestic under the transaction test's second prong. *Id*. at 67.

142. Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 214 (2d Cir. 2014).

> unaware of it. Such a rule would inevitably place § 10(b) in conflict with the regulatory laws of other nations.[143]

The Second Circuit's belief that this test is needed to preclude truly "foreign" transactions underscores the extent to which the *Morrison* Court's test is ill-suited for that purpose. The *Parkcentral* court concluded that even if the sales at issue were "domestic transactions" under *Absolute Activist*'s test, the claims were "so predominantly foreign as to be impermissibly extraterritorial."[144]

The Second Circuit's additional, free-form test looks at whether a transaction, despite being "domestic" under *Morrison*, is "predominantly foreign" and thus precluded. The *Parkcentral* opinion makes clear that the court wishes this individualized scrutiny of untoward "foreignness" to be applied in every case in which *Morrison*'s transactional test specifies that a transaction is "domestic."[145] And this is a one-way ratchet. That is, the *Parkcentral* add-on will prevent courts from hearing cases that, while technically concluded in the United States, are in the court's view "predominantly foreign"; it does not serve to preserve private causes of action in cases in which foreign agents actively and fraudulently solicit American investors to participate in foreign funds[146] or protect foreign investors from the machinations of American fraudsters who ensure that their contracts are concluded abroad.[147]

The First and Ninth Circuits have expressly rejected the Second Circuit's approach.[148] As the Ninth Circuit explained:

> [T]he principal reason that we should not follow the *Parkcentral* decision is because it is contrary to Section 10(b) and *Morrison* itself. It carves-out "predominantly foreign" securities fraud claims from Section 10(b)'s ambit, disregarding Section 10(b)'s text: the domestic "purchase or sale of *any* security registered on a national securities exchange or *any* security not so registered." The basis for the carve-out was speculation about Congressional intent, an inquiry *Morrison* rebukes. *Parkcentral*'s test for whether a claim is foreign is an open-ended, under-defined multi-factor test, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a "clear," administrable rule. And *Parkcentral*'s analysis relies heavily on the foreign location of the allegedly deceptive conduct, which *Morrison* held is irrelevant

143. *Id.* at 215.

144. *Parkcentral Glob.*, 763 F.3d at 216. One district court has since applied the *Parkcentral* test to a case involving prong 1 of the transactions test in the context of the Commodities Exchange Act. *See In re* London Silver Fixing, Ltd. Antitrust Litig., 332 F. Supp. 3d 885, 915–19 (S.D.N.Y. 2018).

145. *See id.* at 217.

146. *See, e.g.*, Cascade Fund, LLP v. Absolute Cap. Mgmt. Holdings Ltd., No. 08-cv-01381-MSK-CBS, 2011 WL 1211511, at *6 (S.D.N.Y. Mar. 31, 2011).

147. *See, e.g.*, Loginovskaya v. Batratchenko, 764 F.3d 266, 275 (2d Cir. 2014).

148. *See* SEC v. Morrone, 997 F.3d 52, 60 (1st Cir. 2021); Stoyas v. Toshiba Corp., 896 F.3d 933, 950 (9th Cir. 2018).

> to the Exchange Act's applicability, given Section 10(b)'s exclusive focus on transactions.[149]

The above demonstrates that Prong Two is presently not capable of bright-line and stable application. It also yields results that are arbitrary when viewed in light of rational securities regulation or traditional allocations of sovereign regulatory interests. The terms of the investment contracts that have been read to resolve the question of irrevocable liability were not (at least at this point) drafted with these considerations in mind.

This contract-focused case law has yet to gel into an internally consistent whole under the irrevocable liability test; however, one can anticipate that fraudsters can divine from the case law ways of avoiding private liability for non-exchange transactions. The simplest means is to expressly provide in the investment contract that "irrevocable liability" is dependent on a condition that is engineered to occur overseas. The caselaw indicates, for example, that despite the fact that the U.S. investors are personally solicited, receive documentation, and sign the subscription agreements in the United States, and wire their money to and from U.S. bank accounts, the sellers can escape fraud actions by simply reserving the right to reject the investment contract and ensuring that this ultimate review takes place overseas.[150] In short, "anyone selling complex financial instruments should just insist that buyers complete the transactions out of the borders of the United States. That way, no matter how badly sellers misrepresent the securities, they're protected by the impermeable heat shield the U.S. Supreme Court erected in *Morrison v. National Australia Bank*."[151]

3. The Test's Arbitrary Results Do Not Rationally Allocate Regulatory Responsibility to the Sovereign with the Greatest Interest

The arbitrary results that may flow from application of both prongs of the transactions test likely will not accurately or efficiently allocate regulatory responsibility to those nations with the primary interest in any given transaction. The transactional test, then, is not well-crafted to safeguard one interest that concerned the *Morrison* majority—preventing clashes with foreign regulation of predominantly overseas securities transactions.

First, the test forecloses section 10(b) suits where foreign sovereigns may prefer that the United States take primary regulatory authority. In this regard, it is notable that the *Morrison* Court's response to the importuning of foreign sovereigns was more dramatic than was necessary. Many of the sovereign amici—including

149. *Stoyas*, 896 F.3d at 950 (citations omitted).

150. *See Cascade Fund*, 2011 WL 1211511, at *7.

151. Alison Frankel, Morrison *Strikes Again! Goldman Gets $1 Bl Fraud Case Tossed*, THOMPSON REUTERS NEWS & INSIGHT, July 21, 2011; *see also* Moon, *supra* note 89, at 29 ("In the securities regulation context, the new jurisprudence allows private entities, with essentially a well-drafted contract and incorporation paperwork, to opt out of Section 10(b) even while soliciting U.S. investors within U.S. territory.").

France, Australia, and the United Kingdom—appeared to be objecting only to the type of "foreign cubed" securities suit involved in *Morrison*: Cases involving *foreign* plaintiffs suing *foreign* issuers based on the purchase or sale of securities in *foreign* countries.[152] Forsaking federal regulatory competence over American fraudsters on U.S. soil who victimize investors in foreign securities, as *Morrison* does, likely was not what these sovereigns had in mind. As Judge Friendly observed, "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent securities devices for export, even when they are peddled only to foreigners," because "[t]his country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States."[153] If there were any doubt, Congress clarified in Dodd-Frank that the U.S. government should protect even "foreign investors" from "conduct within the United States that constitutes significant steps in furtherance of the violation."[154]

To the extent that *Morrison* licenses American fraudsters acting on U.S. soil to prey on foreign investors without accountability, it may well create rather than mitigate international discord. This is particularly true given the realities of transnational litigation. It will be difficult and time-consuming for foreign regulators or plaintiffs in foreign suits to gather evidence of the fraud on U.S. soil and, if necessary, secure the presence of the American perpetrators in foreign courts. This lack of recourse may also damage the standing of the United States in investors' minds, result in retaliatory withdrawal of protection to U.S. citizens victimized abroad, and deter foreign investment in the United States.[155] According to one *Morrison* amicus, "[i]f foreign investors believe that they cannot trust the securities issued by corporations with a substantial American presence—because the American portion of the business may not be subject to stringent antifraud regulation—those investors will hesitate to risk their capital on such securities."[156]

The *Morrison* test also permits section 10(b) cases to proceed that have no business being litigated in federal court, as the *Parkcentral* court essentially conceded. In short, the transaction test cannot ensure that foreign sovereigns will alone have jurisdiction over predominantly foreign cases. Except, perhaps, in the Second

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152. *See, e.g.*, Brief for the Government of the Commonwealth of Australia as Amicus Curiae in Support of Defendants-Appellees at 2, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191) ("The Australian Government believes that the broad assertion of jurisdiction to provide civil remedies in national courts for violations allegedly perpetrated by foreign issuers of securities against foreign investors in foreign places is inconsistent with international law and may interfere with the regimes that Australia and other nations have established to regulate companies and protect investors in their markets."); Brief for the Republic of France as Amicus Curiae in Support of Respondents at 1, 3, *Morrison*, 561 U.S. 247 (No. 08-1191); Brief for the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 3, *Morrison*, 561 U.S. 247 (No. 08-1191).

153. IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (Friendly, J.).

154. SEC STUDY, *supra* note 6, at 7.

155. *See id.* at 19.

156. Brief for Amici Curiae Alecta pensionsfösäkring et al. in Support of Petitioners at 34–35, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191).

Circuit after *Parkcentral*, such cases may still be cognizable in district court simply because of the way that the investment contracts are drafted or the deal concluded. For example, in *In re Platinum & Palladium Antitrust Litigation*, the alleged fraud concerned "bids, asks, and trades made by *foreign* employees of mostly *foreign* corporations in a *foreign* auction for a *foreign* physical commodity" but the court found the transactions to be "domestic" because the derivative transactions were concluded in the United States.[157] Similarly, in *Arco Capital Corps. v. Deutsche Bank AG*, the district court found a domestic transaction to be present where a Cayman Islands investor brought an action against a German bank in connection with the investor's acquisition of notes from a Cayman Islands issue.[158] The notes were tied to a bank-originated portfolio of emerging markets investments and derivative transactions. The transaction was found to have occurred in New York because HSB Bank USA was the trustee, and the note subscription agreements executed in the Cayman Islands provided that the delivery of funds to HSBC automatically made the contract irrevocably binding and therefore consummated the transaction.[159]

This disconnect between the results yielded by the transactions test and the allocation of primary regulatory authority over a transaction not only means that foreign sovereigns will be displeased by its results, but also that persons who should have been able to claim section 10(b)'s remedies will be foreclosed from seeking relief. The sovereign amici, along with a variety of foreign industry and finance amici, emphasized the differences in the remedies other nations make available to individual investors in the course of arguing that the U.S. should not displace those sovereign choices in foreign cubed cases.[160] Numerous amici agreed with the sentiment that, "[o]ther nations' . . . strong interest in regulating disclosures by their own issuers" extends "not only to the nature, content, and timing of disclosures, but also to litigation related to disclosures, including the availability of class actions, contingent fees, and other procedures."[161] Among the significant differences are variations in: substantive liability standards; the allocation of regulatory responsibility among public and private actors; discovery practices; the availability of class actions and their mechanics; permissible fee arrangements, financing, and allocation; the availability of jury trials; and damages computations.[162] For example, "European Union officials view the United States' liberal use of contingency

157. No. 1:14-cv-9391-GHW, 2017 WL 1169626, at *27 (S.D.N.Y. Mar. 28, 2017) (quoting complaint).

158. 949 F. Supp. 2d 532 (S.D.N.Y. 2013).

159. *Id.* at 543.

160. *See, e.g.*, Brief for Amici Curiae Institute of International Bankers et al. in Support of Respondents at 17–27, *Morrison*, 561 U.S. 247 (No. 08-1191); Brief of International Chamber of Commerce et al. as Amici Curiae in Support of Respondents at 19–31, *Morrison*, 561 U.S. 247 (No. 08-1191).

