



2011

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

Andrew Rocks

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Consumer Protection Law Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Andrew Rocks, *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 (2011).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol56/iss1/5>

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2011]

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

I. INTRODUCTION

At a time when the interconnectedness of global markets is as clear as ever and governments around the world strive to mend their respective economies, the United States has a unique opportunity to reconcile the extraterritorial reach of its securities laws with those of other nations.¹ To date, the United States' role in combating fraud beyond its borders has been repeatedly met with disapproval by foreign governments and businesses.² Indeed, foreign governments often have their own devices in

1. See G-20, *Declaration: Summit on Financial Markets and the World Economy* ¶ 8 (Nov. 15, 2008) [hereinafter G-20 Declaration], available at http://www.g20.org/Documents/g20_summit_declaration.pdf (declaring, in response to global economic crisis in 2008, that while “[r]egulation is first and foremost the responsibility of national regulators who constitute the first line of defense against market instability,” such “[r]egulators must ensure that their actions . . . avoid potentially adverse impacts on other countries” due to global scope of current financial markets); Organization for Economic Co-operation and Development (OECD), *Conflicting Requirements Imposed on Multinational Enterprises* (June 1991) [hereinafter OECD], available at http://www.oecd.org/document/25/0,3343,en_2649_34887_1933081_1_1_1_1,00.html (adopting considerations and practical approaches “with the aim of avoiding or minimising the imposition of conflicting requirements on multinational enterprises by governments,” and promoting cooperation between Member nations); see also Brief for Org. for Int’l Inv. as Amicus Curiae Supporting Respondents at *8, *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 719335 [hereinafter Org. for Int’l Inv. Amicus Br.] (arguing that Court should “continue to fulfill America’s obligations to the international community” by not applying U.S. law “to claims of foreign plaintiffs based upon conduct by foreign companies”); Brief for U.K. of Gr. Brit. and N. Ir. as Amicus Curiae Supporting Respondents at *24, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723009 [hereinafter UK Amicus Br.] (“Expansive extraterritorial application of the Rule 10b-5 private right of action risks undermining the kind of global regulatory cooperation that the current economic situation demands and the G-20 calls for.”); Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 327 (2010) (“The unprecedented scope of the current financial crisis has exposed the enormous risk that can arise with the cross-border sale of securities.”); Nick S. Dhesi, Note, *The Conman and the Sheriff: SEC Jurisdiction and the Role of Off-shore Financial Centers*, 88 TEX. L. REV. 1345, 1346 (2010) (“As the recent financial crisis again demonstrates, the effects of adverse market conditions in one nation can cause unforeseeable damage across the world.”).

2. See Org. for Int’l Inv. Amicus Br., *supra* note 1, at *8 (“Other nations—including many of America’s closest allies—regularly have objected to extraterritorial applications of U.S. law [governing securities fraud].”); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 523-24 (1993) (noting “costly” U.S. approach toward extraterritorial application “has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own”); Scott M. Himes, *The Supreme Court Limits*

place to address and remedy unlawful conduct in the securities arena—devices refined according to the particular policy interests of those nations.³ The United States, however, has continually overlooked these legitimate policy concerns in its attempts to regulate predominantly foreign conduct under domestic law.⁴ Fortunately, despite such insular tenden-

Transnational Securities Fraud Cases, 79 U.S.L.W. 1090 (July 7, 2010) (noting that foreign application of Section 10(b) is “deemed very intrusive abroad” because “‘plaintiff friendly’” courts in U.S. subject foreign parties to “more costly and onerous procedures than judicial proceedings in their own countries”); John D. Kelly, Note, *Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 LAW & POL’Y INT’L BUS. 477, 477 (1997) (“Internationally, issuers and sellers have been unwittingly held to U.S. standards in foreign issuances and sales, and nation-states have balked at the ‘arrogance’ with which U.S. courts have exercised jurisdiction over behavior that they consider to be solely within their sovereign domains.”).

3. See *Microsoft v. AT & T Corp.*, 550 U.S. 437, 455 (2007) (applying assumption that Congress drafts legislation with “‘legitimate sovereign interests of other nations’” in mind, and emphasizing fact that “foreign law ‘may embody different policy judgments’” (citation omitted)); cf. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (holding that application of U.S. antitrust law to foreign conduct, causing foreign harm that gives rise to claim, “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs”); *Empagran*, 542 U.S. at 167 (“[E]ven where nations agree about primary conduct . . . they disagree dramatically about appropriate remedies.”); Sarah L. Cave, *F-Cubed=0: Supreme Court’s Decision in Morrison v. National Australia Bank*, N.Y. L.J., July 7, 2010, at 4 (noting that foreign governments urged *Morrison* Court, in interpreting extraterritorial application of Section 10(b) of Securities Exchange Act of 1934, to acknowledge policy considerations of “(1) the sovereignty of other nations; (2) the development of sophisticated regulation of the issuance and trading of securities within numerous markets; (3) the globalization of capital markets; (4) the increasing interdependence of national economies; and (5) the principles of comity and international relations”); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 Nw. J. INT’L L. & BUS. 207, 208 (1996) (“Extraterritoriality results in frequent conflicts between the United States and other nations.”); Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT. L. REV. 1065, 1117 (2002) (“Extraterritorial application of law has become worrisome to many observers because it interferes with sovereign authority by limiting the extent to which a State can control the local conditions . . .”); Howell E. Jackson, *Regulation in a Multisector Financial Services Industry: An Exploratory Essay*, 77 WASH. U. L.Q. 319, 379 (1999) (“Exercising jurisdiction over foreign transactions is costly and difficult; moreover, in many jurisdictions it will be redundant if foreign regulatory structures also govern the transactions and are effectively enforced.”).

4. See Fisch, *supra* note 2, at 572 (noting that U.S. courts are unlikely to pay due regard to foreign interests when facing decision between applying U.S. law and declining to do so out of deference to those interests); cf. *id.* at 540-41 (noting SEC’s position with respect to foreign tender offers is that U.S. law presumptively applies “so long as the offer is conducted in or has an effect in the United States”). See generally Gregory K. Matson, *Restricting the Jurisdiction of American Courts over Transnational Securities Fraud*, 79 GEO. L.J. 141 (1990) (arguing that “judicial activism” in applying U.S. securities laws extraterritorially should be curtailed to more sensible approach that “addresses the concerns of the expanding international legal and financial communities”).

cies, the current regulatory climate provides an avenue through which the extraterritorial reach of the antifraud provisions of U.S. securities laws can be moderated to reflect international comity.⁵

The U.S. Supreme Court took an important step in curtailing the foreign application of these antifraud provisions in *Morrison v. National Australia Bank*.⁶ Specifically, the Court devised a new transactional test for applying Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) to foreign transactions and, in doing so, narrowed the potential body of litigation in this field.⁷ In adopting this new test, the Court overruled the substantial body of U.S. Courts of Appeals case law that relied on the broader “conduct and effects” tests, or variations thereon, developed and refined by the Second Circuit.⁸ Under the new transactional test, Section 10(b), along with Securities and Exchange Commission (SEC) Rule 10b-5, only grants a private right of action to foreign plaintiffs when the transaction at issue occurs in the United States, or when the transaction, if it takes place abroad, involves a security listed on a U.S. exchange.⁹

5. For a discussion of how the foreign reach of the antifraud provisions of the U.S. securities laws has been moderated, see *infra* notes 107-62 and accompanying text.

6. 130 S. Ct. 2869 (2010).

7. See Cave, *supra* note 3 (concluding that *Morrison* decision will lessen “[p]otential for liability both in private civil actions and regulatory proceedings . . . and the corresponding costs of litigation”); Himes, *supra* note 2 (“There will be fewer securities-fraud cases involving foreign investors or foreign issuers in the future, since the transactional test of *Morrison* affords less leeway to bring these cases in the U.S. than under the conduct-and-effects test.”).

8. See *Morrison*, 130 S. Ct. at 2877-81 (rejecting Second Circuit’s approach of interpreting what Congress intended by weighing conduct and effects occurring in U.S. on case-by-case basis rather than applying statutory presumption against extraterritorial jurisdiction). The Court reasoned that “[t]he 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 . . .” *Id.* at 2881.

9. See *id.* at 2888 (“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.”).

Because of the scope of the *Morrison* Court’s holding, this Note shall focus largely on Section 10(b) and Rule 10b-5; the discussion of the reach of these provisions and international reaction to them, however, may extend to other antifraud provisions within the U.S. securities laws as their language permits. See Kellye Y. Testy, *Comity and Cooperation: Security Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 927 n.5 (1994) (limiting article’s scope to Rule 10b-5, but noting that analysis may be applied to “other antifraud remedies under the 1933 Act, see, e.g., 15 U.S.C. §§ 77k, 77l, (1988), or under the 1934 Act, see, e.g., 15 U.S.C. §§ 78n, 78t (1988) [.] . . . where the specific language of the particular antifraud provision does not perforce confine the globalization issue”). Indeed, Congress seems to adopt this rationale in its attempt to broaden the reach of all antifraud provisions under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Advisers Act of 1940. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864-65 (2010) [hereinaf-

Nearly one month after the Court's *Morrison* decision, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, more commonly known as the "Dodd-Frank Act."¹⁰ Hailed as the sweeping reform needed to remedy the country's economic woes and strengthen consumer protections, the Dodd-Frank Act does little to clarify the extraterritorial reach of U.S. securities fraud laws.¹¹ Specifically, the Act fails to expand the geographic enforcement capabilities of the SEC or the Department of Justice (DOJ) under U.S. securities laws.¹² Instead, it merely defines the jurisdiction of federal courts to hear cases brought by those agencies and charges the SEC with the task of soliciting public comment as to the extraterritorial application of such laws in private rights of action.¹³

ter Dodd-Frank Act] ("Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws").

10. 124 Stat. 1376.

11. See Memorandum from George T. Conway III, Partner, Wachtell, Lipton, Rosen & Katz, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged* (July 21, 2010), available at <http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank> (concluding that Dodd-Frank Act provisions 929(b) and 929Y concerning antifraud provisions of federal securities laws do not "overturn [*Morrison*], and neither should extend the substantive reach of the securities laws extraterritorially at all"). Notably, George T. Conway, III served as Counsel of Record on behalf of the respondents in *Morrison*. See *Morrison*, 130 S. Ct. at 2869 (listing counsel of record).

12. Section 929P(b) of the Dodd-Frank Act, entitled "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws," adds the following provision to Section 22 of the Securities Act of 1933 (15 U.S.C. § 77v(a)), 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):

(b) 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—

(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.

§ 929P(b), 124 Stat. at 1864-65. For a discussion of why Section 929P(b) does not expand the extraterritorial reach of the SEC or DOJ, see *infra*, notes 107-62 and accompanying text.

13. Section 929Y, entitled "Study on Extraterritorial Private Rights of Action," states:

(a) IN GENERAL.—The Securities and Exchange Commission of the United States shall solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 (15 U.S.C. 78u-4) should be extended to cover—

(1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; and

This Note argues that the Supreme Court in *Morrison* properly applied the presumption against extraterritorial application of statutes that are silent on the issue.¹⁴ It also contends that the Court appropriately recognized the rule of construction of avoiding statutory interpretations that would interfere with the territorial sovereignty of other nations.¹⁵ Because of this decision, international market participants will likely ease their perceptions of the United States as an imperialist in securities law, at least insofar as private rights of action are concerned.¹⁶ Nonetheless, due to a drafting error in the Dodd-Frank Act that framed the extraterritorial reach of the antifraud provisions as a jurisdictional statute, *Morrison* inadvertently extends beyond private rights of action to encompass SEC and DOJ enforcement actions.¹⁷

Part II of this Note overviews the foreign application of U.S. securities laws, including international reactions to the pre-*Morrison* approach and

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

(b) CONTENTS.—The study shall consider and analyze, among other things—

(1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;

(2) what implications such a private right of action would have on international comity;

(3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and

(4) whether a narrower extraterritorial standard should be adopted.