161. Brief for the Institute of International Bankers et al., *supra* note 160, at 16–17.

162. *See, e.g.*, Brief for European Aeronautic Defence & Space Co. N.V. et al. as Amici Curiae in Support of Respondents at 13–35, *Morrison*, 561 U.S. 247 (No. 08-1191); Brief for Amici Curiae Securities Industry & Financial Markets Ass'n et al. in Support of Respondents at 6, 16–23, *Morrison*, 561 U.S. 247 (No. 08-1191).

fees, failure to adopt a 'loser pays' rule, and embrace of the 'opt-out' [class action] mechanism as a 'toxic cocktail' [that] should *not* be introduced in Europe."[163]

These choices may argue for deference to foreign sovereigns where the case is indisputably foreign in origin and affect, such as foreign cubed suits. But sovereign policy choices that limit the remedies that Congress and the courts deem appropriate in section 10(b) actions are inappropriately inflicted on American or foreign investors who are, through the vagaries of order execution or contractual language, found not to have identified a cognizable domestic transaction or transacted on a domestic exchange. Foreign regulators or courts may have little interest in such cases; for example, where the victims are American and the operative events happened in the United States, the fact that the transaction alone happened on a foreign exchange is unlikely to excite foreign regulators' interest except in the most high-profile cases. And individual plaintiffs will have a great deal of trouble attempting to secure relief in foreign courts.

To sum up, the above demonstrates that the Court's "transaction" test for sorting domestic from extraterritorial cases is fatally flawed when viewed in light of congressional objectives, the felt need for a bright-line or at least predictable rule, and the efficient allocation of regulatory responsibility for transnational fraud enforcement. As difficult as the conduct-and-effects may have been to apply, this test is even worse in one critical respect. The answer to *Morrison*'s question—"where did the transaction take place?"—carries with it a strong whiff of the arbitrary; the answer may often depend on the vagaries of order execution in a global, wired securities marketplace or upon what an investment contract, drafted for other purposes, identifies as the point the deal became final. These answers do not necessarily have any relationship to regulatory interests. By contrast, for all the many deficiencies of the conduct-and-effects test, at least it is trained on circumstances that traditionally have mattered to sovereigns: that is, the territorial site of the wrongful conduct and its effect on the citizens the sovereigns are charged with protecting.

II. DODD-FRANK SECTION 929P DISPLACES THE TRANSACTIONS TEST IN GOVERNMENT-INITIATED SECTION 10(B) SUITS

The conclusion of Part I's inquiry is certainly relevant to whether Congress ought to revise the *Morrison* transactions test controlling private securities suits. More important for present purposes, however, the test's deficiencies underscore the importance of the question whether Dodd-Frank should be read to replace this analysis with a jurisdictional conduct-and-effects test in government-initiated cases, permitting the DOJ and the SEC to address frauds that section 10(b) private actions should, but after *Morrison* cannot, reach. It is to that question that I now turn.

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163. Brief for Securities Industry & Financial Markets Ass'n et al., *supra* note 162, at 22.

A. Congressional Enactment of Dodd-Frank Section 929P

Morrison involved a private securities lawsuit, and it was not clear whether the Court's sweeping language foreclosed extraterritorial enforcement actions by the SEC and DOJ.[164] Given that the Court's ruling was explicitly based on the language of section 10(b), and that the self-same language undergirds private and public suits, it seemed that the answer must be "yes"—that is, until Congress stepped in.

Section 929P of 2010's Dodd-Frank Act, which the President signed into law shortly after *Morrison* was decided, provides:

> Extraterritorial Jurisdiction. The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving . . . conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or . . . conduct occurring outside the United States that has a foreseeable substantial effect within the United States.[165]

Section 929P appears under the heading "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws" and was inserted into the provision (entitled "Jurisdiction of Offenses and Suits") granting the federal courts subject-matter jurisdiction over section 10(b).[166] Although *Morrison* only dealt with the extraterritoriality of section 10(b) of the Securities and Exchange Act of 1934, Congress chose the Dodd-Frank Act to include identical extraterritorial jurisdictional provisions in section 22 of the Securities Act of 1933[167] and section 214 of the Investment Advisers Act of 1940.[168]

With Dodd-Frank, Congress did not address extraterritorial jurisdiction with respect to securities suits brought by private litigants. Instead, the Act, in section 929Y, directed the SEC to study the extent to which private rights of action under

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164. *See, e.g.*, United States v. Vilar, 729 F.3d 62, 72–74 (2d Cir. 2013) (rejecting the government's argument that *Morrison* only applies to civil suits brought by private plaintiffs and does not apply to criminal cases); *see also* United States v. Isaacson, 752 F.3d 1291, 1299 (11th Cir. 2014) (finding it unnecessary to decide whether *Morrison* applies in criminal cases because the *Morrison* test was satisfied); United States v. Coffman, 574 F. App'x 541, 557 (6th Cir. 2014) (same).

165. Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1865 (2010) (codified at 15 U.S.C. § 78aa); *see also* Tim Bakken, *Dodd-Frank's Caveat Emptor: New Criminal Liability for Individuals and Corporations*, 48 WAKE FOREST L. REV. 1173, 1194–1203 (2013) (discussing Dodd-Frank's apparent reversal of *Morrison*); Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Necessary or Sufficient?*, 1 HARV. BUS. L. REV. 195 (2011) (discussing explanations for and possible effects of Dodd-Frank on the jurisdiction of SEC and DOJ).

166. *See* 15 U.S.C. § 78aa.

167. *See* § 77v(c).

168. *See* § 80b-14(b).

the antifraud provisions of the Exchange Act should be extended extraterritorially.[169] In 2012, the SEC produced a report outlining various options available to Congress, but to date, Congress has not acted on it.[170]

Controversy has arisen over what, if anything, section 929P achieved.[171] Recall that the *Morrison* Court held that the courts clearly had subject-matter jurisdiction over territorial *and* extraterritorial securities law cases under 15 U.S.C. § 78aa (a).[172] Having decided that extraterritoriality was a merits issue in this context, the Court then read the substantive antifraud provision—section 10(b)—as limited to territorial claims and identified territorial claims through its transactional test. Defendants in SEC enforcement actions have therefore argued that, because section 929P relates only to subject-matter jurisdiction, it does not address what constitutes a substantive cause of action under section 10(b).[173] In Dodd-Frank, the language of section 10(b) was not altered. Accordingly, the defendants claim that section 929P simply underscores that the courts have jurisdiction over these cases. It does not reverse the *Morrison* Court's ruling that a section 10(b) case cannot be made out on the merits where extraterritorial applications of the statute are at issue, even in public enforcement suits.

Commentators have posited a number of explanations for Congress's amendment of § 78aa rather than section 10(b),[174] but the lawyer who represented National Australia Bank in *Morrison* has concluded, with many others, that Congress "simply made a mistake" in using jurisdictional language when it actually intended to overturn *Morrison*'s holding on the merits.[175] The question for them, then, is whether courts will be willing to hold that what is clearly a jurisdictional test actually applies to overrule *Morrison*'s limitation on the scope of the

169. Dodd-Frank Act § 929Y, 15 U.S.C. § 78aa.

170. *See* SEC STUDY, *supra* note 6. The SEC did not make a specific recommendation in its report. Commentators have attempted to fill the void. *See, e.g.*, Beyea, *supra* note15, at 560–62 (arguing that while Justice Scalia's rule provides valuable certainty, it ignores "the interconnectedness of the financial markets and resulting interest of governments in pushing fraud, regardless of who is directly harmed," "other factors influencing the choice of law (or here, the selection of a market)," and the fact that defrauded U.S. investors are not always protected by an effective antifraud regime on foreign exchanges); Chaffee, *supra* note 15, at 21; Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173 (2012); Ventoruzzo, *supra* note15, at 439–41. The question whether Congress ought to extend the private right of action extraterritorially, and on what terms, is beyond the scope of this Article.

171. *See* sources cited *supra* note 15.

172. *See supra* notes 10–16 and accompanying text.

173. *See, e.g.*, SEC v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 910 (N.D. Ill. 2013); SEC v. Funinaga, No. 2:13-CV-1658 JCM (CWH), 2014 WL 4977334, at *7 (D. Nev. Oct. 3, 2014), *aff'd*, 696 F. App'x 203 (9th Cir. 2017).

174. *See, e.g.*, Painter, *supra* note 165, at 202–05.

175. *Id.* at 200–02 (arguing that one way to read Dodd-Frank is that "Congress, and the SEC on which Congress relied for drafting advice, simply got it wrong" and that they "simply made a mistake"); *see also* George T. Conway III, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged*, WACHTELL, LIPTON, ROSEN & KATZ (July 21, 2010), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf; sources cited *supra* note 15.

substantive antifraud provision, section 10(b)—a fraught enterprise given that it would mean ignoring the jurisdictional language of the statute in the interest of honoring what is assumed to be Congress's intent in government-initiated cases.

A careful review of the chronology through which section 929P was drafted, considered, and enacted demonstrates that Congress was not reacting to the *Morrison* decision in section 929P. The only relevant alteration of the bill between its initial passage and its final form that can perhaps be attributed to *Morrison* is the addition of section 929Y, which required the SEC to study the question of whether private rights of action should apply extraterritorially. My own conclusion, explained within, is that the better reading of section 929P is that Congress, in SEC and DOJ actions, effectively displaced *all* of *Morrison*—not only its rejection of the conduct-and-effects test for extraterritorial application of the securities laws and its transactional test for territoriality, but also the Court's determination that extraterritoriality is a merits, not a jurisdictional, question in securities cases.

B. Legislative History of Dodd-Frank Section 929P

The Second Circuit applied the conduct-and-effects test in *Morrison v. National Australia Bank*[176] to determine the court's subject-matter jurisdiction, a decision subsequently overturned by the Supreme Court as discussed above. In its decision dated October 23, 2008, the Second Circuit noted that Congress had not addressed the extraterritorial reach of the securities laws and "urge[d] that this significant omission receive the appropriate attention of Congress."[177]

Just under a year later, on October 15, 2009, language akin to that which became law in section 929P was first introduced in section 215 of an earlier bill, the Investor Protection Act of 2009.[178] This Act was designed to "provide the Securities and Exchange Commission with additional authorities to protect investors from violations of the securities laws."[179] At this time, all the courts of appeals treated extraterritoriality as a jurisdictional question and applied some version of a conduct-and-effects test to resolve whether Congress would have wished to regulate a given transnational case. Although all the courts of appeals averred that they were applying a conduct-and-effects test, they had come up with different iterations of the test, some of which were more demanding than others.[180] A House Report provided the following explanation for section 215:

> This section addresses the authority of the SEC and the United States to bring civil and criminal law enforcement proceedings involving transnational securities frauds—i.e., securities frauds in which not all of the fraudulent conduct

176. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 171 (2d Cir. 2008).

177. *Id*. at 170 & n.4.

178. H.R. 3817, 111th Cong. § 215 (2009).

179. SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1290 (D. Utah 2017) (quoting Investor Protection Act § 215), *aff'd sub nom.* SEC v. Scoville, 913 F.3d 1204 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 483 (2019).

180. *See* SEC STUDY, *supra* note 6, at 11.

> occurs within the United States and not all of the wrongdoers are located domestically. Courts have previously ruled that Federal securities laws are silent as to their transnational reach, so two court tests—the conduct test and the effects test—have emerged for making such determinations *and different courts apply different tests. This section would codify the SEC's authority to bring proceedings under both the conduct and the effects tests developed by the courts regardless of the jurisdiction of the proceedings.* As a result, the bill *creates a single national standard for protecting investors affected by transnational frauds.*[181]

Section 215 was entitled "Extraterritorial jurisdiction of the antifraud provisions of the Federal securities laws," and it proposed amendments to the jurisdictional provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisor's Act of 1940 ("IAA"). Section 215 contained the same test for extraterritoriality as that which was finally enacted in section 929P of the Dodd-Frank Act: the district courts were given jurisdiction over "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[182] Section 215 differed from section 929P in one significant respect; although the proposed section 215 covered all securities actions, section 929P, as enacted, only extended its version of the conduct-and-effects test to actions brought by the SEC and the DOJ.[183]

The United States, in its October 27, 2009 brief as amicus curiae, urged the Supreme Court to deny certiorari in *Morrison*, advising the Court of the content of this bill and arguing that "[t]he possibility that Congress may address this issue directly in the relatively near future provides an additional reason for this Court to deny the petition."[184] The U.S. government, in its brief opposing certiorari, also conceded that extraterritoriality was a merits question and not jurisdictional.[185]

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181. H.R. REP. NO. 111-687, at 80 (2010) (emphases added).

182. Investor Protection Act § 215; *accord* Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(b), 15 U.S.C. § 78aa ("The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.").

183. *Compare* Investor Protection Act § 215 (extending the jurisdiction to "all suits in law and equity") *with* Dodd-Frank Act § 929P(b), 15 U.S.C. § 77v(c) (extending jurisdiction only to "action[s] or proceeding[s] brought or instituted by the Commission or the United States").

184. Brief for United States as Amicus Curiae at 6 n.1, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2009 WL 3460235; *see also* Brief of Amici Curiae Law Professors in Support of Respondents, *supra* note 111, at 30 (filed Feb. 26, 2010) (discussing text of H.R. § 4173, 111th Cong., 2d Sess., 7216 (2010)).

185. *See* Brief for the United States as Amicus Curiae, *supra* note 184, at 9.

Despite the government's plea for caution and its concession, the Court granted certiorari in *Morrison* on November 30, 2009.[186]

Section 215 was never considered by the full House; the last action taken on it was its discharge by the House Judiciary Committee on December 17, 2010. But two days after the Court granted certiorari, on December 2, 2009, the Dodd-Frank Wall Street Reform and Consumer Protection Act was introduced in the House as H.R. 4173. The language of section 215 from the earlier failed bill was incorporated into it, verbatim, as section 7216 (which subsequently became section 929P).[187] Section 7216 used the same title, amended the same jurisdictional provisions, and adopted the same test set forth in section 215. As initially introduced, section 7216, like section 215 before it, was not limited to actions by the SEC and the DOJ, but the SEC apparently drafted language limiting this section's scope to government-initiated actions.[188] When the House passed H.R. 4173 nine days later, section 7216 had been amended to limit its applicability to "actions and proceedings brought or instituted by the Commission or the United States."[189] The Senate

186. Morrison v. Nat'l Austl. Bank Ltd., 558 U.S. 1047 (2009).

187. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (2009). It stated in relevant part:

> § 7216. Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws.
>
> (a) Under the Securities Act of 1933—Section 22 of the Securities Act of 1933 (15 U.S.C. 77v(a)) is amended by adding at the end the following new subsection:
>
> "(c) Extraterritorial Jurisdiction—The jurisdiction of the district courts of the United States and the United States courts of any Territory described under subsection (a) includes violations of section 17(a), and all suits in equity and actions at law under that section, involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States."

Identical language was proposed to be added to section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, and section 214 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-14. *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216(a)–(c) (as introduced in the House Dec. 2, 2009).

188. *See* Painter et al., *supra* note 15, at 15.

189. As of December 11, 2009, section 7216, entitled "Extraterritorial jurisdiction of the antifraud provisions of the Federal securities laws," read as follows:

> (a) UNDER THE SECURITIES ACT OF 1933.—Section 22 of the Securities Act of 1933 (15 U.S.C. 77v(a)) is amended by adding at the end the following new subsection:
>
> (c) EXTRATERRITORIAL JURISDICTION.—With respect to any actions or proceedings brought or instituted by the Commission or the United States, this jurisdiction includes violations of section 17(a) of this title, and all suits in equity and actions at law under that section, involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

passed an amended version of the bill six months later, on May 20, 2010, but the Senate's version excluded the language that later became section 929P(b).[190]

In the meantime, on December 8, 2009, the Supreme Court announced its decision in *Union Pacific R.R. Co. v. Locomotive Engineers*.[191] In that case, the Court unanimously affirmed that Congress alone controls statutory jurisdiction, that jurisdictional and merits questions are different, and that jurisdiction may exist even if a statutory claim fails on the merits.[192] Perhaps spurred by this decision, and given that the parties and the U.S. government all seemed to concede that extraterritoriality in the securities fraud context was a merits issue, the *Morrison* petitioners asked the Court to remand without deciding the case on the merits. The Court refused to do so because "nothing in the analysis of the courts below turned on the mistake," and a remand "would only require a new Rule 12(b)(6) label for the same Rule 12 (b)(1) conclusion."[193] Six months later, a congressional conference committee was constituted to reconcile the Senate and House bills,[194] including the fact that "the House had included what eventually became section 929P(b), addressing as a jurisdictional matter the extraterritorial application of the antifraud provisions, while the Senate had removed that proposed amendment."[195] The conference committee charged with reconciling the two bills first met on June 10, 2010 and concluded its work on June 24, 2010, the date that the *Morrison* decision was announced.[196] It was on that date that the Senate members of the conference committee agreed to section 929P(b) and "that evening that Congressman Kanjorski proposed the private study of private rights of actions."[197] On June 29, 2010—five days after *Morrison* was announced—the conferees agreed to file the conference report.

The next day, the House agreed to the conference report. The floor comments made on June 30, 2010, by the statute's sponsor, Representative Paul Kanjorski, indicate that at least some in Congress were aware of the *Morrison* decision and believed that section 929P(b) would overturn the Court's ruling on the territorial reach of the antifraud provisions in government-initiated cases:

> The bill creates a single national standard for protecting investors affected by transnational frauds by codifying the authority to bring proceedings under

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Again, identical language was proposed to be added to section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and section 214 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-14. *See* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. §§ 7216(a)–(c) (as of Dec. 11, 2009).

190. SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1290 (D. Utah 2017), *aff'd sub nom.* SEC v. Scoville, 913 F.3d 1204 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 483 (2019).

191. 558 U.S. 67 (2009).

192. *Id.* at 71, 81–82.

193. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010).

194. *See* SEC v. Scoville, 913 F.3d 1204, 1217 (10th Cir. 2019), *cert. denied*, 149 S. Ct. 483 (2019).

195. *Id.*

196. SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1290–91 (D. Utah 2017), *aff'd sub nom. Scoville*, 913 F.3d 1204.

197. Painter et al., *supra* note 15, at 24.

> both the conduct and the effects tests developed by the courts regardless of the jurisdiction of the proceedings.
>
> In the case of Morrison v. National Australia Bank, the Supreme Court last week held that section 10(b) of the Exchange Act applies only to transactions in securities listed on United States exchanges and transactions in other securities that occur in the United States. In this case, the Court also said that it was applying a presumption against extraterritoriality. This bill's provisions concerning extraterritoriality, however, are intended *to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department*.
>
> *Thus, the purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application*, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States, when the conduct within the United States is significant or when conduct outside the United States has a foreseeable substantial effect within the United States.[198]

The only other mention of section 929P(b) in the Congressional Record was made by Senator Jack Reed on July 15, 2010. Senator Reed explained:

> I am particularly pleased that the conference report contains extraterritoriality language that clarifies that in actions brought by the SEC or the Department of Justice, specified provisions in the securities laws apply if the conduct within the United States is significant, or the external U.S. conduct has a foreseeable substantial effect within our country, whether or not the securities are traded on a domestic exchange or the transactions occur in the United States.[199]

On the same date, the Senate agreed to the conference report. And on July 21, 2010, Dodd-Frank became effective with the President's signature.[200]

This chronology reveals that section 929P's title, geographical test, placement in the relevant jurisdictional provisions, *and* limitation to SEC and DOJ actions were not affected by *Morrison* and in fact predated that decision by six months. The only action Congress took in response to *Morrison* was to insert a new section 929Y, requiring the SEC "to conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Exchange Act" should be extended to cover extraterritorial conduct.[201]

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198. 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski) (emphasis added).

199. 156 CONG. REC. S5915–16 (daily ed. July 15, 2010) (statement of Sen. Reed).

200. *Traffic Monsoon*, 245 F. Supp. 3d at 1291.

201. Dodd-Frank Wall Street & Consumer Protection Act of 2009, Pub. L. No. 111-203, § 929Y, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78aa). "Section 929Y of the Dodd-Frank Act directed the Commission to solicit public comment and then conduct a study to consider the extension of the cross-border scope of private actions in a similar fashion, or in some narrower manner[, to 929P(b)]. Additionally, Section

C. Implications of Legislative History: Dodd-Frank Section 929P is Jurisdictional in Government-Initiated Cases

We start with the question upon which the controversy has thus far centered: is section 929P a jurisdictional provision or does it affect the territorial reach of section 10(b) on the merits? Although I do not believe they are correct to do so, most who have engaged this issue believe that the extent to which section 929P overrules *Morrison* in SEC and DOJ cases turns on whether or not section 929P is treated as "jurisdictional."[202] Many also appear to agree that if it is jurisdictional, the amendment is simply superfluous, and that Congress left *Morrison*'s merits-based limit on extraterritorial application of section 10(b) unchanged.[203] Only when courts are willing to treat the jurisdictional language as a gloss on section 10 (b) does the conduct-and-effects test control.

To begin with what is clear, Congress obviously has the power to determine the jurisdiction of the federal courts.[204] "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[205] "As in any statutory construction case, '[w]e start, of course, with the statutory text,' and proceed from the understanding that '[u] nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'"[206] "Here, the plain language of Section 929P(b) is clear on its face. Specifically, the provision uses the word 'jurisdiction,' and it appears in the jurisdictional portions of the Exchange Act."[207]

The Court's decision in *Arbaugh v. Y&H Corp*., the principal case relied upon for guidance when a statutory condition is deemed jurisdictional, reinforces this plain language conclusion.[208] Following *Arbaugh*, the Court is likely to simply look at the language of section 929P(b) of the Dodd Frank Act, as well as Congress's placement of that section in the relevant jurisdictional provisions of the law, and conclude that the section is in fact jurisdictional and does not alter section 10(b).

In *Arbaugh*, the Court instructed that where Congress has provided a general grant of jurisdiction, for example federal "arising under" jurisdiction under 28 U.S.C. § 1331, and a more specific jurisdictional provision in the statute under which the

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929Y provided that the study shall consider and analyze the potential implications on international comity and potential economic costs and benefits of extending the cross-border scope of private actions." SEC STUDY, *supra* note 6, at i.

202. *See, e.g*., SEC v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 910 (N.D. Ill. 2013); *see also* sources cited *supra* note 15.