(c) REPORT.—A report of the study shall be submitted and recommendations made to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House not later than 18 months after the date of enactment of this Act.

§ 929Y, 124 Stat. at 1871.

14. See *Morrison*, 130 S. Ct. at 2877-78 (invoking presumption against extraterritorial application and concluding, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none”).

15. See *id.* at 2892 (“It is true, of course, that ‘this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.’” (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164 (2004))). In *Empagran*, the Court justified its holding by noting that “[t]his rule of construction reflects principles of customary international law.” *Empagran*, 542 U.S. at 164; see also *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, at 35 (Apr. 9) (“Between independent States, respect for territorial sovereignty is an essential foundation of international relations.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(a) (1987) (“[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”).

16. See *Morrison*, 130 S. Ct. at 2886 (addressing “fear that [U.S.] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets”).

17. For a discussion of the Dodd-Frank Act and its implications on the extraterritorial application of the U.S. antifraud provisions, see *infra* notes 107-72 and accompanying text.

discussions of the principle of comity and of the need for reform.¹⁸ Part III examines the conduct and effects tests employed prior to the *Morrison* decision. This Part also details the facts of *Morrison* and evaluates the Court's application of the statutory presumption against extraterritoriality and the new transactional test set forth in its holding.¹⁹ Part IV then summarizes the Dodd-Frank Act as it relates to the extraterritorial application of the antifraud provisions of the U.S. securities laws.²⁰

In light of this examination, Part V argues that the Dodd-Frank Act fails to achieve its desired result because of drafter oversight.²¹ The Dodd-Frank Act attempts to statutorily delineate the reach of both the SEC and the United States by defining the jurisdiction of federal district courts.²² Many commentators assume that the Dodd-Frank Act grants the SEC and DOJ jurisdiction to apply U.S. antifraud provisions abroad.²³ These early interpretations, however, overlook the well-settled law that jurisdictional statutes do not define the rights or obligations of a party, but speak only to the power of a court to hear a case.²⁴ Part VI asserts that, with a report on the extraterritorial reach of private rights of actions due in January 2012, the SEC can contract U.S. securities laws to a more appropriate level within the international economic system.²⁵ Finally, Part VII concludes by summarizing the current reach of the antifraud provisions, and emphasizing the need to maintain international comity when construing the Dodd-Frank Act in the wake of *Morrison*.²⁶

18. For a further discussion of foreign applicability of U.S. securities laws, see *infra* notes 27-60 and accompanying text.

19. For a further discussion of the Court's approach to extraterritorial application of U.S. securities laws, see *infra* notes 61-106 and accompanying text.

20. For a further discussion of the Dodd-Frank Act's specific treatment of extraterritoriality, see *infra* notes 107-10 and accompanying text.

21. For a further discussion of the drafting errors in the Dodd-Frank Act, see *infra* notes 111-62 and accompanying text.

22. For a further discussion of the statutory language of the Dodd-Frank Act, see *supra* note 11-13 and accompanying text.

23. See, e.g., John C. Coffee, Jr., *What Hath 'Morrison' Wrought?*, N.Y. L.J., Sept. 16, 2010, at 5 (concluding that Dodd-Frank Act precludes extension of *Morrison* holding to SEC and DOJ enforcement actions); Stephen R. Smerek & Jason C. Hamilton, *The Long Arm of the Law: Morrison, Dodd-Frank, and the Extraterritorial Reach of U.S. Regulators*, SEC. L. DAILY, (BNA) (Oct. 4, 2010) ("The Dodd-Frank Act appears to codify the earlier 'conduct and effects' test, at least in cases brought by the SEC and United States."); Thomas O. Gorman, *Dodd-Frank: New Authority for SEC Enforcement*, <http://www.secactions.com/?p=2403> (last visited Sept. 24, 2010) (same); Allens Arthur Robinson, *Focus: US Courts' Extraterritorial Reach in Securities Fraud Cases Reinstated*, Aug. 5, 2010, <http://www.aar.com.au/pubs/ldr/focsraug10.htm> (same).

24. For a discussion of the scope of jurisdictional statutes, see *infra* notes 115-35 and accompanying text.

25. For a discussion of how U.S. securities laws can be harmonized with the international economic system, see *infra* notes 163-72 and accompanying text.

26. For a discussion of the importance of international comity in securities law enforcement, see *infra* notes 173-79 and accompanying text.

II. A HORNET AMONG FLYSWATTERS: U.S. SECURITIES LAWS IN THE INTERNATIONAL ARENA

The extraterritorial application of U.S. securities laws often interferes with foreign attempts to regulate the same conduct.²⁷ This practice aggravates many foreign governments with interests in such regulation as well as foreign businesses that fear subjection to U.S. judgments.²⁸ To reverse this troubling trend and uphold its obligations under international law, the United States should place greater emphasis on cooperative efforts to regulate securities fraud and moderate its reach abroad.²⁹

A. A Snapshot of the Extraterritorial Application of U.S. Securities Laws

The number of federal securities class action filings and government enforcement actions has recently decreased due to the sharp decline in claims resulting from the economic crisis.³⁰ The SEC has reported that, in 2009, sixty-eight securities class actions involved issuer reporting and disclosure, down from eighty-one in 2008.³¹ The SEC brought seventy-five administrative proceedings under this same category, only one less than in 2008.³² Nevertheless, the litigation and enforcement landscape in the

27. For a discussion of the conflict between U.S. and foreign securities regulation, see *infra* notes 40-43 and accompanying text.

28. See Kelly, *supra* note 2, at 477 (“Internationally, issuers and sellers have been unwittingly held to U.S. standards in foreign issuances and sales, and nation-states have balked at the ‘arrogance’ with which U.S. courts have exercised jurisdiction over behavior that they consider to be solely within their sovereign domains.”).

29. For a discussion of how the U.S. should limit its unilateral international securities law enforcement activities, see *infra* notes 44-60 and accompanying text.

30. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2010 MID-YEAR ASSESSMENT 3-4 (2010), available at http://securities.stanford.edu/clearinghouse_research/2010_YIR/Cornerstone_Research_Filings_2010_Mid_Year_Assessment.pdf (noting how securities class action filings have decreased from 212 in 2008, to 168 in 2009, to 71 in first half of 2010 due “to several factors, including a severe drop-off in filings associated with the recent credit crisis and the absence of any filings related to the Madoff fraud and other Ponzi schemes that occurred in 2009”); see also GRACE LAMONT & PATRICIA A. ETZOLD, PRICewaterhouseCOOPERS, 2009 SECURITIES LITIGATION STUDY 35 (2010), available at http://10b5.pwc.com/PDF/NY-10-0559%20SEC%20LIT%20STUDY_V7%20PRINT.PDF (noting that class actions filed against foreign issuers declined from all-time high of thirty-six in 2008 to twenty in 2009).

31. Compare SEC. AND EXCH. COMM’N, SELECT SEC AND MARKET DATA: FISCAL 2009, at 3, <http://www.sec.gov/about/secstats2009.pdf> (summarizing 2009 enforcement actions) with SEC. AND EXCH. COMM’N, SELECT SEC AND MARKET DATA: FISCAL 2008, at 3, <http://www.sec.gov/about/secstats2008.pdf> (summarizing 2008 enforcement actions).

32. For a discussion of SEC enforcement actions in 2008 and 2009, see *supra* note 31 and accompanying text. See also LAMONT & ETZOLD, *supra* note 30, at 26-27 (noting that federal securities class actions involving either SEC or DOJ have dropped from seventy-six cases in 2006 to twenty-eight in 2009).

United States continues to influence (and in many instances, interfere with) international regulatory initiatives.³³

The extraterritorial reach of the antifraud provisions of U.S. securities laws is governed by judicial interpretations of the Exchange Act.³⁴ Section 10(b) of the Exchange Act makes it unlawful to “use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance”³⁵ Rule 10b-5, which the SEC promulgated pursuant to Section 10(b), identifies the specific fraudulent conduct rendered unlawful by the Exchange Act.³⁶ Under both provi-

33. See European Economic and Social Committee, *Opinion of the European Economic and Social Committee on Defining the Collective Actions Systems and Its Role in the Context of Community Consumer Law*, 2008 O.J. (C 162) 2 (rejecting “US-style ‘class actions’,” because they are incompatible with European “traditions and principles” and promote “particularly harmful” practice of compensating “third party investors and lawyers” with “substantial share of sums won as compensation or punitive damages”); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 872 (2006) (noting that SEC is both “widely acclaimed” and “forcefully criticized” as it “is among the most influential regulatory agencies in the world”); cf. Testy, *supra* note 9, at 927 (“Not only are the United States securities laws committed to fighting fraud in domestic transactions, the broad jurisdictional reach of those laws threatens to seek out and destroy fraud (American style) worldwide.”); Brandy L. Fulkerson, Note, *Extraterritorial Jurisdiction and U.S. Securities Law: Seeking Limits for Application of the 10(b) and 10b-5 Antifraud Provisions*, 92 KY. L.J. 1051, 1051 (2004) (noting that U.S. is “attractive forum” for bringing securities fraud claims because it provides “substantive remedies and procedural devices, such as the class action, that are unavailable in many foreign states, and deference to plaintiff autonomy”).

34. Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 912 (1998) (“[S]ection 10(b)’s scope has been left to the courts, which have grappled with the issue of extraterritoriality on a case-by-case basis.”).

35. 15 U.S.C. § 78j(b) (1996), amended by Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

36. See 17 C.F.R. § 240.10b-5 (2010). Rule 10b-5 states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

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

Id.

Courts recognized that both Section 10(b) and Rule 10b-5 include an implied private right of action, and Congress “imposed statutory requirements on that private action” in 1998. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). The elements of such private right of action are:

- (1) a material misrepresentation (or omission);
- (2) scienter, i.e., a wrongful state of mind;
- (3) a connection with the purchase or sale of a security;
- (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as “transaction causation”;

sions, fraudulent conduct must be carried out “by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange.”³⁷ Against this legislative backdrop and in the absence of direction from the Supreme Court, U.S. courts have long grappled with the issue of whether, and to what extent, these provisions apply to non-U.S. parties and to occurrences abroad.³⁸ The courts have adopted different standards depending on the circumstances being litigated and, as a result, have proved to be dynamic forums for international parties to challenge the extraterritorial application of U.S. law.³⁹

These parties have expressed their disapproval of transnational regulation under U.S. law by citing an array of rationale.⁴⁰ Most prominent

(5) economic loss; and

(6) “loss causation,” i.e., a causal connection between the material misrepresentation and the loss.

Dura Pharm., 544 U.S. at 341-42 (citations omitted).

37. 15 U.S.C. § 78j (2010), *amended by* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

38. See Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 19-20 (2007) (noting that while it is “broadly accepted” that antifraud provisions have some extraterritorial application, defining “[p]recisely which transactions or conduct are covered remains a matter of judicial interpretation”); Derek N. White, Note, *Conduct and Effects: Reassessing the Protection of Foreign Investors from International Securities Fraud*, 22 REGENT U. L. REV. 81, 86 (2010) (stating “lower courts have had to determine whether ‘Congress would have wished the precious resources of U.S. courts and law enforcement agencies to be devoted to’ . . . predominantly foreign transactions rather than allowing foreign nations to deal with the problem,” because statute is silent as to extraterritorial reach and Supreme Court has not addressed issue (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975), *overruled by* *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869 (2010))).

39. For example, in response to the *Morrison* litigation, eighteen amicus curiae briefs were submitted in total, with fifteen of them supporting the respondents and the bright-line test eventually adopted by the Court. See, e.g., *Bersch*, 519 F.2d at 996-97 (noting that Germany, Switzerland, Italy, and France all submitted declarations stating that they “would not recognize a U.S. judgment in favor of the defendant as a bar to an action by [their] own citizens”).

40. The amicus briefs filed in the *Morrison* case shed light on the range and intensity of arguments against the foreign application of U.S. laws. See, e.g., Br. for Eur. Aeronautic Defence & Space Co. N.V. as Amici Curiae in Supp. of Resp’ts at *9-12, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 719336 [hereinafter Eur. Aero. Defence & Space Co. Amici Br.] (arguing that Congress never expressed “clear intent” to have Section 10(b) apply abroad); Br. of Int’l Chamber of Commerce as Amici Curiae in Supp. of Resp’ts at *18-29, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 719334 [hereinafter ICC Amici Br.] (arguing that Court should accord comity to foreign law when interpreting Section 10(b), citing numerous foreign regulatory frameworks addressing securities fraud); Org. for Int’l Inv. Amicus Br., *supra* note 1, at *12-19 (arguing that “case-by-case approach” adopted by lower courts creates confusion and is contrary to Supreme Court precedent, thus creating risk of deterred foreign investment in U.S.); UK Amicus Br., *supra* note 1, at *6-12 (discussing UK law pertaining to securities regulation, including disclosure requirements, enforcement parameters, and procedural rules). International parties have used the litigation process as a forum to denounce the extraterritorial application of U.S. law long before the *Morrison* case as well. See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167-68 (2004) (citing amicus briefs

among these are arguments evincing comity concerns and asserting that the United States, by applying its securities laws abroad, is acting in a manner inconsistent with its international legal duties.⁴¹ These protests have not been limited to litigators, but have also been expressed by foreign governments that have voiced their discontent and have even enacted retaliatory legislation in response to U.S. assertions of transnational jurisdiction.⁴² Thus, the need for refining the U.S. approach to securities

filed by Germany, Canada, and Japan in presenting argument that extraterritorial application of U.S. antitrust laws interferes with foreign regulatory regimes); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16-17 (1963) (reasoning that assertion of power to foreign conduct “aroused vigorous protests from foreign governments and created international problems for our Government” in holding that National Labor Relations Act does not apply where foreign flag vessels employ foreign sailors).

41. See, e.g., *Morrison*, 130 S. Ct. at 2885-86 (reasoning that adoption of transactional test will avoid “probability of incompatibility with the applicable laws of other countries,” and citing as support numerous amicus briefs filed by international parties, which “all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce”). See generally ICC Amici Br., *supra* note 40, at *21-29 (arguing that foreign regulatory regimes are sufficient to address and remedy securities violations, summarizing regulatory frameworks in Switzerland, Germany, and France as support); Eur. Aero. Defence & Space Co. Amici Br., *supra* note 40, at *16-33 (summarizing European Union securities regulation framework and those of its member nations, and discussing conflicts with U.S. class action system). The Supreme Court defined international comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

42. See, e.g., Foreign Extra-territorial Measures Act, R.S.C. 1985, c. F-29, § 5(1) (2001) (Can.) (granting Attorney General authority to prohibit compliance with foreign judgment that infringes Canada’s sovereignty); Protection of Trading Interests Act of 1980, c. 11, §§ 1-2 (U.K.) (prohibiting courts from enforcing foreign judgment that “infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom”); Michael A. Gerstenzang, Note, *Insider Trading and the Internationalization of the Securities Markets*, 27 COLUM. J. TRANSNAT’L L. 409, 483 (1989) (discussing French blocking statute, Law No. 80-538 of July 16, 1980, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 17, 1980, p. 1799, and noting that it “forbids nationals, and certain others with ties to France, from divulging economic, commercial, industrial, financial or technical matters to foreign authorities except as provided by international agreement”); see also Embassy of Switz. in the United States of America, Diplomatic Note to the United States Dep’t of State, Note No. 17/2010 (Feb. 23, 2010), reprinted in ICC Amici Br., *supra* note 40, at *1a-4a (drawing attention to then-pending *Morrison* case, and stating that “[t]he extraterritorial assertion of jurisdiction requested by the plaintiffs in this case would be inconsistent with established principles of international law”).

Interestingly, the U.S. government has also vigorously protested the extraterritorial application of foreign law and threatened retaliation, at least in the context of human rights. See Org. for Int’l Inv. Amicus Br., *supra* note 1, at *11 (discussing U.S. reaction to attempts by Belgium and Spain to have laws applied to human right claims). Former Secretary of State Donald Rumsfeld, in response to Belgium’s assertion of its laws, stated that “Belgium appears not to respect the sovereignty of other countries. [It] needs to realize that there are consequences to its actions.” *Id.* (quoting Donald H. Rumsfeld, U.S. Sec’y of State, Remarks at

regulation is ever-present—particularly in light of the growing interconnectedness between markets—and due regard must be paid to foreign interests accordingly.⁴³

B. *Retreat!: Maintaining International Posture Through
Cooperation and Comity*

Courts have addressed the issue of the antifraud laws' extraterritorial application through a variety of different lenses and methodologies, but a common theme—that is, a common reservation—can be discerned from the common law vernacular.⁴⁴ A constant, unwavering appreciation of the sovereignty of other nations lines the case law that informs U.S. legislation invoked to address foreign circumstances.⁴⁵ Prior to *Morrison* and the

NATO Headquarters (June 12, 2003)), available at <http://www.defense.gov/speeches/speech.aspx?speechid=469>. Belgium ultimately repealed its universal jurisdiction, as did Spain after the United States and other countries pressured it do so. See *id.* (citing AGENCE FRANCE-PRESSE, *Spanish Lawmakers Move to Curb Foreign Human Rights Probes*, THE RAW STORY, May 19, 2009, <http://rawstory.com/08/?p=4584>).

43. See Michael Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 1372 PLI/CORP. 817, 825 (2009) (“In today’s global marketplace cross-border securities transactions have become routine: firms and investors frequently undertake activities in one jurisdiction that impact the laws and regulations of other jurisdictions.”); Matsou, *supra* note 4, at 166 (noting that “principle of comity creates the foundation of the international legal system”); Testy, *supra* note 9, at 929 (arguing that SEC efforts to have U.S. securities laws apply abroad should be governed by “comity and cooperation”); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1320 (1985) (“[T]he nature and intensity of the United States’ interest in regulating extraterritorial conduct cannot alone determine the proper limits on extraterritorial jurisdiction.”).

44. See *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 372 (S.D.N.Y. 2005) (noting “substantial degree of doctrinal ambiguity and division that exists in the governing legal rules and precedents” that “confound[s] the courts’ subject matter jurisdiction determination in claims regarding foreign securities transactions”); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 467-68 (2009) (noting that courts address extraterritorial application of U.S. securities laws differently, listing as examples use of conduct and effects tests, “concepts of reasonableness or other doctrines to consider the relative efficiency and desirability of extending jurisdiction abroad”); see also Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 119-20 (2003) (arguing that “courts are ill-suited to the task of resolving the overlapping legal, economic, and political concerns involved in the [extraterritorial] application of antifraud rules” because of “institutional constraints”). See generally Buxbaum, *supra* note 38 (examining different doctrines courts employ to interpret whether jurisdiction exists, such as conduct and effects tests, class certification under Federal Rule of Civil Procedure 23, subject-matter jurisdiction, forum non conveniens, and international comity); White, *supra* note 38, at 87-101 (same). For a discussion of the conduct and effects tests, see *infra* notes 64-75 and accompanying text.

45. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993) (holding comity concerns are appropriate considerations in adjudicating claims brought under Sherman Act, but only after conclusion that court has jurisdiction

Dodd-Frank Act, this case-by-case identification of foreign interests represented no more than a tool courts used to determine whether adjudicating a matter would conflict with the interests of foreign sovereignties.⁴⁶

The international economic system has also recognized the need for a more unified regulatory effort to curtail instances of securities fraud taking place across a number of global markets.⁴⁷ Even the U.S. government,

to act); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (adopting “general and almost universal rule [] that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,” and reasoning that rule guards against interference with sovereign authority of other nations (citations omitted)); *Spatola v. United States*, 925 F.2d 615, 618-19 (2d Cir. 1991) (denying petition for writ of habeas corpus because district court was justified in determining that certified copy of foreign conviction sufficed as probable cause to extradite and reasoning that to hold otherwise inquiries would have to be made that are “inconsistent with principles of comity”); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440, 444 (3d Cir. 1971) (granting deference to English adjudication of breach of contract claim under rationale that “comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect” (citation and footnote omitted)); *Paraschos v. YBM Magnex Int’l, Inc.*, 130 F. Supp. 2d 642, 647 (E.D. Pa. 2000) (dismissing securities fraud claims due to international comity concerns).

46. See Fisch, *supra* note 2, at 566 (“In addition to considering the interests of the United States in applying its law to foreign tender offers, the courts must, under an interest analysis approach, consider the interests of other sovereigns in regulating the transaction.”); *Matson*, *supra* note 4, at 148 (“Courts . . . face a situation in which they must resolve the cases before them by weighing the domestic and foreign aspects of a particular case to determine the appropriateness of applying the securities laws.”).

47. See International Organization of Securities Commissions [IOSCO], *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, May 2002, available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf> (stating purpose of establishing cooperative multilateral agreement to address “increasing international activity in the securities and derivatives markets, and the corresponding need for mutual cooperation and consultation among IOSCO Members to ensure compliance with, and enforcement of, their securities and derivatives laws and regulations”); Eric C. Chaffee, *The Internationalization of Securities Regulation: The United States’ Role in Regulating the Global Capital Markets*, 5 J. BUS. & TECH. L. 187, 193-97 (2010) (arguing that “[t]he best model for international securities regulation is one based upon regulatory harmonization and centralization”); Charles V. Baltic, III, Note, *The Next Step in Insider Trading Regulation: International Cooperative Efforts in the Global Securities Market*, 23 LAW & POL’Y INT’L BUS. 167, 192-97 (1992) (arguing that “future of effective regulation in [international securities markets] depends not on extraterritorial exertion of national jurisdiction but rather on cooperative regulatory efforts,” and offering European Economic Community Directive on Insider Trading as example in area of insider trading); cf. G-20 Declaration, *supra* note 1, at ¶ 9 (calling upon “regulators to formulate their regulations and other measures in a consistent manner” and making it priority to “strengthen cooperation”); OECD, *supra* note 1 (stating that “[m]ember countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom”); Christopher M. Bruner, *States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization*, 30 MICH. J. INT’L L. 125, 171 (2008) (“The push for cooperative regimes has been particularly strong in the economic arena.”). See generally Ahdieh, *supra* note 33 (arguing for international

in a variety of contexts, acknowledges the value of increasing cooperation between countries to create more effective regulatory controls.⁴⁸ Such an effort would not only likely prove more effective than domestic actions, but would also minimize intrusions by one country into the regulatory interests of another.⁴⁹ Only if the constituents in the global system cooperate, however, would this system operate efficiently—without such cooperation, market players would simply flock to those areas not “playing along” and the “race-to-the-bottom” trend that many commentators identify would continue.⁵⁰

regulatory system encouraging jurisdictional “overlap, interdependence, and attendant complexity” so that regulators may cooperate and compete to achieve effective global regime); Brummer, *supra* note 1 (discussing obstacles and solutions to international cooperation among regulators in securities regulation); Mann & Barry, *supra* note 43 (discussing developments in internationalization of securities regulation); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113 (2009) (discussing efficacy of “transnational regulatory networks”).

48. See U.S. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM—A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 4 (2009), available at http://www.financialstability.gov/docs/regs/FinalReport_web.pdf (stating one of five objectives is to “[r]aise international regulatory standards and improve international cooperation”); SEC. AND EXCH. COMM’N, *International Regulatory Policy*, Jan. 20, 2010, http://sec.gov/about/offices/oia/oia_regpolicy.shtml (last visited Sept. 17, 2010) (stating that regulatory priorities include “facilitating regulatory cooperation regarding the supervision of financial entities active in the cross-border capital markets”).

The SEC has also yielded to other nations when discontinuing enforcement proceedings, thus recognizing the need to harmonize efforts and defer to primarily foreign interests in curtailing international securities fraud. See, e.g., Gregory Crouch, *Ahold Reaches a Settlement with the S.E.C.*, N.Y. TIMES, Oct. 14, 2004, at C1 (stating that SEC ceased to pursue securities fraud charges out of deference to Dutch prosecutors); *Parmalat Settles with S.E.C. on Accusations of Bond Sale Fraud*, N.Y. TIMES, July 29, 2004, at C8 (noting that SEC deferred to Italian bankruptcy proceedings, requiring only that Parmalat “put in effect internal governance reforms to settle a civil fraud suit filed by [SEC]”).