203. *See A Chi. Convention Ctr*., 961 F. Supp. at 910, 913–14; *see also* sources cited *supra* note 15

204. U.S. CONST. art. III, § 1; *see also, e.g*., Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

205. Bowles v. Russell, 551 U.S. 205, 212–13 (2007).

206. Sebelius v. Cloer, 569 U.S. 369, 376 (2013) (alterations in original) (quoting BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006)).

207. *A Chi. Convention Ctr*., 961 F. Supp. 2d at 912.

208. 546 U.S. 500 (2006).

case "arises," the more specific grant language controls.[209] The *Arbaugh* Court was faced with the question of the proper classification of Title VII's statutory limitation of covered employers to those with fifteen or more employees. The suit at issue in *Arbaugh* had gone through discovery and trial and had resulted in a verdict for the plaintiff on her claim of sexual harassment.[210] After the entry of judgment, the defendant asserted, for the first time, that the employee-numerosity requirement had not been met. The district and circuit courts determined that this issue was jurisdictional, and not waivable, and thus vacated the judgment. The Supreme Court reversed, relying on fact that the numerosity requirement was not included within the jurisdictional provision of Title VII and instead appeared in a separate provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."[211]

Citing the lack of a clear statutory statement that the requirement was jurisdictional, and the "unfair[ness]" and "waste of judicial resources" that would result from treating the fifteen-employee threshold as non-waivable, the Court deemed it appropriate to read the issue as a merits question, "leav[ing] the ball in Congress' court."[212] The Court's reasoning seems to establish a soft presumption against treating threshold elements as jurisdictional:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[213]

If such a presumption exists,[214] it is rebutted in the case of the extraterritorial application of section 10(b). Unlike the provision at issue in *Arbaugh*, section 929P clearly states that the extraterritoriality question is jurisdictional and amends the jurisdictional sections of the securities statutes. In short, if this does not satisfy the *Arbaugh* test, it is difficult to see what would.

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209. *See id*. at 506, 513–14; *see also Kontrick*, 540 U.S. at 456 (distinguishing between jurisdictional and "claim-processing" rules); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393–94 (1982) (distinguishing between jurisdictional and timely filing rules).

210. 546 U.S. at 503–04.

211. *Id*. at 515 (quoting *Zipes*, 455 U.S. at 394).

212. *Id*.

213. *Id*. at 515–16 (footnote and citation omitted).

214. In its subsequent decision in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), the Court did not reference this presumption.

D. Dodd-Frank Section 929P Provides for a Jurisdictional Conduct-and-Effects Extraterritoriality Test in Government Actions but No Extraterritorial Jurisdiction in Private Actions

The remaining question is the critical one: did Congress, by enacting this jurisdictional requirement in SEC and DOJ cases, add a jurisdictional conduct-and-effects test in government-initiated cases but, by failing to amend the substantive antifraud provisions, leave in place *Morrison*'s dictate that such provisions apply only to "domestic transactions" in public and private cases—that is, is section 929P a nullity for practical purposes? Or should section 929P be read to effectively amend section 10(b) in government cases?

These are the options presented by the parties in ongoing litigation regarding the effect of section 929P because the litigants—and the courts—thus far treat *Morrison* as the baseline against which to measure the effect of section 929P(b). That is, they presume, based on *Morrison*'s holding, that Congress acted with an understanding that extraterritoriality is a merits question and that section 10(b) has no extraterritorial purchase because the *Morrison* Court so held. Again, the fact that Congress embodied the conduct-and-effects test in a jurisdictional provision in section 929P(b) is viewed as a problem, an error, evidence that the section was incorrectly drafted.[215] In the interest of completeness, I will recount and analyze these arguments in Part II.D.1 below. I believe that if the Court were to adopt this framing of the question, the government is likely to lose. As discussed above, section 929P(b) is clearly "jurisdictional" under Supreme Court precedent, and the Court is likely to use a presumption against extraterritoriality that will dictate, under a *Morrison*-centered analysis, that Congress was not successful in enlarging the scope of section 10(b).

I believe that this *Morrison*-focused approach is incorrect, however, as I will discuss in Part II.D.2. What the above framing misses is the fact that Congress has the power to take what otherwise would be an element of a violation and make it jurisdictional[216]—and presumably, in so doing, to overrule a Supreme Court interpretation of the statute that contravenes its wishes. The question is whether the Court will conclude that Congress did so in this case. The plain language of the statute certainly indicates that this is what Congress did. This reading is also consistent with the Court's canons of construction—including the presumption against extraterritoriality—and avoids some of the obvious pitfalls of the approach described in Part II.C.

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215. *See, e.g.*, Joshua L. Boehm, *Private Securities Fraud Litigation After* Morrison v. National Australia Bank: *Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT'L L.J. 249, 261 (2012) (suggesting that "the phrasing of Section 929P(b) is erroneous"); Beyea, *supra* note 15, at 573 (noting that Dodd-Frank's drafting was "less than meticulous"); Rocks, *supra* note 15, at 188, 192 (arguing that the language of section 929P(b) "seemingly fails to capture the drafters' intent" and was the result of a "drafting error").

216. *Arbaugh*, 546 U.S. at 514–15 ("Of course, Congress could make the employee-numerosity requirement 'jurisdictional,' just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332.").

Most fundamentally, this approach appropriately focuses on Congress, not the Court. The *Morrison* decision reflected the Court's best *guess*, in the face of congressional silence, about Congress's intent regarding the extraterritorial reach of the securities fraud laws. The Court granted certiorari in *Morrison* despite its awareness that Congress, perhaps in response to the Second Circuit's plea for clarification in *Morrison*, was already working on making its intention manifest. The question, then, should not be whether Congress intended to overrule *Morrison*—as though the Court and not Congress is the bellwether. The question, rather, is whether the Court's presumptions—against extraterritoriality and against presuming that this question goes to jurisdiction—and its focus test led it astray in projecting congressional intent. Section 929P demonstrates that the Court simply guessed wrong in *Morrison* with respect to government-initiated cases; in section 929P(b) Congress clearly endorsed the approach that all the circuit courts had been taking for forty years in treating the cross-border application of the securities laws as a jurisdictional question to be resolved through the conduct-and-effects test.[217]

1. Did This Jurisdictional Provision Amend the Substantive Reach of Section 10(b)? (No)

Those arguing that section 929P was ineffective in replacing the Court's transactions test with the conduct-and-effects test in government-initiated cases rely on the "foundational principles of statutory interpretation providing that a statute should be interpreted according to its plain terms."[218] They claim that no resort to legislative history or other interpretive aids is necessary where, as here, the statutory language is clear.[219] In sum, "Dodd-Frank amended only the jurisdictional provision of the ['33 and '34 Securities Acts] . . . provisions that, under *Morrison*, posed no obstacle to adjudication of extraterritorial conduct. Dodd-Frank did not amend the relevant antifraud provisions - provisions that, under *Morrison*, are the obstacle[s] to any claim based on extraterritorial conduct."[220] In addition to this plain language appeal, the primary argument of those in this camp is that courts must employ the *Morrison* presumption against extraterritoriality as an interpretive aid, thus putting a very heavy burden on the government to demonstrate that Congress actually intended to extend the extraterritorial reach of section 10(b) despite the "jurisdictional" label and statutory placement of section 929P(b).[221]

Two additional arguments support this position. First, if the government has its way, the substantive language of section 10(b) would have different meanings

217. *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir.), *modified on other grounds en banc*, 405 F.2d 215, 217 (2d Cir. 1968); Painter et al., *supra* note 15, at 3.

218. Petition for Writ of Certiorari at 12–14, Scoville v. SEC, 140 S. Ct. 483 (2019) (No. 18-1566), 2019 WL 2577758; *see also id.* at 18–20.

219. *Id.* at 19–20.

220. *Id.* at 12; *see also* Appellant's Opening Brief at 35, SEC v. Traffic Monsoon, LLC, 913 F.3d 1204 (10th Cir. 2019) (17-4059), 2017 WL 4073923.

221. Petition for Writ of Certiorari, *supra* note 218, at 12–14.

depending on the author of the suit—something that the Supreme Court generally does not countenance. And second, Congress amended the jurisdictional provision of three statutes in Dodd-Frank: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisor's Act of 1940. Accordingly, recategorizing jurisdictional changes as substantive amendments, which is how defendants characterize the SEC's position, would mean that courts must now construe "substantive provisions of three complex statues . . . as having been amended to incorporate the conduct and effects test used in the court of appeals prior to *Morrison* whenever an action is brought by the SEC or DOJ."[222] The position of those who would read Dodd-Frank's effect to be negligible has force: the plain language of the amendment is clearly jurisdictional[223] and, at least in some contexts, the Court has frowned on reference to legislative history in the absence of ambiguity.[224] Although the legislative history timeline traced above certainly argues otherwise, the Court does generally assume "that Congress is aware of existing law when it passes legislation,"[225] an assumption borne out at least by Rep. Kanjorski's remarks. If that assumption is applied in this context the Court may conclude that Congress elected to leave untouched *Morrison*'s "domestic transaction" limitation on the substantive reach of section 10(b). The remarks of Rep. Kanjorski are probative, but they "may not have accurately represented the intent of Congress as a whole."[226] And the Supreme Court has made clear that "the views of a single legislator, even a bill's sponsor, are not controlling."[227] Finally, in the past the Supreme Court has applied the presumption against extraterritoriality in construing a congressional attempt to overrule a prior decision limiting a statute's extraterritorial reach.[228] Were the presumption to apply, the government would then bear a heavy

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222. Painter, *supra* note 165, at 206.

223. *See, e.g.*, United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (alteration in original)); Caminetti v. United States, 242 U.S. 470, 485 (1917) (noting that where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms").

224. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 254 (2010) (Scalia, J., concurring in part) ("[The Supreme Court's] cases have said that legislative history is irrelevant when the statutory text is clear."); United States v. Gonzalez, 520 U.S. 1, 6 (1997) (noting that the Court has "no reason to resort to legislative history" when faced with a "straightforward statutory command"). As the Supreme Court explained in *Connecticut National Bank v. Germain*,

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

503 U.S. 249, 253–54 (1992) (citations omitted).

225. Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

226. SEC v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 915 (N.D. Ill. 2013).

227. Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 385 (2012).

228. In *Deepsouth Packing Co. v. Laitram Corp.*, the Court held that although Deepsouth was barred by a competitor's patent from making and selling the patented machine in the United States, it could make parts of the

burden of showing that Congress intended its "jurisdictional" test to amend section 10(b)—something that is unlikely to be able to do on this record.

The SEC has a strong practical counterargument. If section 929P is read to only impose upon the DOJ and SEC a new jurisdictional hurdle, leaving the Court's determination of the limited extraterritorial reach of section 10(b) intact, it would render section 929P(b) "a nullity."[229] As the *Morrison* Court recognized, the DOJ and SEC already had jurisdiction over securities cases;[230] the question was whether section 10(b) had extraterritorial application. There is little legislative history upon which to rely in attempting to discern what Congress intended to do, but one must assume it meant to do *something* to ensure, in SEC and DOJ enforcement actions, that the conduct-and-effects test for extraterritoriality controls.