49. Cf. *Predictability and Comity*, *supra* note 43, at 1322 (“When the United States asserts jurisdiction over activities occurring within the territory of another sovereign, its action may well be perceived as intrusive and perhaps even unlawful.”). One commentator has suggested that “optimal deterrence” is best achieved through a cooperative global regime rather than a unilateral approach boasting harsher penalties, at least in the antitrust context. See Siddharth Fernandes, Note, *F. Hoffman-LaRoche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 CONN. J. INT’L L. 267, 304-05, 316-17 (2005) (arguing that Supreme Court’s decision in *Empagran S.A.* supports theory that “[i]n today’s global economy and in an environment where unilateral action has proven to be both counterproductive and insulting, nations must cooperate to forge an effective antitrust regime”).

50. See W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions*, 74 FORDHAM L. REV. 213, 229 (2005) (noting “fear” among some commentators that if securities fraud regulation is left to individual nations, “regulatory competition will cause nations to draft progressively weaker securities laws in an attempt to attract corporations, creating a downward spiral” as corporations will seek “weaker investor protections”); see also Chaffee, *supra* note 47, at 194 (noting that, even if “race-to-the-bottom” is

In addition to establishing an international regulatory regime, the United States has a number of alternative avenues through which it could cooperate in curtailing international securities fraud at an appropriate level.⁵¹ Already in place are Memoranda of Understanding (MOU) between the United States and foreign parties.⁵² These memoranda aim to facilitate the type of information exchanges needed to combat cross-border securities fraud as well as to encourage the cooperation necessary in respecting the sovereign rights of other nations.⁵³ MOUs have been criti-

avoided by establishing transnational norms, it may not be fully preventable due to gaps between regulation and likelihood of enforcement among different countries).

Some commentators argue that regulatory competition or disparity between nations actually induces a "race-to-the-top" scenario, reasoning that investors place a premium on reliable information. See Patterson, *supra* note 50, at 229 (noting that "other commentators believe that the market will value securities lower when they are subject to minimal investor protections, so corporations will not select weak securities regimes"); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2426-27 (1998) ("The supporting evidence against the race-for-the-bottom thesis . . . is that firms the world over voluntarily release more information than their securities regulators require in order to raise capital, with the best example being the European firms listing in London, which voluntarily choose to meet higher local disclosure requirements.").

51. See Chaffee, *supra* note 47, at 202 (discussing current SEC "initiatives to increase cooperation and coordination," such as "provid[ing] assistance to foreign securities regulators in cross-border securities investigations and prosecutions," agreeing to "memorand[a] of understanding . . . to allow for the sharing of information," participating in various international regulatory organizations, "engaging in a number of bilateral dialogues," and "exploring the use of International Financial Reporting Standards and the possible convergence of those international standards with Generally Accepted Accounting Principles in the United States"). After analyzing the current U.S. regulatory framework, Chaffee presented three proposals to push the United States toward a more cooperative and harmonized approach towards securities regulation, reasoning that action should be taken "while it has the power to lead the process, rather than be a mere contributor." *Id.* at 205-06. To help establish the centralized securities regulatory body needed to be effective in today's globalized economy, he posited that:

First, the United States should convene a successor organization to IOSCO with more robust monitoring powers and an international task force to regularly report on issues facing the emerging global capital markets. Second, the United States should spearhead the creation of an international agreement on the regulation of securities and exchanges that sets basic regulatory norms for national securities markets throughout the world from which nations could upwardly depart if desired. Third, the United States should begin a discussion regarding how to bring a global securities and exchange regulator into being.

Id. at 205.

52. See SEC. AND EXCH. COMM'N, *Cooperative Arrangements with Foreign Regulators*, June 11, 2010, http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (last visited Oct. 1, 2010) (identifying five areas of cooperative arrangements established via MOU's and entered into by SEC, including Enforcement Cooperation, Regulatory Cooperation, Technical Assistance, Terms of Reference for Bilateral Dialogues, and Mutual Recognition).

53. Cf. SEC. AND EXCH. COMM'N, *The SEC's Cooperative Arrangements with Foreign Regulators*, May 23, 2008, http://www.sec.gov/about/offices/oia/oia_coopfact-sheet.htm (last visited Sept. 18, 2010) ("MOUs establish clear mechanisms for the

cized, however, as ineffective due to their nonbinding nature, the amount of time required for negotiation, and the fact that foreign regulators must first seek assistance if the SEC is to get involved.⁵⁴

Whatever the means employed, international law binds the United States to respect the sovereignty of other governments, and, consequently, the United States must not exert influences contrary to such an end.⁵⁵

exchange of information, including setting forth the terms and conditions for sharing and protecting the confidentiality of non-public information.”).

54. See Dhesi, *supra* note 1, at 1371-73 (arguing that despite SEC publicity to contrary, MOUs, its “main method of expanding its jurisdiction to foreign soil,” remains “insufficient mechanisms”).

55. See, e.g., *Lauritzen v. Lauren*, 345 U.S. 571, 577-78 (1953) (holding that Jones Act does not have extraterritorial application in circumstances involving foreign ship in foreign waters under rationale that statutes silent as to their foreign application are “construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law”); *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, [1978] A.C. 547 (H.L.) 631 (U.K.) (determining that United States’ “exercise of jurisdiction” over foreign conduct “is not in accordance with international law”); Rb. The Hague 17 September 1982, RvdW 1982, 167 m.nt. (*Compagnie Européenne des Petroles S.A./Sensor Nederland B.V.*), translated in 22 I.L.M. 66, 71-73 (1982) (holding that United States may not bring foreign corporation within its extraterritorial jurisdiction through imposition of trade embargo, as doing so would violate “universally accepted rule of international law that in general it is not permissible for a State to exercise jurisdiction over acts performed outside its borders” unless nationality, protection, or universality principle exceptions apply, which they do not); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 244, at 35 (Apr. 9) (“Between independent States, respect for territorial sovereignty is an essential foundation of international relations.”); S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7) (“Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule—it may not exercise its power in any form in the territory of another State.”). The *Lotus* court determined that under this principle of international law, “jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.” S.S. “*Lotus*,” 1927 P.C.I.J. (ser. A) No. 10, at 18-19; see also John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 356 (2010) (“The most important basis for jurisdiction is territory: each state undoubtedly has legislative jurisdiction over events taking place and persons found within its own territory, and territory is often called the normal or primary basis for jurisdiction.”).

The principle that sovereignty guides international obligations was carefully explained in *Island of Palmas*:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others.

The Supreme Court has recognized this principle since America's infancy.⁵⁶ Unwaveringly, the Court has continued to rely upon this notion when asked to balance the proper application of U.S. law with the nation's international obligations.⁵⁷ Notwithstanding this appreciation, applying U.S. law abroad should not depend on judicial interpretations of foreign policy concerns.⁵⁸ Rather, comity of nations may be properly realized through the cooperative regulatory efforts alluded to above, or by simply moderating the current U.S. reach abroad.⁵⁹ As shown below, the latter

The fact that the functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State.

Island of Palmas (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829, 838 (Perm. Ct. Arb. 1928).

56. See, e.g., *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454-55 (2007) (holding that U.S. patent law does not have extraterritorial application by relying on "presumption that United States law governs domestically but does not rule the world" and finding that foreign policy judgments are implicated); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."); *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (holding that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived," and that "'the comity of nations'" defines scope of such sovereignty); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations . . ."); *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 117 (1779) (equating "independency and inviolability" of foreign minister to "immunities of his house," and holding that "to invade [a State's] freedom is a crime against the State and all other nations"); cf. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.").

57. See *Lauritzen*, 345 U.S. at 578-79 (noting that issue of statutory construction in case is "rather commonplace in a federal system by which courts often have to decide whether 'any' or 'every' reaches to the limits of the enacting authority's usual scope or is to be applied to foreign events or transactions").

58. See *Chang*, *supra* note 44, at 107 ("The problem here is that the antifraud provisions are applied by the courts on an ad hoc judicial decision-making basis, not by clear rules that the legislative or executive branches have formulated."); *Matson*, *supra* note 4, at 165 ("Not only is it inappropriate for United States courts to determine the policies of other sovereign nations, but courts are also singularly ill-suited to weigh the delicate political and practical concerns affecting this policy judgment."); *Testy*, *supra* note 9, at 958 (arguing that formulation of policy with regard to "subject matter jurisdiction over transnational transactions" is best left with legislative and executive branches, because "institutional constraints" make courts "ill-suited" to address foreign policy concerns).

59. See *Choi & Silberman*, *supra* note 44, at 502-03 ("A rule based on the regulatory authority of a country over its securities-market would limit the United States to applying the securities laws where it has the power to enforce its laws.");

approach proves viable after *Morrison* and the Dodd-Frank Act's failure to overturn it.⁶⁰

III. GETTING THE BALL ROLLING: THE *MORRISON* DECISION LIMITS FOREIGN PRIVATE RIGHTS OF ACTION UNDER THE ANTIFRAUD PROVISIONS

In *Morrison*, the Supreme Court overruled lower court case law that applied the conduct and effects tests.⁶¹ The Court held that these courts erred by making determinations of what Congress would have intended Section 10(b) to govern, rather than applying the statutory presumption against extraterritoriality.⁶² Finding no language in the Exchange Act to rebut this presumption, the Court held that Section 10(b) applies only to transactions involving a security listed on any U.S. exchange, or domestic transactions involving any other security.⁶³

A. A Brief Synopsis of the Conduct and Effects Tests

In holding that the Exchange Act does not have foreign application, the *Morrison* Court expressly rejected the conduct and effects tests that developed in the lower courts.⁶⁴ The Second Circuit first adopted the effects test governing subject-matter jurisdiction over violations of the Exchange Act in *Schoenbaum v. Firstbrook*.⁶⁵ In that case, the court held that the impaired value of domestic investments through fraudulent conduct committed by foreign issuers had "a sufficiently serious effect upon United States commerce to warrant assertion of jurisdiction."⁶⁶ The inquiry under this effects test, later clarified by the same court, is "whether the

Kelly, *supra* note 2, at 500 (concluding that "domestic-traded" test, what Supreme Court termed transactional test, promotes comity interests by "defer[ring] jurisdiction to the country with the greatest interest" and respecting foreign policy judgments).

60. For a discussion of the scope of Section 10(b) and Rule 10b-5 after *Morrison* and the Dodd-Frank Act, see *infra* notes 136-62 and accompanying text.

61. See *infra* notes 89-96 and accompanying text.

62. See *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2881 (2010) ("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.").

63. See *infra* notes 97-103 and accompanying text.

64. *Morrison*, 130 S. Ct. at 2877-81 (holding that "judicial-speculation-made-law" embodied in conduct and effects tests fails to properly recognize presumption against extraterritoriality).

65. 405 F.2d 200 (2d Cir. 1968), *rev'd*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *overruled by Morrison*, 130 S. Ct. 2869. In *Schoenbaum*, investors of a Canadian corporation, listing its stock on the New York Stock Exchange and the Toronto Stock Exchange, brought suit claiming the corporation and its directors fraudulently withheld information "in order to purchase [] treasury shares at an artificially low market price." *Id.* at 204-05.

66. *Id.* at 208-09 (citations omitted); see *id.* at 208 (holding that subject-matter jurisdiction over defendants existed, even though alleged fraudulent transactions took place abroad, "when the transactions involve stock registered and listed on a

wrongful conduct had a substantial effect in the United States or upon United States citizens.”⁶⁷ An effect is not substantial “when predominantly foreign-based fraud only tangentially impacts the United States market, such as by affecting general investor confidence.”⁶⁸

The conduct test, first adopted by the Second Circuit in *Leasco Data Processing Equipment Corp. v. Maxwell*,⁶⁹ focuses on conduct within the United States and the harm it causes to investors abroad rather than the effects of foreign conduct on domestic markets and investors.⁷⁰ Subject-matter jurisdiction exists under this test “if the defendant’s conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad.”⁷¹ The “critical factor” in this assessment is that the conduct that “directly caused the loss to investors” occurred in the United States.⁷²

national securities exchange, and are detrimental to the interests of American investors” (citations omitted)).

67. SEC v. Berger, 322 F.3d 187, 192 (2d Cir. 2003), *overruled by Morrison*, 130 S. Ct. 2869.

68. *In re Nat’l Austl. Bank Secs. Litig.*, No. 03-6537, 2006 WL 3844465, at *3 (S.D.N.Y. Oct. 25, 2006); *accord* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975) (holding effects test is satisfied “only when [fraudulent acts relating to securities] result in injury to purchasers or sellers of those securities in whom the United States has an interest, not where acts simply have an adverse affect on the American economy or American investors generally” (footnote omitted)), *overruled by Morrison*, 130 S. Ct. 2869; *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 562 (S.D.N.Y. 2008) (noting “focus of the effects test on concrete harm to U.S. investors and markets”).

69. 468 F.2d 1326 (2d Cir. 1972), *overruled by Morrison*, 130 S. Ct. 2869.

70. *See id.* at 1333-34 (differentiating between circumstances in case before court from those in *Schoenbaum*, and determining that “when no fraud has been practiced in this country and the purchase or sale has not been made here, we would be hard pressed to find justification for going beyond *Schoenbaum*”). In *Leasco*, the court concluded that it had subject-matter jurisdiction over the plaintiff’s claim against a British corporation and its executives, even though the corporation’s stock was listed and purchased only on the London Stock Exchange, because “there were abundant misrepresentations in the United States.” *Id.* at 1334-35. The court based its holding on the determination that “[s]ince Congress [] meant § 10(b) to protect against fraud in the sale or purchase of securities whether or not these were traded on organized United States markets, we cannot perceive any reason why it should have wished to limit the protection to securities of American issuers.” *Id.* at 1336.

71. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) (citing *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir.1983)), *overruled by Morrison*, 130 S. Ct. 2869; *accord* *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) (noting that focus of conduct test is on how U.S.-based conduct “relates to the alleged fraudulent scheme, ‘on the theory that Congress did not want to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.’” (quoting *Psimenos*, 722 F.2d at 1045) (internal quotation omitted)), *overruled by Morrison*, 130 S. Ct. 2869.

72. *Morrison v. Nat’l Austl. Bank*, 547 F.3d 167, 174 (2d Cir. 2008) (discussing Second Circuit’s holding in *Berger*, 322 F.3d 187), *aff’d and overruled by Morrison*, 130 S. Ct. 2869.

The Second Circuit later blended these two tests into a single inquiry, reasoning that “an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.”⁷³ Other circuits created their own tests, based predominantly on the Second Circuit’s reasoning, but diverging in certain respects.⁷⁴ These developments contributed to the lack of clarity that commentators have long recognized among the interpretations of securities laws, and that the Supreme Court finally remedied in *Morrison*.⁷⁵

B. *The Facts of Morrison*

In 1998, Australia-based National Australia Bank (NAB) acquired Florida-based HomeSide Lending, Inc. (HomeSide).⁷⁶ HomeSide operated by collecting fees for servicing mortgages.⁷⁷ The company would compute the present value of its rights to such mortgage servicing fees at the beginning of each year and list these rights as an asset on its balance

73. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995), *overruled by Morrison*, 130 S. Ct. 2869.

74. *See U.S. Supreme Court Greatly Restricts Extraterritorial Application Of Civil Securities Fraud Actions*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES MEMORANDUM (July 19, 2010), *available at* http://www.skadden.com/content/Publications/Publications2112_0.pdf (stating that number of circuit courts of appeals issued interpretations of whether Section 10(b) had extraterritorial application, “each with varying results that district courts recognized became a difficult and amorphous standard to apply” and that the *Morrison* decision “provide[s] clarity where it was very much needed”); *see also Morrison*, 130 S. Ct. at 2880 (“While applying the same fundamental methodology of balancing interests and arriving at what seemed the best policy, [the other circuit courts using the Second Circuit’s approach] produced a proliferation of vaguely related variations on the ‘conduct’ and ‘effects’ tests.”). *See generally* Jonathan Wang, Note, *Securities Pirates: Why a More Expansive Basis for Jurisdiction Over Transnational Securities Fraud Will Prevent the United States From Turning Into the Barbary Coast*, 62 ADMIN. L. REV. 223, 229-32, 239 (2010) (examining different approaches to conduct test taken by U.S. circuit courts of appeals and discussing its inconsistent application).

75. *See, e.g.*, Chang, *supra* note 44, at 108 (noting that “each court has had to struggle with the difficult issue of the extraterritoriality of securities laws without congressional guidance, expanding or limiting its jurisdictional coverage according to its individual whims,” which has resulted in inconsistent applications of tests and in courts tending to give statute overbroad applications); Choi & Silberman, *supra* note 44, at 467 (“The individual doctrines applied within the courts—such as the conduct and effects tests—are often ambiguous and difficult to predict.”); White, *supra* note 38, at 114 (noting “inconsistent application of judicially-crafted solutions in determining whether to apply U.S. securities laws to foreign-cubed class actions”); *see also Morrison*, 130 S. Ct. at 2879 (“As they developed, [the conduct and effects] tests were not easy to administer.”).

76. *See Morrison*, 130 S. Ct. at 2875 (noting that NAB, Australia’s largest bank, purchased mortgage servicing company, Homeside).

77. *See id.* (“HomeSide’s business was to receive fees for servicing mortgages (essentially the administrative tasks associated with collecting mortgage payments). The rights to receive those fees, so-called mortgage-servicing rights, can provide a valuable income stream.” (citations omitted)).

sheets.⁷⁸ To this end, the company's success depended largely on the state of the housing market and, thus, on interest rates.⁷⁹ Between 1998 and 2001, HomeSide and NAB's reported profits predominantly reflected the calculations of servicing rights from HomeSide's valuation models.⁸⁰ In July 2001 and September 2001, NAB announced two write-downs of HomeSide's assets totaling \$2.25 billion.⁸¹ Accordingly, the value of the NAB's ordinary shares and American Depositary Receipts dropped.⁸² In response to the write downs, NAB cited "a failure to anticipate the lowering of prevailing interest rates, . . . other mistaken assumptions in the financial models, and the loss of goodwill."⁸³

Australian investors in NAB's ordinary shares filed suit against NAB and HomeSide in the United States District Court for the Southern District of New York.⁸⁴ The investors claimed that NAB, HomeSide, and relevant executives of each entity, fraudulently manipulated the forecasting

78. *See id.* (stating that right to mortgage servicing fees proves to be "a valuable income stream").

79. *See id.* (noting that value of rights is dependent upon "the likelihood that the mortgage to which it applies will be fully repaid before it is due," additionally, ability to repay depends on current interest rates).

80. *See id.* (stating that NAB touted success of business through annual reports, other public documents, and public statements by directors and officers).

81. *See id.* at 2875-76 ("[O]n July 5, 2001, National announced that it was writing down the value of HomeSide's assets by \$450 million; and then again on September 3, by another \$1.75 billion.").

82. *See id.* at 2876 (noting "slump[]" in prices). Ordinary shares are "what in America would be called 'common stock.'" *Id.* at 2875. The SEC defines American Depositary Receipts:

The stocks of most foreign companies that trade in the U.S. markets are traded as American Depositary Receipts (ADRs). U.S. depositary banks issue these stocks. Each ADR represents one or more shares of foreign stock or a fraction of a share. If you own an ADR, you have the right to obtain the foreign stock it represents, but U.S. investors usually find it more convenient to own the ADR. The price of an ADR corresponds to the price of the foreign stock in its home market, adjusted to the ratio of the ADRs to foreign company shares.

SEC. AND EXCH. COMM'N, *American Depositary Receipts* (Jan. 31, 2007), <http://www.sec.gov/answers/adrs.htm>.

83. *Morrison*, 130 S. Ct. at 2876.

84. *See id.* (noting that investors purchased NAB ADRs before write-downs—in 2000 and 2001); *see also id.* at 2876 n.1 ("Robert Morrison, an American investor in National's ADRs, also brought suit, but his claims were dismissed by the District Court because he failed to allege damages." (citation omitted)).

The *Morrison* case is an example of what has been termed an "F-cubed" or "foreign-cubed" case. *Cf. id.* at 2894 n.11 (Stevens, J., concurring in result) (noting that "foreign-cubed actions" would also be categorically excluded from Section 10(b) application under Second Circuit approach). Such a case has been defined as a "securities fraud case involving a foreign plaintiff suing a foreign company with regard to shares of that company purchased on a foreign securities exchange." Ronald J. Colombo, *Morrison v. National Australia Bank—Post-Decision SCOTUScast*, THE FEDERALIST SOCIETY (Aug. 19, 2010), <http://www.fed-soc.org/audioLib/SCOTUScast-08-19-10-Colombo%28001%29.mp3>.

models for their mortgage servicing rights.⁸⁵ By knowingly reporting continued revenues based on those rights through financial statements and press releases, the complaint alleged, the defendants' actions violated Section 10(b) and Rule 10b-5.⁸⁶ The district court dismissed the claims for lack of subject-matter jurisdiction, holding that NAB's conduct in the United States was insufficient to establish jurisdiction and did not cause the plaintiffs' harm.⁸⁷ The Second Circuit affirmed on appeal.⁸⁸

C. *The Court Resurrects the Long Lost Statutory Presumption*

In *Morrison*, the Supreme Court revived the statutory presumption that the Second Circuit neglected in developing its conduct and effects tests.⁸⁹ The Court, with Justice Scalia writing for the majority, emphasized

85. See *Morrison*, 130 S. Ct. at 2876 (stating that suit alleged violations of Section 10(b) and Rule 10b-5).

86. See *id.* (noting that plaintiffs claimed defendants "violat[ed] §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5, promulgated pursuant to § 10(b)" (citations omitted)).

87. See *In re Nat'l Austl. Bank Secs. Litig.*, No. 03-6537, 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006) (applying Second Circuit's conduct and effects tests in holding that "[o]n balance, it is the foreign acts—not any domestic ones—that 'directly caused' the alleged harm here" (citation omitted)).

88. See *Morrison v. Nat'l Austl. Bank*, 547 F.3d 167 (2d Cir. 2008) (holding that court lacks subject-matter jurisdiction due to "particular mix of factors—the fact that the fraudulent statements at issue emanated from NAB's corporate headquarters in Australia, the complete lack of any effect on America or Americans, and the lengthy chain of causation between HomeSide's actions and the statements that reached investors"), *aff'd in part and overruled in part by Morrison*, 130 S. Ct. at 2869.

89. See *Morrison*, 130 S. Ct. at 2878 (noting disregard among Second Circuit and other lower courts of statutory presumption against extraterritorial application). The Second Circuit did address this presumption in its earlier cases. In *Schoenbaum*, for example, the court reversed the district court's determination that subject-matter jurisdiction did not exist because of the presumption against extraterritoriality. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968), *rev'd*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *overruled by Morrison*, 130 S. Ct. 2869. Instead, it held that "Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities." *Id.* In doing so, the court actually flipped the presumption into one *favoring* extraterritorial application, reasoning that "[i]f § 30(b) had been meant to exempt every transaction by any person outside of the United States it would have been drafted to state that the Act does not apply to 'any transaction in any security outside the jurisdiction of the United States,' a phrase used in § 30(a)." *Id.* The court went on to conclude that, rather than presuming the Act does not apply outside the United States, "the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted." *Id.* From this analysis, the judicial creations of the conduct and effects tests came to life. See *Morrison*, 130 S. Ct. at 2879 ("As long as there was prescriptive jurisdiction to regulate, the Second Circuit explained, whether to apply § 10(b) even to 'predominantly foreign' transactions became a matter of whether a court thought Congress '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.'" (citing *Bersch v. Drexel*

the “‘longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”⁹⁰ Recognizing that Congress generally legislates only with concern for domestic matters,⁹¹ the Court held 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.’”⁹² The majority reasoned that the purpose of the presumption is to avoid exactly that which became the underlying inquiry of the judicially-created conduct and effects tests—ascertaining what legislators had in mind when enacting the statute.⁹³

Thus, as the Court explained, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”⁹⁴ With this conclusion established, the Court proceeded to analyze whether the language of the Exchange Act provides for extraterritorial application of its provisions.⁹⁵ Here, the Court addressed three contentions regarding the Exchange Act’s language and concluded that none of the proffered provisions evidenced congressional intent to have Section 10(b) apply outside the United States.⁹⁶

Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975), *overruled by Morrison*, 130 S. Ct. 2869; IIT v. Vencap, Ltd., 519 F.2d 1001, 1017-18 (2d Cir. 1975), *overruled by Morrison*, 130 S. Ct. 2869)).