> Specifically, the SEC argues that it would be illogical to assume that Congress enacted Section 929P(b) to confer subject-matter jurisdiction over SEC enforcement cases involving foreign securities transactions and foreign investors (jurisdiction it possessed *before* passage of the Dodd-Frank Act), only to dismiss all such enforcement cases for failure to state a claim under *Morrison*'s domestic transaction requirement.[231]

In support of this argument, the government relies on the "cardinal principle of statutory construction"[232] that courts have a "duty 'to give effect, if possible, to every clause and word of a statute.'"[233] Certainly courts should not read a statutory

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machine in the United States and sell them to foreign buyers for assembly and use abroad. 406 U.S. 518, 529–31 (1972). Because the patent law of the United States does not apply extraterritorially, the Court reasoned, it was not an infringement on the patent to make or use the patented machine outside the United States. *Id*. at 531. The parts of the machine were not themselves patented and hence the unassembled export of those parts also did not constitute an infringement. Congress responded by enacting 35 U.S.C. § 271(f), which expanded the definition of infringement to include supplying from the United States a patented invention's components. *Id*. In *Microsoft Corp. v. AT&T Corp*., however, the Court employed the presumption against extraterritoriality to read narrowly the overruling statute, explaining that "'the presumption is not defeated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application'; it remains instructive in determining the *extent* of the statutory exception." 550 U.S. 437, 455–456 (2007) (quoting Smith v. United States, 507 U.S. 197, 204 (1993)).

229. SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1293 (D. Utah 2017), *aff'd sub nom.* SEC v. Scoville, 913 F.3d 1204 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 843 (2019); *see also A Chi. Convention Ctr*., 961 F. Supp. 2d at 913 ("[I]f Section 929(b) is purely jurisdictional, it would be redundant and superfluous because other provisions in the 'Jurisdiction of offenses and suits' section already granted federal courts extraterritorial jurisdiction."); Painter et al., *supra* note 15, at 20 ("There is no alternative explanation for what Congress intended to do in these provisions of the Dodd-Frank Act. Congress wanted the SEC and DOJ to be able to bring suits in certain circumstances and described those circumstances in Dodd-Frank. Congress could not possibly have intended only to give federal courts jurisdiction over SEC and DOJ cases simply for the purpose of dismissing those cases on the merits. Congress intended to change the law (or at least change judicial interpretation of prior law).").

230. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (asserting that "[t]he District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to National's conduct").

231. *A. Chi Convention Ctr*., 961 F. Supp. 2d at 916 (internal quotation marks and citation omitted).

232. Williams v. Taylor, 529 U.S. 362, 404 (2000) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)).

233. *Menasche*, 348 U.S. at 538–39 (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995) (articulating the Court's

provision so as to render it "insignificant, if not wholly superfluous."[234] "Interpreting Section 929P(b) as jurisdictional, rather than as a partial refutation of *Morrison*, may, therefore, run contrary to a cardinal principle of statutory construction to avoid superfluous portions of statutes."[235] These rules apply with special force where, as here, the jurisdictional provision "occupies so pivotal a place in the statutory scheme."[236]

The government's response to the plain language argument that section 929P is clearly jurisdictional and does not affect the *Morrison* Court's limitations on the substantive scope of section 10(b) is to largely ignore the jurisdictional nature of the amendment. The government instead focuses on the contention that section 929P rebutted the presumption applied in *Morrison* and, in so doing, impliedly returned the law to its pre-*Morrison* status. The U.S. government argues that the *Morrison* Court did not find that the plain language of section 10(b) forbade transnational application; its holding was the result of a presumption.[237] Congress, attempting to incorporate the conduct-and-effects test that controlled pre-*Morrison*, understandably put the test in the jurisdictional section because that is what the courts of appeals had done for decades and section 929P was crafted before the *Morrison* decision was announced. What is important from the government's perspective, then, is not section 929P's placement in the jurisdictional section, but rather the evidence it provides of a congressional intent to apply the conduct-and-effects test in government-initiated cases.[238] By doing so, Congress clearly rebutted the presumption the Court had applied to section 10(b) and revived the courts of appeals' treatment of transnational government-initiated cases, although the limitation that the Court read into section 10(b) in civil cases still controls.[239]

Finally, the rebuttal of those who argue that *Morrison*'s test still controls is that "superfluity" is no warrant to rewrite the plain language of a statute.[240] In

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"reluctance to treat statutory terms as surplusage"); Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994) (noting that "[j]udges should hesitate" to treat statutory terms as "surplusage"); Market Co. v. Hoffman, 101 U.S. 112, 115–16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

234. Duncan v. Walker, 533 U.S. 167, 174 (2001); *see also* TRW, Inc. v. Andrews, 534 U.S. 19, 29 (2001) (rejecting reading that would "in practical effect render [an] exception entirely superfluous in all but the most unusual circumstances").

235. *A Chi. Convention Ctr.*, 961 F. Supp. 2d at 913.

236. *Duncan*, 533 U.S. at 168; *see also Ratzlaf*, 510 U.S. at 140–41 (stating that the rule should apply with special force when an element of a criminal violation is at issue).

237. *See, e.g.*, Brief of the Securities & Exchange Commission at 48, SEC v. Scoville, 913 F.3d 1204 (10th Cir. 2019) (No. 17-4059), 2017 WL 4684491; Brief for the Respondent in Opposition to Petition for Certiorari at 16–17, Scoville v. SEC, 140 S. Ct. 483 (2019) (No. 18-1566), 2019 WL 4598221.

238. Brief of the Securities & Exchange Commission, *supra* note 237, at 48–49; Brief for the Respondent in Opposition to Petition for Certiorari, *supra* note 237, at 16–17.

239. Brief of the Securities & Exchange Commission, *supra* note 237, at 49 & n.9; Brief for the Respondent in Opposition to Petition for Certiorari, *supra* note 237, at 16–17.

240. Petition for Writ of Certiorari, *supra* note 218, at 21–22.

particular, they contend that the Court should conclude, as it has in cases past, that "[i]t is beyond [the Court's] province to rescue Congress from its drafting errors, and to provide for what [the Court] might think . . . is the preferred result."[241]

Most courts, while noting this "complex interpretation question," have found it unnecessary to decide what effect, if any, section 929P had on *Morrison*; instead, the courts have generally resolved their cases by determining that the SEC had stated a case whether the court used section 929P's standard or *Morrison*'s transactional test.[242] A number of courts have applied the *Morrison* test in criminal cases without mention of the Dodd-Frank amendment.[243] In only one case, *SEC v. Scoville*, has a circuit court actually decided the issue, holding that the "antifraud provisions of the federal securities laws reach [the defendants'] sales to customers outside the United States because, applying the conduct-and-effects test added to the federal securities laws by the 2010 Dodd-Frank Act, [the defendant corporation] undertook significant conduct in the United States to make those sales to persons abroad."[244]

Scoville involved a revenue-sharing advertising company that operated a web traffic exchange as a worldwide Ponzi scheme. The defendant, Charles Scoville, operated the internet traffic exchange business through his Utah company, Traffic Monsoon, LLC. Scoville was the sole member, employee, manager, and registered agent of Traffic Monsoon and operated the business from his Utah apartment. The company contracted with a Russian computer programmer and several call centers

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241. Lamie v. United States Tr., 540 U.S. 526, 542 (2004) (quoting United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) (last alteration in original)).

242. *See, e.g.*, SEC v. Sabrdaran, 252 F. Supp. 3d 866, 895 n.6 (N.D. Cal. 2017); SEC v. Brown, No. 14 C 6130, 2015 WL 1010510, at *4–5 (N.D. Ill. Mar. 4, 2015); SEC v. Sabrdaran, No. 14-cv-04825-JSC, 2015 WL 901352, at *12–14 (N.D. Cal. Mar. 2, 2015); SEC v. Funinaga, No. 2:13-CV-1658 JCM (CWH), 2014 WL 4977334, at *7–8 (D. Nev. Oct. 3, 2014), *aff'd*, 696 F. App'x 203 (9th Cir. 2017); SEC v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 916–17 (N.D. Ill. 2013); *see also generally* SEC v. Battoo, 158 F. Supp. 3d 676, 692–93 & n.12 (N.D. Ill. 2016) (noting the controversy but concluding that it need not be addressed because Section 929P(b) does not apply retroactively); SEC v. Gruss, 859 F. Supp. 2d 653, 664, 666 (S.D.N.Y. 2012) (using Dodd-Frank amendment as an aid in interpreting the extraterritoriality of the Investment Advisor's Act; allegations would satisfy the conducts and effects test if it applies). *But see* SEC v. Montano, No. 6:18-cv-1606-GAP-GJK, 2020 WL 5887648, at *4 (M.D. Fla. Oct. 5, 2020) (using Dodd-Frank amendment to decide that territoriality existed).

243. *See, e.g.*, United States v. Georgiou, 777 F.3d 125 (3d Cir. 2015); United States v. Isaacson, 752 F.3d 1291 (11th Cir. 2014); United States v. Mandell, 752 F.3d 544, 548 (2d Cir. 2014) (per curiam); United States v. Vilar, 729 F.3d 62 (2d Cir. 2013); Butler v. United States, 992 F. Supp. 2d 165 (E.D.N.Y. 2014).

244. SEC v. Scoville, 913 F.3d 1204, 1209 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 483 (2019) (No. 18-1566). Recently the First Circuit, without discussion and relying only on *Scoville*, mentioned in a footnote that "*Morrison*'s transactional test only governs conduct occurring before July 22, 2010. Shortly after *Morrison* was decided, Congress amended the federal securities laws to 'apply extraterritorially when the [newly added] statutory conduct-and-effects test is satisfied.'" SEC v. Morrone, 997 F.3d 52, 60 n.7 (1st Cir. 2021) (quoting *Scoville*, 913 F.3d at 1218. This language was dicta, however, because the court actually applied the *Morrison* transactions test to resolve the question. *See id.* at 59–61. A Florida district court likewise applied the Dodd-Frank standard in reliance on *Scoville*. *See* SEC v. Montano, No. 6:18-cv-1606-Orl-31GJK, 2020 WL 5534653, at *7 (M.D. Fla. July 24, 2020), *aff'd*, *Montano*, 2020 WL 5887648, at *4. The Magistrate Judge who initially heard the case relied on the amendment despite the defendant's claim that "*Scoville* 'is not long for this world.'" *Id.*

to respond to telephone inquiries from customers. The servers from which the website operated were physically located in the United States.[245] Customers wishing to participate had to become members of the website and then purchase through the website various advertising services. Ninety percent of Traffic Monsoon's customers lived outside the United States.[246] There is some question whether *Morrison*'s transactional test would have been satisfied in this case; the majority evidently assumed that the *Morrison* test would not have been met while a concurring opinion argued that the SEC had demonstrated that the transactions at issue were domestic.[247]

The Tenth Circuit focused on what it believed to be the congressional intent to codify the conduct-and-effects test, ignoring the actual language of the statute. It concluded that "[n]otwithstanding the placement of the Dodd-Frank amendments in the jurisdictional provisions of the securities acts," the "context and historical background surrounding Congress's enactment of those amendments" made clear that Congress had "undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statute['s] conduct-and-effects test is satisfied" in a government-initiated case.[248]

In support of its holding, the Tenth Circuit first asserted that:

> Although courts generally presume that Congress is familiar with the precedents of the Supreme Court when it enacts legislation, the close proximity between the date when *Morrison* was issued and the date when the language of Dodd-Frank was finalized, greatly undermines this presumption. It strains credulity to assume that legislators read *Morrison* on the last day that they met to negotiate the final version of a massive 850-page omnibus bill designed to overhaul large swaths of the United States financial regulations and consciously chose to enact Section 929P(b) against the background of the fundamental shift in securities law brought about by *Morrison*. Given this timing, the more reasonable assumption is that *Morrison* was issued too late in the legislative process to reasonably permit Congress to react to it.[249]

The *Scoville* court then argued that its conclusion was bolstered by the title of the section, "STRENGTHENING ENFORCEMENT BY THE COMMISSION," which suggested that Congress believed it had extended extraterritorial enforcement power to the SEC.[250] The court noted too that Congress, in another section of the Act, directed the SEC to study the extent to which private rights of action under

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245. *Scoville*, 913 F.3d at 1209–10.