90. *Morrison*, 130 S. Ct. at 2877 (quoting *E.E.O.C. v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted).

91. *See id.* (“Congress ordinarily legislates with respect to domestic, not foreign matters.” (citing *Smith v. U.S.*, 507 U.S. 197, 204 n.5 (1993))).

92. *Id.* (quoting *Aramco*, 499 U.S. at 248) (internal quotation marks omitted).

93. *See id.* at 2881 (“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.”); *see also id.* at 2880 n.4 (dismissing Judge Stevens’ reliance in concurrence on conduct and effects tests from Second Circuit). The Court noted the “judicial oak” that grew from a “legislative acorn” in Rule 10b-5 actions, and that Judge Friendly of the Second Circuit was its “master arborist.” *Id.* (quoting *id.* at 2888-89 (Stevens, J., concurring in part and dissenting in part); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975)). Nevertheless, the majority stated that “[Judge Friendly’s] successors, though perhaps under the impression that they nurture the same mighty oak, are in reality tending each its own botanically distinct tree.” *Id.*

94. *Id.* at 2878.

95. *See id.* at 2882-83 (shifting analysis to extraterritorial reach of provisions).

96. *See id.* The first contention was that the use of the term “interstate commerce” in Section 30(b) of the Exchange Act indicates an intention to have the act apply abroad. *Id.* at 2882. “Interstate commerce” is defined as “trade, commerce, transportation, or communication . . . between any foreign country and any State.” 15 U.S.C. § 78c(a)(17) (2006), *amended by Dodd-Frank Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Court dismissed this argument, holding that “the general reference to foreign commerce in the definition of ‘interstate commerce’ does not defeat the presumption against extraterritoriality.” *Morrison*, 130 S. Ct. at 2882 (citing *Aramco*, 499 U.S. at 251).

The second contention pointed to one of the stated purposes of the Exchange Act that provides in part, “prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign

D. *No “Craven Watchdog” Here: The New Transactional Test Governing § 10(b) and Rule 10b-5 Claims*

After resolving the presumption question, the Court turned its examination to the petitioners’ contention that they should succeed on their claims even if Section 10(b) does not apply extraterritorially.⁹⁷ Specifically, the petitioners argued that the violation at issue was HomeSide’s fraudulent reporting, a domestic activity requiring exclusively domestic application of the Exchange Act.⁹⁸ The Court, however, only briefly addressed this argument, stating that, given the rarity of a case in which no domestic activity could be alleged, “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”⁹⁹

The majority opinion then drew the significant distinction between “deceptive conduct ‘in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered’” and mere deceptive conduct.¹⁰⁰ Employing this distinction, the

countries.” 15 U.S.C. § 78b(2) (2006), *amended by* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see also* *Morrison*, 130 S. Ct. at 2882 (presenting argument). The Court quickly rejected this argument by looking to the qualifying language prior to “such transactions,” which states that “‘transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest.’” *Morrison*, 130 S. Ct. at 2882 (quoting 15 U.S.C. § 78b). The Court held that, because “[n]othing suggests that this *national* public interest pertains to transactions conducted upon *foreign* exchanges and markets,” this “fleeting reference” fails to overcome the presumption. *Id.*

The petitioners’ third contention involved Section 30(b) of the Exchange Act, and argued that its language indicates an exception to the general understanding that the Exchange Act applies abroad. *Id.* Under Section 30(b), the Court stated, “‘The provisions of [the Exchange Act] or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States,’ unless he does so in violation of regulations promulgated by the Securities and Exchange Commission ‘to prevent . . . evasion of [the Act].’” *Id.* (quoting 15 U.S.C. § 78dd(b) (2006), *amended by* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)) (brackets in original). The Court concluded that Section 30(b) seemed more likely to be a type of catch-all provision to prevent domestic violations going unpunished due to some minor foreign conduct. *Id.* at 2882-83. “At most,” the Court stated, “the . . . proposed inference is possible; but possible interpretations of statutory language do not override the presumption against extraterritoriality.” *Id.* at 2883 (citing *Aramco*, 499 U.S. at 253); *see id.* (rejecting argument in concurrence accusing majority of considering presumption against extraterritoriality “clear statement rule,” and simply holding that “there is no clear indication of extraterritoriality here”).

97. *Id.* at 2883-84 (“Petitioners argue that the conclusion that § 10(b) does not apply extraterritorially does not resolve this case.”).

98. *Id.* (“[The petitioners] contend that they seek no more than domestic application anyway, since Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide’s financial models; their complaint also alleged that [Homeside executives] made misleading public statements there.”).

99. *Id.* at 2884.

100. *Id.* (quoting 15 U.S.C. § 78j(b) (2006) and citing *SEC v. Zandford*, 535 U.S. 813, 820 (2002)).

Court determined that the Exchange Act focuses upon transactions of securities in the United States rather than where the fraudulent conduct originated.¹⁰¹ Thus, Section 10(b) only applies to transactions involving a security listed on a domestic exchange, or domestic transactions involving any other security.¹⁰² Consequently, under this standard, the petitioners failed to state a claim upon which relief could be granted, and the Court dismissed the case accordingly.¹⁰³

This bright-line rule provides greater certainty and guidance with respect to the protection afforded investors and the potential liability for issuers, as evidenced by district courts' applications of the *Morrison* holding to date.¹⁰⁴ The decision has also reversed the recent trend of increased

101. *See id.* (“[W]e think 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.”).

102. *See id.* (“[I]t is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.”). The Court reasoned that, “[w]ith regard to securities *not* registered on domestic exchanges, the exclusive focus on *domestic* purchases and sales is strongly confirmed by § 30(a) and (b), discussed earlier.” *Id.* at 2885 (footnote omitted). Additionally, the Court looked to the Securities Act of 1933, which was “enacted by the same Congress as the Exchange Act, and form[ed] part of the same comprehensive regulation of securities trading,” and concluded the SEC interpreted the statute’s registration requirement for sales of securities as inapplicable to sales occurring outside the U.S. *Id.* (citing 17 C.F.R. § 230.901 (2009)); *see id.* (“[The Securities Act of 1933] makes it unlawful to sell a security, through a prospectus or otherwise, making use of ‘any means or instruments of transportation or communication in interstate commerce or of the mails,’ unless a registration statement is in effect.” (quoting 15 U.S.C. § 77e(a)(1) (2006), *amended by* Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010))).

103. *See id.* at 2888 (“This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.”). Lastly, the Court voiced its comity concerns in stating, “[t]he probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application ‘it would have addressed the subject of conflicts with foreign laws and procedures.’” *Id.* (quoting *Aramco*, 499 U.S. 244, 256 (1991)).

104. *See, e.g.,* Cedeño v. Intech Group, Inc., No. 09-9716, 2010 WL 3359468 at *2 (S.D.N.Y. Aug. 25, 2010) (applying *Morrison* Court’s analysis in holding RICO statute “does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign,” because “RICO evidences no concern with foreign enterprises”); *In re* Banco Santander Securities-Optimal Litigation, Nos. 09-MD-02073-CIV, 09-CV-20215-CIV., 2010 WL 3036990 at *5 (S.D. Fla. July 30, 2010) (holding that *Morrison*’s transaction test is not satisfied where plaintiffs “made off-shore purchases in off-shore Bahamian investment funds closed to United States investors”); Cornwell v. Credit Suisse Group, No. 08-3758, 2010 WL 3069597 at *5 (S.D.N.Y. July 27, 2010) (rejecting plaintiff’s arguments that *Morrison* decision is limited to circumstances involving “F-cubed” claims, because “the *Morrison* opinions indicate that the Court considered that under its new test § 10(b) would not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the transaction occurred in the United States”); Stackhouse v. Toyota Motor Co., No. 10-922, 2010 WL 3377409 (C.D. Cal. July 16, 2010) (holding that *Morrison*’s transactional test is not satisfied when “purchaser or seller resides in the United States and completes a transaction on a foreign exchange from the United States,” because “[t]he

litigation aimed at foreign issuers as it retracts the reach of U.S. securities law in private rights of action.¹⁰⁵ Moreover, *Morrison* will likely serve to lessen the discord between the United States and other nations with equal interests in regulating securities fraud.¹⁰⁶

IV. THE NEW FRAUD LAWS OF THE LAND: ANTIFRAUD PROVISIONS IN THE DODD-FRANK ACT

The Dodd-Frank Act was enacted on July 21, 2010, “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”¹⁰⁷ The relevant antifraud provisions governing claims under the U.S. securities laws are sections 929P(b) and 929Y.¹⁰⁸ Under section 929P(b), entitled “Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws,” Congress grants U.S. district courts subject-matter jurisdiction over enforcement actions by the SEC or the United States pursuant to the antifraud provisions of the securities law under the conduct and effects tests.¹⁰⁹ Congress did not speak to the extraterritorial application of the antifraud provisions with respect to private rights of action under the

Supreme Court emphasized that the Exchange Act was not intended to regulate foreign exchanges”); *see also* Cave, *supra* note 3 (“[T]he [*Morrison*] Court’s decision will impact in (sic) the numerous F-cubed cases pending throughout the federal courts” and citing, as an example, *In re Vivendi Universal, S.A. Securities Litigation*, No. 02-5571, 2009 WL 3859066 (S.D.N.Y. Nov. 19, 2009), in which three quarters of class of plaintiffs were foreign).

105. *See* Cave, *supra* note 3 (noting that potential for liability stemming from application of U.S. law to foreign companies will decrease after *Morrison*); Himes, *supra* note 2 (concluding that “*Morrison* will put the brakes on” extraterritorial expansion of Section 10(b) claims).

106. *See Morrison*, 130 S. Ct. at 2885 (rationalizing holding by noting that “the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney’s fees are recoverable, and many other matters”); Himes, *supra* note 2 (“[T]he Supreme Court’s opinion can be seen as advancing globalization of the securities markets by constricting application of U.S. law in the recognition that other countries will apply their own securities regulation to overseas capital-raising activity.”).

107. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

108. *See* Conway, *supra* note 11 (“The Dodd-Frank Wall Street Reform and Consumer Protection Act . . . contains two provisions, Sections 929P(b) and 929Y, that concern the territorial scope of the federal securities laws.”); *Investor Protection and SEC Enforcement: Skadden Commentary on the Dodd-Frank Act*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES NEWSLETTERS 2 nn.5-7 (July 9, 2010), http://www.skadden.com/newsletters/FSR_Investor_Protection_and_SEC_Enforcement.pdf (same).

109. Dodd-Frank Act § 929P(b), 124 Stat. at 1864-65.

federal securities laws, however, thereby deferring to the *Morrison* decision until the SEC submits a report on the issue.¹¹⁰

V. PERHAPS TOO MANY ALL-NIGHTERS: A DRAFTING ERROR IN THE DODD-FRANK ACT SIGNALS AN INADVERTENT “THUMBS UP” BY CONGRESS TO THE *MORRISON* COURT

Despite the anticipation and excitement that accompanied the enactment of the Dodd-Frank Act, the language of the Act’s provisions governing extraterritorial application seemingly fails to capture the drafters’ intent.¹¹¹ While debating the Dodd-Frank Act on the House floor, Representative Paul Kanjorski, one of the leaders in drafting the legislation, asserted that the object of section 929P(b) is to specifically rebut the presumption against extraterritorial application.¹¹² Representative Kanjorski further indicated that the Act aimed to confer extraterritorial application to U.S. securities laws in actions brought by the SEC or the DOJ.¹¹³ Nevertheless, the language in the final draft of the legislation, passed by Congress the day after the *Morrison* decision, lacked the clarity and force of law that Representative Kanjorski envisioned because section 929P(b) ultimately took the form of a jurisdictional statute granting federal district courts subject-matter jurisdiction over such SEC and DOJ actions.¹¹⁴

A. *Jurisdictional Statutes: Sifting Through Their “Many Meanings”*

The Supreme Court has aptly stated that “[j]urisdiction . . . is a word of many, too many, meanings.”¹¹⁵ With respect to jurisdictional statutes, the Court has held that they only speak to the power of courts to hear a case, as opposed to defining a party’s rights or obligations.¹¹⁶ This line of

110. *Id.* § 929Y, 124 Stat. at 1871.

111. *See* Conway, *supra* note 11 (noting that language of section 929P(b) does not reflect intentions indicated during debate on House floor).

112. *See* 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski) (“This bill’s provisions concerning extraterritoriality [] are intended to rebut th[e] presumption [against extraterritorial application] by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department.”); *see also* 156 CONG. REC. H5235 (daily ed. June 30, 2010) (statement of Rep. Frank) (identifying Rep. Kanjorski as leader in drafting of Act).

113. *See id.* (“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 . . .”).

114. *See* Conway, *supra* note 11 (noting that “the territorial scope of a federal law” is issue of “substance” and not jurisdiction and that drafters made “crucial, and likely fatal” error).

115. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 90 (1998)) (internal quotation marks omitted).

116. *See* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (“[J]urisdictional statutes ‘speak to the power of the court rather than to the rights

reasoning—distinguishing between the substance of a statute imposing certain obligations or granting certain rights and the power of a court to hear a case concerning such substance—is consistent across the Supreme Court’s jurisprudence.¹¹⁷ Debate, however, stems from the distinction between the principles of “jurisdiction to adjudicate” and “jurisdiction to prescribe.”¹¹⁸ Congress’s authority to grant jurisdiction does not rest solely upon the theory of jurisdiction to adjudicate.¹¹⁹ Apart from this authority, Congress may also define the extraterritorial reach of its legislation by way of jurisdiction to prescribe, otherwise known as “legislative jurisdiction.”¹²⁰ The *Restatement (Third) of Foreign Relations Law* defines this concept in terms of Congress’s authority “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.”¹²¹ Interpreting a given statute to determine its extraterritorial reach requires a careful consideration of both concepts, as “it would be . . . erroneous to assume that

or obligations of the parties.’” (quoting *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring))). It has even been argued that jurisdictional statutes do not compel a court to hear a case pursuant to the statute at issue, but only authorize a court to do so. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574-75 (1985) (“[A] grant of jurisdiction should normally be (and indeed generally has been) read as an authorization to the court to entertain an action but not as an inexorable command.”).

117. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-14 (2004) (noting that “[a]s enacted in 1789, the ATS gave the district courts ‘cognizance’ of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law” (citation omitted)); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 820 (1993) (Scalia, J., dissenting) (arguing that “Court’s comity analysis” is “misdirected,” because it “proceeds as though the issue is whether the courts should ‘decline to exercise . . . jurisdiction’ . . . rather than whether the Sherman Act covers this conduct” (citation omitted))). Justice Scalia continued to note that “the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute.” *Id.*

118. See Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1096-1103 (2010) (discussing distinction between legislative and subject-matter jurisdiction); see also Lonny Sheinkopf Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137, 1191-93 (2000) (explaining how courts may not dismiss action in response to Rule 12(b)(1) motion when statute at issue grants court power to hear case, but same court may grant Rule 12(b)(6) motion for failure to state claim under same statute if court determines statute was not intended to provide right of recovery).

119. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a)-(b) (1987) (defining “jurisdiction to prescribe” in terms of Congress’ authority “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court”).

120. *Id.* § 401(b); see *Hartford Fire Ins. Co.*, 509 U.S. at 813 (Scalia, J., dissenting in part) (noting that “[legislative jurisdiction] is quite a separate matter from ‘jurisdiction to adjudicate’” (citation omitted)).

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1987).

the legislature always means to go to the full extent permitted.”¹²² Although many early cases failed to recognize this guiding principle, the Supreme Court has reemphasized the distinction more recently.¹²³ This recent jurisprudence, discussed below, makes clear that the extraterritorial application of federal law is not an issue of subject-matter jurisdiction (i.e., jurisdiction to adjudicate), but rather an issue of statutory interpretation in determining whether Congress exercised its legislative jurisdiction (i.e., jurisdiction to prescribe) in enacting that law.¹²⁴

In *Landgraf v. USI Film Products*,¹²⁵ the Court looked to its tradition of “appl[ying] intervening statutes conferring or ousting jurisdiction” to determine if Section 102 of the Civil Rights Act of 1991 applied retroactively.¹²⁶ It noted that the “[a]pplication of a new jurisdictional rule usually ‘takes away no substantive right but simply changes the tribunal that is to hear the case.’”¹²⁷ Under this rationale, the Court held that jurisdictional statutes such as Section 102 have no retroactive effect, because they “‘speak to the power of the court rather than to the rights or obligations of the parties.’”¹²⁸

122. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972), *overruled by* *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869 (2010).

123. *See Morrison*, 130 S. Ct. at 2869 (noting that mistake of failing to distinguish between subject-matter jurisdiction and jurisdiction to prescribe claim for relief had been made before (citing *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *rev’d*, 405 F.2d 215 (2d Cir. 1968), *overruled by Morrison*, 130 S. Ct. at 2869; *In re CP Ships Ltd. Secs. Litig.*, 578 F.3d 1306, 1313 (11th Cir. 2009), *overruled by Morrison*, 130 S. Ct. at 2869; *Cont’l Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (addressing need to be more “meticulous” regarding “subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy”); Reuveni, *supra* note 119, at 1101 (discussing history of how early case law “conflate[d] the concept of legislative jurisdiction with the court’s power to adjudicate” and only analyzed issue of extraterritoriality “as a question of subject matter jurisdiction”).

124. *See, e.g., Morrison*, 130 S. Ct. at 2877 (“[Subject-matter jurisdiction] presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.”); *Hartford Fire Ins. Co.*, 509 U.S. at 813-14 (Scalia, J., dissenting in part) (arguing that interpretation of Sherman’s Act extraterritorial reach “has nothing to do with the jurisdiction of the courts,” but rather is question of whether Congress has exercised its “legislative jurisdiction in enacting the Sherman Act”); Reuveni, *supra* note 119, at 1102 (concluding that “the extraterritorial scope of federal law is not properly deemed a question of subject matter jurisdiction,” but “question [of] whether and to what extent Congress exercised its legislative jurisdiction”); *cf. Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 455-56 (2007) (addressing extraterritorial reach of U.S. patent law as issue of statutory interpretation of Congress’ authority rather than issue of subject-matter jurisdiction); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (discussing same with respect to antitrust laws).

125. 511 U.S. 244 (1994).

126. *Id.* at 274.

127. *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

128. *Id.* (quoting *Republic Nat’l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

The *Landgraf* Court's interpretation was reaffirmed in *Hughes Aircraft Co. v. United States*.¹²⁹ In *Hughes Aircraft*, the Court declared that "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties."¹³⁰ It went on to hold that these jurisdictional "statutes affect only *where* a suit may be brought, not *whether* it may be brought at all."¹³¹

Most recently, in *Morrison*, the Court highlighted this distinction at the outset of its analysis, stating, "[subject-matter jurisdiction] presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief."¹³² According to the Court, the district court had subject-matter jurisdiction under the Exchange Act and, therefore, should not have dismissed the case for lack of jurisdiction.¹³³ Instead, the lower court should have dismissed the case for failure to state a claim, because the issue of what conduct Section 10(b) prohibits is a merits question—not a question of a court's power to hear a case.¹³⁴ Only after the Court drew this distinction did it proceed to analyze the language of the Exchange Act to determine whether Congress exercised its legislative jurisdiction to have Section 10(b) apply abroad.¹³⁵

B. Section 929P(b) Unmasked: Little Bite to Congress's Extraterritorial Bark

Due to the limited nature of jurisdictional statutes, it seems that the extent of the powers granted by Section 929P(b) ends with a federal dis-

129. 520 U.S. 939 (1997).

130. *Id.* at 951.

131. *Id.* (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994); *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring)).

132. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869, 2877 (2010) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

133. *See id.* at 2877 ("The District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to National's conduct."). Section 27 of the Exchange Act provides:

The district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] 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 [the Exchange Act] or the rules and regulations thereunder.

15 U.S.C. § 78aa (1996), amended by Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

134. *See Morrison*, 130 S. Ct. at 2877 ("[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.").

135. By doing so, the majority properly followed Supreme Court precedent. *See, e.g., Aramco*, 499 U.S. 244, 248 (1991) (framing issue as whether Congress exercised its legislative jurisdiction to have Title VII protections apply abroad, and then analyzing issue under principle "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States" (citation omitted)); *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949) (addressing same with respect to Eight Hour Law).

strict court's power to hear the case.¹³⁶ While such courts may entertain SEC and DOJ enforcement actions under Section 929P(b), the ability of these agencies to enforce the antifraud provisions of the U.S. securities laws is no clearer than it was prior to the Dodd-Frank Act's enactment.¹³⁷ Consequently, despite the drafters' intentions to the contrary, the presumption against extraterritorial application of the provision is not overcome by the Act's provisions.¹³⁸

The issue of whether Congress exercised its legislative jurisdiction in allowing Section 10(b) to apply abroad should, arguably, be considered *res judicata*.¹³⁹ The *Morrison* decision analyzes the language of the Exchange Act, and, realizing the foreign interests at stake, appropriately subjected it to time-tested canons of construction.¹⁴⁰ The natural response to this conclusion is that the Dodd-Frank Act's amendatory language requires a new inquiry and reveals a clear intention to give Section 10(b) extraterritorial application with respect to SEC and DOJ enforcement actions.¹⁴¹ Lower courts, if faced with this argument, should adopt the *Morrison* test governing foreign application because it properly defers to foreign regulation of securities markets.¹⁴²

Notwithstanding the subjective intent of various legislators regarding foreign application, Congress's drafting error in Section 929P(b) still proves fatal under any new inquiry.¹⁴³ Indeed, the provision addresses

136. See *Landgraf*, 511 U.S. at 274 (Thomas, J., concurring) (“[J]urisdictional statutes ‘speak to the power of the court rather than to the rights or obligations of the parties’” (quoting *Republic Nat’l Bank of Miami v. U.S.*, 506 U.S. 80, 100 (1992)); Conway, *supra* note 11 (explaining that Section 929P(b) “unambiguously addresses only the ‘jurisdiction’ of the ‘district courts of the United States’ to hear cases involving extraterritorial elements; its language clearly does not expand the geographic scope of any substantive regulatory provision”).

137. See Conway, *supra* note 11 (“The new law does not . . . expand the territorial scope of the government’s enforcement powers at all.”).

138. Cf. *Smith v. United States*, 507 U.S. 197, 204 (1993) (holding that even though Federal Tort Claims Act “specifically addresses the issue of extraterritorial application in the foreign-country exception,” lack of clear indication of congressional intent fails to defeat presumption).

139. See *Morrison*, 130 S. Ct. at 2883 (“[T]here is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.”).

140. See *id.* at 2877-83 (applying presumption against extraterritoriality to Exchange Act, and determining whether statutory language defeats presumption).

141. See *id.* at 2883 (noting that presumption is not “a clear statement rule,” and stating that “context can be consulted” to determine whether Congress indicated intention to have statute apply abroad).