246. *Id.* at 1211, 1214.

247. *See id.* at 1225, 1227 (Briscoe, J., concurring) ("[T]he majority appears to assume . . . that the . . . sales at issue were foreign sales outside of the United States."); *see also* SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1294–95 (D. Utah 2017) ("[A]ll of the transactions satisfy the domestic transaction test under *Morrison* and *Absolute Activist*."), *aff'd sub nom. Scoville*, 913 F.3d 1204, *cert. denied*, 140 S. Ct. 483 (2019).

248. *Scoville*, 913 F.3d at 1218.

249. *Id.* (quoting the district court's decision in *Traffic Monsoon*, 245 F. Supp. 3d at 1291).

250. *Id.*

the antifraud provisions should be extended extraterritorially.[251] As the district court argued below, "[c]ommissioning such a study demonstrates Congress's expectation that it had already extended the SEC's authority to bring an enforcement action under 929P(b)."[252] Finally, the court pointed to the floor comments of Rep. Paul Kanjorski, the drafter of section 929P, who asserted that section's "provisions concerning extraterritoriality . . . are intended to rebut th[e] presumption [against extraterritoriality applied by the *Morrison* Court] by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department."[253]

The *Scoville* court may be spot on in its evaluation of congressional intent, but its reasoning is likely to meet stiff resistance in the Supreme Court if *Morrison* is any indication. The Court would take the *Scoville* court to task for largely ignoring the "plain language" of the statute and declining to consider the applicability of the presumption against extraterritoriality in construing Dodd-Frank. The *Scoville* court also neglected to mention a potentially powerful argument against its position: that this interpretation requires a conclusion that the language of section 10 (b) means one thing in government cases and another in private civil cases—a conclusion that itself runs into another important interpretive assumption.

The general rule is that courts construing statutory language ought to assume that the language means the same thing regardless of the context of the case in which it arises.[254] Thus, for example, the Supreme Court has asserted that "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context."[255] The Court explained in *Clark v. Martinez* that holding that the meaning of words in a statute can change with the statute's application "would render every statute a chameleon" and "would establish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases."[256] Not only does this assumption generally comport with common sense, but it is also generally necessary to cabin the power of judges and to respect the prerogatives of Congress in making law.

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251. *Id.*

252. *Traffic Monsoon*, 245 F. Supp. 3d at 1293.

253. *Id.* at 1292.

254. *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004); *see also* United States v. Vilar, 729 F.3d 62, 74 (2d Cir. 2013) (finding a statute "has the same meaning in every case"). Note, however, that some judges, and even Justices, have questioned this imperative. *See, e.g.*, United States v. Santos, 553 U.S. 507, 525 (2008) (Stevens, J., concurring) (plurality opinion) (noting that "the same word can have multiple meanings in the same statute," and that the Court therefore "need not pick a single definition . . . applicable to every [situation], no matter how incongruous some applications might be"); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 10 (1st Cir. 1997) (Lynch, J., concurring) ("Where Congress intends that our laws conform with international law, and where international law suggests that criminal enforcement and civil enforcement be viewed differently, it is at least conceivable that different content could be ascribed to the same language depending on whether the context is civil or criminal.").

255. *Leocal*, 543 U.S. at 11 n.8; *accord Vilar*, 729 F.3d at 74.

256. 543 U.S. 371, 382, 386 (2005); *see also Santos*, 553 U.S. at 522–23 (citing *Clark* for the proposition of consistency).

Granted, this *is* only a general assumption. The Court has, on rare occasions, read the same statutory language to have different meanings in different contexts.[257] The SEC might argue for an exemption from the rule barring differential readings of the same statutory language based on two circumstances. First, the language of section 10(b) has already been read to carry with it different proof requirements in publicly and privately initiated cases:

> In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.[258]

But in government-initiated enforcement actions, the SEC does not have to prove the last three elements: reliance, economic loss, or a causal connection between that injury and the defendant's misconduct.[259]

Second, we know that the *Morrison* Court took the Second Circuit to task for "judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the Court,"[260] but the Supreme Court has unabashedly undertaken exactly this role in fleshing out the contours of securities law provisions in the past. The securities fraud prohibitions—like the antitrust laws[261]—are so general and terse that the courts have been called upon to specify

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257. *See, e.g., Santos*, 553 U.S. at 524–28 (Stevens, J., concurring); United States v. U.S. Gypsum Co., 438 U.S. 422, 444–46 (1978).

258. Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 157 (2008) (citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005)).

259. *See, e.g.*, SEC v. Rana Rsch., Inc., 8 F.3d 1358, 1363–64 (9th Cir. 1993) (finding that the SEC need not prove reliance); Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 545–46 (2011) (explaining that the SEC does not need to prove reliance, economic loss or loss causation); *see also* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190–91 (1994) (finding no civil liability for aiding and abetting under section 10(b) but acknowledging that criminal liability can be imposed for aiding and abetting a section 10(b) violation).

260. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010).

261. See, for example, United States v. Nippon Paper Industries Co., 109 F.3d 1, 9 (1st Cir. 1997) (Lynch, J., concurring), positing that the same language can mean different things in civil and criminal antitrust context, in part because:

> The task of construing Section One in this context is not the usual one of determining congressional intent by parsing the language or legislative history of the statute. The broad, general language of the federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the judiciary. The Supreme Court has called the Sherman Act a "charter of freedom" for the courts, with "a generality and adaptability comparable to that found . . . in constitutional provisions."

(quoting Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933)). As Professors Areeda and Turner have said, the federal courts have been invested "with a jurisdiction to create and develop an 'antitrust law' in the manner of the common law courts." PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 103d2 (5th ed. 2020).

their content and applicability in a manner not generally required by other, more specific legislation. As the Court has acknowledged:

> The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b–5 right and the definition of the duties it imposes. As we recognized in a case arising under § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a), "where a legal structure of private statutory rights has developed without clear indications of congressional intent," a federal court has the limited power to define "the contours of that structure."[262]

The Commission is expressly authorized by statute to bring enforcement actions to prevent and punish violations of section 10(b).[263] But although "the text of the Securities Exchange Act does not provide for a private cause of action for § 10(b) violations, the Court has found a right of action implied in the words of the statute and its implementing regulation."[264] As the Court explained in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*:

> [D]etermining the elements of the 10b–5 private liability scheme . . . has posed difficulty because Congress did not create a private § 10(b) cause of action and had no occasion to provide guidance about the elements of a private liability scheme. We thus have had "*to infer how the 1934 Congress would have addressed the issue[s] had the 10b–5 action been included as an express provision in the 1934 Act*."[265]

Indeed, the *Morrison* majority's insistence on focusing only on text and excoriating the Second Circuit for its speculations regarding congressional intent was deeply ironic considering that the Court—without any express statutory mandate—created a section 10(b) private cause of action out of whole cloth and has been very open about the fact that it has "flesh[ed] out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance."[266]

On balance, I believe that the Supreme Court is unlikely to accept these arguments if the *Morrison*-centered framing is pursued. Justice Stevens' concurrence underscores the degree to which the Court has engaged not in interstitial back-

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262. Musick, Peeler & Garrett v. Emp.'s Ins. of Wausau, 508 U.S. 286, 292–93 (1993) (quoting Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1104 (1991)); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (recognizing that the private cause of action under Rule 10b-5 is a "judicial oak" grown from a "legislative acorn").

263. *See* 15 U.S.C. § 78u(d)(1) (empowering the Commission to bring suits for injunctive relief); *id.* § 78u(d)(3)(A) (empowering the Commission to seek civil penalties).

264. Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 157 (citing Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971)).

265. 511 U.S. 164, 173 (1994) (emphasis added) (quoting *Musick*, 508 U.S. at 294).

266. *Blue Chip*, 421 U.S. at 737; *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 276 (Stevens, J., concurring in the judgment) ("[I]n light of [the Court's history of fleshing out the contours of section 10(b)], the Court's critique of the decision below for applying 'judge-made rules' is quite misplaced. This entire area of law is replete with judge-made rules, which give concrete meaning to Congress' general commands.").

filling in this context, but rather has embraced wholesale lawmaking.[267] But Justice Scalia's *Morrison* majority opinion unequivocally rejects any suggestion that courts should be making up the applicable rules based on policy; he insists that they must instead confine themselves to the plain language of the statute in this context as in any other. Under *Arbaugh*, section 929P is plainly jurisdictional and just as plainly does not alter what the Supreme Court determined was the limited scope of section 10(b).[268] Such a result is frustrating, but if the Court insists on a plain language reading *and adopts the view that section 929P must be construed against the backdrop of* Morrison *rather than on its own merits*, this result appears inevitable.

As noted previously, however, I do not accept this framing.

2. Did Congress Create a Jurisdictional Conduct-and-Effects Test in Government-Initiated Cases, Leaving Courts Without Jurisdiction to Entertain Privately Initiated Extraterritorial Cases? (Yes)

An alternative approach—one that focuses on section 929P, not *Morrison*—is much to be preferred. Such a framing yields the conclusion that Congress wished to endorse the lower courts' approach prior to *Morrison*, *both* by reinstating the conduct-and-effects test for extraterritoriality in government-initiated cases *and* by codifying the treatment of extraterritoriality as a jurisdictional mandate. This result is consistent with relevant principles of statutory construction—including the plain language inquiry, the assumption that Congress legislates against the backdrop of the Court's interpretive rules, the superfluity bar, and the presumption against extraterritoriality—and avoids many of the difficulties outlined above. For example, the distinction between government- and privately initiated cases would find a principled basis not in the language of section 10(b) but rather in the jurisdictional provision, 15 U.S.C. § 78aa.

As the *Scoville* court rightly recognized, it is doubtful that Congress was aware of the particulars of the *Morrison* decision when it approved the final Dodd-Frank legislation.[269] "Dodd-Frank represents the most sweeping changes to the financial regulatory environment in the United States since the Great Depression."[270] Section 929P(b) was only a very small part of a gargantuan bill. Given the timeline and the scope of the Dodd-Frank Act, "[t]o conform Section 929P(b) to the *Morrison* decision at the last minute would be like requiring a steaming battleship to turn on a dime to retrieve a lifejacket that fell overboard."[271] To remove the

267. *See Morrison*, 561 U.S. at 274–78 (Stevens, J., concurring in the judgment).

268. *See supra* notes 208-214 and accompanying text.

269. *See* United States v. Gonzalez, 520 U.S. 1, 6 (1997) ("[F]ar from clarifying the statute, the legislative history only muddies the waters.").

270. Edward F. Greene, *Dodd-Frank and the Future of Financial Regulation*, 2 HARV. BUS. L. REV. ONLINE 79, 79 (2011).

271. SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1292 (D. Utah 2017), *aff'd sub nom.* SEC v. Scoville, 913 F.3d 1204 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 483 (2019).

confusion created by a focus on *Morrison*, assume that the Court had never decided *Morrison* and instead was faced with a de novo examination of the extraterritoriality of section 10(b) in light of 15 U.S.C. § 78aa as amended by Dodd-Frank.

Because Congress chose to title section 929P "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws" and inserted it into the provision (entitled "Jurisdiction of Offenses and Suits") granting the federal courts subject-matter jurisdiction over section 10(b), as § 78aa(b), the question of extraterritoriality must be determined under § 78aa, not section 10(b).[272] One normally assumes that Congress acts with knowledge of Supreme Court precedent and, as discussed above, the Court's *Arbaugh* reasoning would compel the same results as the plain language of the provision: that Congress intended the extraterritoriality of the antifraud provisions to be a jurisdictional question and that such jurisdiction should be decided under the statutory conduct-and-effects test.

The legislative history certainly supports this reading. Congress was acting against the backdrop of 40 years of unanimous courts of appeals decisions treating extraterritoriality as a jurisdictional inquiry and applying the conduct-and-effects test. "Congress has not just kept its silence by refusing to overturn" four decades of lower court precedent but has also now "ratified [that precedent] with positive legislation."[273] In such circumstances, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory interpretation"[274] and certainly more than the Supreme Court's obviously erroneous guess as to congressional intent.

As the *Scoville* court pointed out, Congress thought it was establishing a uniform test for determining the extraterritorial reach of government-initiated securities fraud cases, as evidenced by the historical context and the title of the provision.[275] It is apparent that the amendment was designed to do what one House Report identified as the aim of the language later enacted as section 929P(b): to "codify the SEC's authority to bring proceedings under both the conduct and the effects tests developed by the courts regardless of the jurisdiction of the proceedings," and to rationalize the different tests used in the courts of appeals to "create[] a single national standard for protecting investors affected by transnational frauds."[276]

This approach has the added appeal of being consistent with the Court's recent extraterritoriality jurisprudence. These precedents, in particular, tell us how the

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272. *See* 15 U.S.C. § 78aa.

273. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381–82 (1969).

274. *Id.* at 380–81; *see also* Bell v. New Jersey, 461 U.S. 773, 784–86 (1983) (holding that an amendment to a statutory scheme that necessarily presumes a particular interpretation of an existing statute is a persuasive indication of the meaning of the existing statute); South Carolina v. Regan, 465 U.S. 367, 392 (1984) (O'Connor, J., concurring) ("[S]ubsequently *enacted* provisions and the legislative understanding of them are entitled to 'great weight' in construing earlier, related legislation." (citations omitted)).

275. 913 F.3d at 1218; *see also* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (citations omitted)).

276. H.R. REP. NO. 111-687, at 80 (2010).

Court might have approached the interpretation of the amended § 78aa had that been the Court's task in *Morrison*. First, the Court likely would apply its presumption against extraterritoriality to the general jurisdictional language of § 78aa(a). In *Kiobel v. Royal Dutch Petroleum*,[277] the Court held that it was appropriate to apply a presumption against extraterritoriality to general jurisdictional language. The *Kiobel* Court acknowledged that the presumption against extraterritoriality is "typically" applied to statutes "regulating conduct," but it determined that the principles supporting the presumption should "similarly constrain courts considering causes of action that may be brought under"[278] a jurisdictional statute. In short, the presumption applies "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction."[279]

Second, the Court would use the presumption to justify reading the broad language of the general jurisdictional grant in § 78aa(a) narrowly to apply only to "all [territorial] suits." Section 78aa(a), labeled "[i]n general," provides that:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of *all suits* in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.[280]

The question is whether "all suits" encompasses cases requiring an extraterritorial application of section 10(b). The Court's decision in *Small v. United States*[281] provides guidance in this respect. The *Small* Court decided that a statute that prohibits "any person . . . *convicted in any court*" from owning a firearm encompasses only domestic, not foreign, convictions.[282]

The Court noted that broad terms like "any" (and presumably "all") cannot be considered in isolation. It then determined that the scope of the statutory phrase should be read restrictively given the presumption against extraterritoriality and its rationale that Congress generally legislates with "domestic concerns in mind."[283]

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277. 569 U.S. 108 (2013). In *Kiobel,* the Court was called upon to decide whether the Alien Tort Statute (ATS) confers federal-court jurisdiction over causes of action alleging international-law violations committed overseas. Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations pursuant to the ATS, alleging that the corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria. The Court granted certiorari to decide whether corporations are immune from tort liability under the ATC for violations of the law of nations. The Court then asked for supplemental brief on the question of extraterritoriality jurisdiction. The Court applied the presumption and held that the ATS statute did not apply extraterritorially because the statute lacked any clear indication that it extended to the foreign violations alleged in that case. *Id.* at 114–18, 124–25.

278. *Id.* at 116.

279. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016).

280. 15 U.S.C. § 78aa(a) (emphasis added).

281. 544 U.S. 385 (2005).

282. *Id.* at 387 (emphasis in original) (quoting 18 U.S.C. § 922(g)(1)).

283. *Id.* at 388–89 (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

Employing the *Small* analysis, then, § 78aa(a) would be read as granting jurisdiction over "all" *domestic* suits, thus confining private civil suits to territorial jurisdiction. Section 929Y reinforces the presumption against extraterritoriality by making clear that Congress understood § 78aa(a) to be limited to domestic cases and wished the input of the SEC before deciding whether to extend the extraterritorial reach of these jurisdictional provisions in privately filed cases.[284]

In § 78aa(b), however, we have the "clearly expressed"[285] extraterritoriality instructions that the Court has required to rebut the presumption. This section "affirmatively and unmistakably instructed that the statute" apply extraterritorially in government-initiated cases that pass the conduct-and-effects test.[286]

When examining the statute, one must also consider the larger context of the legislation. Congress did not just amend § 78aa, which controls jurisdiction over the section 10(b). It also amended the jurisdictional provisions of the Securities Act of 1933[287] and the IAA[288] to include the same conduct-and-effects test. The Supreme Court has not addressed the extraterritoriality of those Acts, so there is no precedent to skew analysis of Congress' efforts.[289] Courts, then, are likely to use the analytical approach outlined above and conclude that any presumption against extraterritoriality has been rebutted by the plain language of the jurisdictional provision, that *Arbaugh* and the statutory language demand that extraterritoriality be considered a jurisdictional question, and that the conduct-and-effects test controls. It is difficult to see how courts could so conclude with respect to the '33 Act and the IAA but come to a different conclusion with respect to the '34 Act.

This interpretation is consistent not only with the statutory language, history, and structure and comports with the Court's precedents, but it also avoids other

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284. Dodd-Frank Wall Street Reform and Consumer Protection Act § 929Y, 15 U.S.C. § 78aa.

285. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

286. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016).

287. *See* Dodd-Frank Act § 929P(b), 15 U.S.C. § 77v(c).

288. *Id.* § 929P(b), 15 U.S.C. § 80b-14(b).

289. The lower courts have implicitly or explicitly found *Morrison*'s reasoning applicable to the '33 Act, *see, e.g.*, SEC v. Scoville, 913 F.3d 1204 (10th Cir. 2019); *In re* Smart Techs., Inc. S'holder Litig., 295 F.R.D. 50, 55–56 (S.D.N.Y. 2013), although Section 17(a) of the Securities Act is treated differently, *see* SEC v. Tourre, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *6–7 (S.D.N.Y. 2013). The same goes for the IAA. *See, e.g.*, SEC v. Battoo, 158 F. Supp. 3d 676, 697 n.19 (N.D. Ill. 2016); SEC v. Amerindo Inv. Advisors, Inc., No. 05 Civ. 5231 (RJS), 2013 WL 1385013, at *9 n.10 (S.D.N.Y. 2013) ("Neither the Supreme Court nor the Second Circuit has extended *Morrison* to the IAA, and the Court declines to do so here. In *Morrison*, the Supreme Court based its interpretation of section 10(b) on the fact that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States. By contrast . . . the focus of the IAA is clearly on the investment advisor and its actions." (internal quotation marks, citations, and brackets omitted)); SEC v. Gruss, 859 F. Supp. 2d 653, 661–62 (S.D.N.Y. 2012) (noting that the "focus" of the IAA is the advisor, not the transactions). *See also generally* Lee, *supra* note 15, *passim*.

Some argue that the courts are wrong to conflate the '33 and '34 Acts for extraterritoriality purposes. *See, e.g.*, Richard A. Grossman, *The Trouble with Dicta:* Morrison v. National Australia Bank *and the Securities Act*, 41 SECS. REG. L.J. 1 (2013).

One court has held that "Section 929P(b) restores the SEC's extraterritorial authority over the IAA and its passage suggests that Congress intended for the extraterritorial application of the IAA." *Gruss,* 859 F. Supp. 2d at 664.

important interpretive difficulties identified above. It gives effect to the language of the amendment, thus avoiding superfluity concerns. And Congress' differential intent with respect to publicly and privately initiated cases finds a principled basis in the language of the jurisdictional statute. Finally, reading this provision as jurisdictional means that courts need not determine whether the substantive reach of the three statutes affected by the Dodd-Frank amendment has changed.

Defendants' plain language argument is premised on the implicit assumption that Congress was aware of the Court's holding in *Morrison*—that extraterritoriality is a merits, not a jurisdictional, question, and that the substantive antifraud provisions are territorial in their scope—at the time of Dodd-Frank's enactment. Even granting that the Court presumes Congress is familiar with its holdings, the fact that *Morrison* came down a mere five days before the conferees agreed on the final shape of the voluminous, enormously complex bill makes such an assumption fantastical in this context. In the alternative, defendants implicitly argue that, based on *Arbaugh* and the SG's and SEC's concession in their *Morrison* brief, Congress should have anticipated that the Court would treat extraterritoriality as a question going to the scope of the substantive anti-fraud provisions.[290] Can one accept this premise and reject the inference that defendants draw—that Congress' failure to respond by amending section 10(b) leaves *Morrison*'s limited reading of the scope of the antifraud provisions intact? In other words, if we indulge an assumption that Congress knew or should have known that *Morrison* would decree that extraterritoriality is a merits question, does that change the analysis? I think not.

The SEC was actively involved in the drafting of section 929P(b). Given the Solicitor General's concession in *Morrison*, as well as the presumption that Congress would have known about *Arbaugh* and other similar precedents, it is reasonable to assume that Congress could have forecast the Court's result in this respect. But that does not compel the conclusion that Congress made a mistake in amending the jurisdictional provision. Rather, it shows that Congress made a conscious decision that it wished extraterritoriality to be a jurisdictional question, not a merits issue. It made this decision manifest by amending the jurisdictional language in three statutes to codify what was developed in the courts of appeals as a jurisdictional conduct-and-effects test. It is difficult to know how much more plainly Congress could have expressed this intention. Certainly, this inference—given the express language of these amendments—makes more sense than an assumption that Congress made a mistake, particularly because such a mistake would render the amendment a nullity.

While it is difficult to identify reasons why Congress would knowingly enact a jurisdictional provision that would have no practical effect, there are readily understandable reasons why Congress may have chosen to make extraterritoriality a jurisdictional inquiry. The SEC apparently drafted this provision, and it prefers the

290. *See* Petition for Writ of Certiorari, *supra* note 218, at 16–17.

rules forged by the courts of appeals pre-*Morrison*.[291] And categorizing an issue as jurisdictional rather than substantive has significant procedural consequences. Congress may have determined that it was procedurally more efficient to have extraterritoriality questions decided at the inception of the litigation rather than in the merits phase.[292]

In civil cases, for example, treating the question as a merits issue means that defendants will be forced to endure full-scale U.S.-style discovery on the merits of the claim—discovery which is viewed as oppressive overseas. As the International Bankers Association argued in *Morrison*, absent a bright-line rule that could be litigated early on, "foreign issuers will often be subjected to the burdens and uncertainty of intensive U.S. discovery, pre-trial litigation, and perhaps trial before plaintiff's claims can be ruled out-of-bounds as improperly extraterritorial, and by that time much harm to the foreign issuer will have been done."[293] It further noted that:

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291. *See, e.g.*, SEC, STUDY, *supra* note 6, at 61 (advocating modification of the conduct-and-effects test it pressed for in *Morrison* for private antifraud cases, stating that the "Commission has not altered its view in support of this standard"); Painter et al., *supra* note 15, at 22–23 ("[T]he SEC, in proposing the Dodd-Frank language, is asking Congress to put this issue in the jurisdictional box where the court of appeals had placed it, and to confer jurisdiction. Admittedly, nowhere in the legislative history is there a statement that the SEC or Congress wanted this to be a jurisdictional issue instead of an issue of the merits in SEC and DOJ suits. The SEC, however, has favored the way extraterritoriality was analyzed by the courts of appeals. Even if, in the *Morrison* briefs, the SEC recognized that under Supreme Court precedent extraterritoriality was not a question of subject matter jurisdiction, the SEC still apparently wanted Congress to reinstate the approach of the courts of appeals in SEC and DOJ suits and drafted language that it believed did precisely that. Treating extraterritoriality as a jurisdictional question was part of this approach.").

292. The categorization of extraterritoriality as a jurisdictional, rather than a merits, question "is not a picky point that is of interest only to procedure buffs. Rather, this distinction affects how disputed facts are handled . . . when a party may raise the point," when an objection is waived, and, in criminal cases, who must decide the question. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 852–53 (7th Cir. 2012) (en banc); *see also* United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 953–65 (7th Cir. 2003) (en banc) (Wood, J., dissenting) (disagreeing with court's holding that the matter was not jurisdictional), *overruled by Minn-Chem*, 683 F.3d at 848.

If extraterritoriality is a merits question, parties in civil cases must challenge allegedly improper extraterritorial application under Federal Rule of Civil Procedure 12(b)(6), which provides for motions for failure to state a claim. But, if extraterritoriality is a jurisdictional issue in government-initiated cases, parties in SEC enforcement actions wishing to contest the extraterritorial reach of the statute must move under Rule 12(b)(1), which provides for dismissal for lack of subject-matter jurisdiction. This has important practical consequences.

Although "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor' . . . 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute,'" FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (citations omitted), courts generally "accept as true all of the allegations contained in a complaint." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Subject-matter jurisdiction must be secure at all times, regardless of whether the parties raise the issue, and no matter how much has been invested in a case. The power of a court to adjudicate a case can be challenged at any time, up to and including at the Supreme Court. *See, e.g.*, Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 381–82 (1884). By contrast, a motion to dismiss for failure to state a claim may only be brought as late as trial.

A dismissal due to subject-matter jurisdiction normally does not preclude refiling the suit, whereas dismissal on the merits may preclude re-litigation in another forum. *See* Steinberg & Flanagan, *supra* note 15, at 839.

293. Brief for Amici Curiae the Institute of International Bankers, The European Banking Federation, & the Australian Bankers' Ass'n in Support of Respondents at 28, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191).

> To date, because the courts of appeals have regarded the extraterritoriality inquiry as one of subject-matter jurisdiction, the district courts have had authority to resolve issues of improper extraterritorial scope (couched in terms of lack of subject-matter jurisdiction) at the outset of litigation. These courts have tended to resolve such claims expeditiously and efficiently, based on the allegations within the complaint or, increasingly, on factual declarations by the parties. However, should the Court regard the question of extraterritoriality as relevant not to jurisdiction but instead to whether the facts of the case are within the scope of the cause of action impliedly authorized, it is not clear that district courts, as opposed to the jury, would retain authority to resolve factual disputes bearing on that question.[294]

Deferral of this issue to the merits stage means that defendants may have no idea of the extent of their liabilities, seriously disadvantaging them in settlement negotiations and requiring them to carry inflated reserves on their books pending judgment.[295]

In criminal cases, the consequences of treating a question as jurisdictional also have critical implications that Congress cannot be presumed to have ignored. A defendant entering a guilty plea normally waives all non-jurisdictional objections, including constitutional challenges, to the prosecution and also loses his right to appeal.[296] The distinction between jurisdictional questions and merits issues is also important to defendants who do not plead out. Again, issues going to jurisdiction can be raised at any point, but a failure to raise a merits defense can be waived if

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294. *Id*. at 29. *Cf*. Brief of European Issuers AISBL as Amicus Curiae in Support of Petitioners at 10, 13, Petróleo Brasileiro S.A.-Petrobras v. Universities Superannuation Scheme Ltd., 138 S. Ct. 754 (2018) (No. 17-664) (noting, in an unrelated context, the fact that other foreign entities made clear that swift and early determination of whether there has been a "domestic transaction" is critical).

295. Brief of European Issuers AISBL as Amicus Curiae in Support of Petitioners, *supra* note 294, at 10, 13.

296. *See, e.g*., United States v. Broce, 488 U.S. 563, 569–70 (1989); Tollett v. Henderson, 411 U.S. 258, 267 (1973); United States v. Jacobo Castillo, 496 F.3d 947, 954 (9th Cir. 2007) ("In general, a defendant who enters into a plea agreement waives his right to appeal his conviction."). As the Supreme Court explained in *United States v. Cotton*:

> [T]he term "jurisdiction" means . . . "the courts' statutory or constitutional power to adjudicate the case." This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.

535 U.S. 625, 630 (2002) (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 89 (1998)); *see also* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (holding that "subject-matter jurisdiction . . . can never be forfeited or waived" (quoting *Cotton*, 535 U.S. at 630)). The D.C. Circuit has held, on the basis of *Morrison*'s instruction that extraterritoriality is a merits rather than a jurisdictional question, that a defendant waived his extraterritoriality objection by his guilty plea. *See* United States v. Miranda, 780 F.3d 1185, 1191 (D.C. Cir. 2015); *see also* Butler v. United States, 992 F. Supp. 2d 165, 172 (E.D.N.Y. 2014) (holding that the extraterritoriality question was procedurally defaulted because it was not raised on direct appeal). If, however, Congress was successful in making the extraterritorial question a jurisdictional issue, it would not be waived through guilty plea.

not timely brought to the trial court's attention.[297] The question of the geo-appropriateness of a prosecution would also be a question for the jury were extraterritoriality deemed a merits question;[298] jurisdictional issues would instead be resolved by a judge.

Finally, and importantly, it is reasonable to project that some members of Congress "might have refused to vote for a bill that went beyond jurisdictional questions to make substantive changes to these key provisions of federal securities laws."[299] Certainly, they would know that opening up the text of the antifraud provisions for amendment would have invited an unwelcome lobbying frenzy as interest groups sought to persuade Congress to overturn other judicial decisions interpreting the scope of section 10(b) with which they disagreed. Confining the "fix" to the jurisdictional provisions would limit such importuning yet achieve Congress' goal.

In sum, Dodd-Frank ought to be read to mean what it says: that extraterritoriality is a jurisdictional question under the '33 and '34 Acts and the IAA, that courts have no jurisdiction over extraterritorial cases in privately initiated civil actions, and that the jurisdiction of the SEC and DOJ in extraterritorial section 10(b) suits should be judged by the conduct-and-effects test.

CONCLUSION

The real engine of the Supreme Court's blockbuster decision in *Morrison* was not the presumption against extraterritoriality. On the ground, what matters is the test for separating actionable "domestic" section 10(b) claims from foreclosed "extraterritorial" suits. Applying a new "focus" test, the Court determined that section 10(b) only covered "transactions in securities listed on [U.S.] domestic exchanges" or "domestic transactions in other securities."

The case law and expert commentary demonstrate that this test is not capable of meeting the Court's aims in *Morrison*: it yields arbitrary results, and in many cases, it is incapable of stable and predictable application; it thus does not further congressional objectives in securities regulation; and it does not efficiently allocate cases to the jurisdiction with the greatest sovereign interest.

Many commentators believe that Congress' effort to replace the transactions test with the traditional conduct-and-effects test in government-initiated cases was ineffective because Congress chose to amend section 10(b)'s jurisdictional mandate rather than the text of section 10(b) itself. This article has demonstrated that the consensus is wrong. With the appropriate framing—that is, a focus on the statute itself (§ 78aa) rather than *Morrison*—the correct answer is obvious: Congress

297. Granted, on appeal, a federal court of appeals has discretion under Federal Rule of Criminal Procedure 52(b) to correct a "plain error that affects substantial rights" that was forfeited because it was not timely raised in the district court. FED. R. Crim. P. 52(b). But even so, defendants must surmount a great many barriers to relief.

298. *See* O'Sullivan, *supra* note 2, at 1062–66.

299. Painter, *supra* note 165, at 202.

wished to endorse the lower courts' approach prior to *Morrison both* by reinstating the conduct-and-effects test for extraterritoriality in government-initiated cases *and* by codifying the treatment of extraterritoriality as a jurisdictional mandate. This result is consistent with relevant principles of statutory construction—including the plain language inquiry, the assumption that Congress legislates against the backdrop of the Court's interpretive rules, the superfluity bar, the prohibition against reading statutory language to have different meanings in different contexts, and the presumption against extraterritoriality.

And although the conduct-and-effects test has been subject to legitimate criticism, it far superior to the transactional test. The *Morrison* Court's test allocates private causes of action according to the vagaries of order execution in the wired international marketplace or the happenstance of where a contract, drafted for other purposes, deems a deal to become irrevocable. The conduct-and-effects test, difficult as it is to administer, at least is trained on circumstances that traditionally have mattered to sovereigns—the territorial site of the wrongful conduct and its effect on citizens the sovereign ought to protect.