142. See *id.* at 2886 (holding that transactional test addresses concerns that extraterritorial application of Section 10(b) and Rule 10b-5 “interfere[s] with foreign securities regulation”).

143. See Conway, *supra* note 11 (“The new law does not address [the issue of what conduct is prohibited], and accordingly does not expand the territorial scope of the government’s enforcement powers at all.”).

only the matters over which U.S. district courts “shall have jurisdiction.”¹⁴⁴ Under this rationale, the *Morrison* analysis remains unchanged because nothing in the statute specifically speaks to the statute’s extraterritorial reach.¹⁴⁵ This conclusion is consistent with Supreme Court precedent upholding the presumption against extraterritoriality even though the statute contains references to extraterritorial elements.¹⁴⁶

Nonetheless, any litigation regarding extraterritorial application under Section 929P(b) will center around the issue of Congress’s intent.¹⁴⁷ The strongest arguments in favor of foreign application will be those positing that the legislative history reveals congressional intent to rebut the presumption against extraterritoriality.¹⁴⁸ Litigators will also likely point to the headings of Section 929P(b) and 929Y—“Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws” and “Study on Extraterritorial Private Rights of Action,” respectively—as evidence of Congress’s intention.¹⁴⁹ Faced with Section 929P(b)’s language regarding the conduct and effects tests and furnished with statements made by the drafters, some lower courts may indeed hold that the presumption is overcome and apply the provision to foreign SEC and DOJ actions.¹⁵⁰

144. Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864-65 (2010).

145. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-14 (2004) (recognizing that ATS “gave the district courts ‘cognizance’ of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law”); *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997) (holding that jurisdictional “statutes affect only *where* a suit may be brought, not *whether* it may be brought at all” (citations omitted)); *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (“[J]urisdictional statutes ‘speak to the power of the court rather than to the rights or obligations of the parties.’” (quoting *Republic Nat’l Bank of Miami v. U.S.*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring))).

146. *See Smith v. United States*, 507 U.S. 197, 204 (1993) (“The applicability of the presumption is not defeated here just because the FTCA specifically addresses the issue of extraterritorial application in the foreign-country exception.”).

147. *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963) (holding that National Labor Relations Act does not apply abroad after finding no contrary indication in “specific language in the Act itself or in its extensive legislative history that reflects such a congressional *intent*” (emphasis added)); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-87 (1952) (holding that stated purpose of Lanham Act indicated *intent* to have statute with broad extraterritorial reach).

148. *See Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (“The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby *unexpressed congressional intent* may be ascertained.” (emphasis added) (citations omitted)).

149. Dodd-Frank Act, Pub. L. No. 111-203, §§ 929P(b), 929Y, 124 Stat. 1376, 1864-65, 1871 (2010).

150. *See Conway*, *supra* note 11 (noting that “some judges may be tempted to find substantive extraterritorial reach in Section 929P(b)”). Notably, this likely trend among lower courts will put securities fraud jurisprudence in the exact position of uncertainty that the *Morrison* Court sought to remedy. *Cf. Morrison v. Nat’l*

Nevertheless, the presumption mentioned above is not the only canon of construction relevant in this analysis, as courts must also recognize the rule that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁵¹ Indeed, such a construction is apparent here, for as the Supreme Court aptly stated in *Lamie v. U.S. Trustee*,¹⁵² “[i]t is beyond our province to rescue Congress from its drafting errors.”¹⁵³ The *Lamie* Court continued to hold that “if Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”¹⁵⁴ Per *Lamie*, the legislative history of Section 929P(b) should not even be considered, for its text is plain and unambiguous.¹⁵⁵ While the majority in *Morrison* did note that “context can be consulted” in determining a statute’s meaning, it is this author’s contention that such context is limited to the language of the statute.¹⁵⁶ Moreover, the Supreme Court prohibited the consideration of titles and headings as they “cannot undo or limit that which the text makes plain.”¹⁵⁷ Because these sections unambiguously fail to grant extraterritorial jurisdiction to SEC or DOJ actions, their headings should be disregarded.¹⁵⁸

Thus, while Section 929P(b) need not specifically state that the SEC and DOJ may apply Section 10(b) extraterritorially in their enforcement actions, a statute merely granting district courts jurisdiction over such actions in clear and unambiguous terms does not reveal such an intention.¹⁵⁹ Adhering to the *Morrison* test, therefore, will avoid the interference with foreign securities regulation that international law holds

Austl. Bank, 130 S. Ct. 2869, 2879-81 (2010) (rationalizing overruling of conduct and effects tests by noting tests’ “unpredictable and inconsistent application of § 10(b) to transnational cases”).

151. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

152. 540 U.S. 526 (2004).

153. *Id.* at 542 (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)); see also *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989) (holding that Foreign Sovereign Immunities Act of 1976 does not extend to conduct occurring on “high seas,” reasoning that “[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute”).

154. *Lamie*, 540 U.S. at 542.

155. See *id.* at 534 (“It is well established that ‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))).

156. *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2883 (2010).

157. *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947). The Court made clear that “[f]or interpretative purposes, [the title of statute and the heading of a section] are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt.” *Id.*

158. See *Conway*, *supra* note 11 (noting that Sections 929P(b) and 929Y both fail to extend extraterritorial reach of antifraud provisions).

159. See *Morrison*, 130 S. Ct. at 2883 (“[W]e do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a ‘clear statement

the United States accountable for avoiding, and will sufficiently protect American interests.¹⁶⁰ Other commentators have concluded that extending jurisdiction beyond legal limits violates international law.¹⁶¹ In view of this position, the new transactional test set forth in *Morrison* governing private rights of action under Section 10(b) and Rule 10b-5 should be extended to govern SEC and DOJ enforcement actions as well, at least until Congress amends Section 929P(b).¹⁶²

VI. THE IMPENDING SIGH OF SECURITIES HUMILITY: AN APPEAL TO THE SEC

Under Section 929Y of the Dodd-Frank Act, Congress directs the SEC to solicit public comment concerning the extraterritorial application of private rights of action brought pursuant to Rule 10b-5.¹⁶³ With this charge, the SEC is in a powerful position at a critical time.¹⁶⁴ Section 929Y provides four factors the SEC should consider in determining whether private rights of action should be extended under the conduct and effects tests.¹⁶⁵ For purposes of this Note, the relevant factors are: “(2) what implications such a private right of action would have on international com-

rule,’ if by that is meant a requirement that a statute say ‘this law applies abroad.’” (citation omitted)).

160. See *id.* at 2886 (holding that transactional test addresses concerns that extraterritorial application of Section 10(b) and Rule 10b-5 “interfere[s] with foreign securities regulation”).

161. See Knox, *supra* note 55, at 355-56 (“The extension of jurisdiction beyond a legal basis for it, or in contravention of a specific legal limit, violates international law.”). For a general discussion of the implications of jurisdiction in the context of international law, see CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* (2008).

162. Cf. Sarah S. Gold & Richard L. Spinogatti, *Applicability to SEC of Private Action Requirements in §10(b) Cases*, N.Y. L.J., Aug. 11, 2010, at 3 (noting that “[i]t is difficult to see how the SEC would not have been subject to the *Morrison* analysis, absent enactment of Dodd-Frank,” but ultimately concluding that Section 929P(b) expressly grants SEC and DOJ right to enforce under conduct and effects tests); Himes, *supra* note 2 (same); Smerek & Hamilton, *supra* note 23 (same). *Contra* Coffee, *supra* note 23 (concluding that Dodd-Frank Act precludes extension of *Morrison* holding to SEC and DOJ enforcement actions); Allens Arthur Robinson, *supra* note 23 (same); Gorman, *supra* note 23 (same).

163. Dodd-Frank Act, Pub. L. No. 111-203, § 929Y, 124 Stat. 1376, 1871 (2010).

164. See Brummer, *supra* note 1, at 328 (“[T]he SEC is grappling not only with the question of how to reform its domestic oversight, but also how to export its preferred safeguards and reforms in a time of declining U.S. economic and financial influence.”); cf. Conway, *supra* note 11 (stating that interested parties would be “behoove[d]” to submit comments to SEC); Himes, *supra* note 2 (noting that study under Section 929Y is “sure to generate a robust and multi-faceted study on extra-territoriality for Section 10(b)”).

165. See § 929Y, 124 Stat. at 1871 (listing four factors). Discussion regarding the first factor is beyond the scope of this Article, therefore only factors (2)-(4) shall be considered. The first factor is “the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise.” *Id.*

ity; (3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and (4) whether a narrower extraterritorial standard should be adopted.¹⁶⁶

The second factor, concerning implications on international comity, has already been discussed and weighs heavily in favor—if not requires the recommendation—against adoption of the now-overruled conduct and effects tests.¹⁶⁷ The economic implications to be considered under the third factor have also been well-documented and support a narrower application of the private right of action.¹⁶⁸ The fourth factor seems to be merely a request for a conclusion based on the preceding factors.¹⁶⁹ To this end, the SEC should consider its recent actions to curtail the transnational reach of U.S. law, such as the territorial approach adopted in passing Regulation S and Rule 15a-6 with respect to registration requirements.¹⁷⁰ The SEC should continue this territorial approach in

166. *Id.* After reviewing these considerations, one cannot help but wonder what the drafters took into account when composing Section 929P(b), as many of the issues alluded to are implicated in both private rights of action and government enforcement proceedings. See Himes, *supra* note 2 (“[W]hile distinctions exist, a principled basis to differentiate the SEC from a private plaintiff might not prevail.”).

167. See notes 28-57 and accompanying text. It is troubling that Congress defers this analysis to the SEC, considering the rule of construction requiring courts to “assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

168. See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (“Private securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”); Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Laws*, 1743 PLI/CORP 1243, 1253 (2009) (“What drives foreign firms away from the U.S. capital markets is not U.S. regulatory compliance but rather the ‘fear that listing on a U.S. exchange exposes the foreign issuer to potentially bankrupting securities liabilities if its stock price were to decline sharply.’” (quoting John C. Coffee, Jr., *Global Class Actions*, NAT’L L. J., June 11, 2007, at 1)); Patterson, *supra* note 50, at 235-36 (presenting argument that broad exercises of U.S. jurisdiction expend more judicial resources, so “[c]ourts need to be ‘concerned to preserve American judicial resources for the adjudication of domestic disputes and the enforcement of domestic law’” (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987), *overruled by Morrison*, 130 S. Ct. at 2869)); John C. Coffee, Jr., *Foreign Issuers Fear Global Class Actions*, NAT’L L. J., June 14, 2007 (“A series of recent reports by blue-ribbon bodies have warned that the U.S. capital markets are losing their competitiveness and that foreign firms fear entering the U.S. market.”); see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”). See generally Matson, *supra* note 4, at 224-28 (discussing economic costs of extraterritorial application, including negative impact on capital mobility and therefore less efficient capital allocation).

169. See § 929Y, 124 Stat. at 1871.

170. See Offshore Offers and Sales, Securities Act Release Nos. 33-6863, 34-27942, 55 Fed. Reg. 18,306 (Apr. 24, 1990) (adopting Regulation S and stating that “[p]rinciples of comity and the reasonable expectations of participants in the

conducting its study under section 929Y after consideration of the noted factors and “[t]he SEC’s vision . . . to strengthen the integrity and soundness of U.S. securities markets.”¹⁷¹ Thus, the SEC should uphold the *Morrison* standard governing the extraterritorial application of a Rule 10b-5 implied right of action under Section 10(b), as doing so would constitute a major step toward reconciling U.S. securities laws with its obligations under international law.¹⁷²

VII. CONCLUSION

After *Morrison*, and pending the SEC’s report due to Congress pursuant to Section 929Y of the Dodd-Frank Act, Section 10(b) and Rule 10b-5 apply extraterritorially in private rights of action only to transactions of securities listed on a U.S. exchange, or to domestic transactions of any other security.¹⁷³ This transactional test has completely closed off “F-cubed” claims from U.S. litigation.¹⁷⁴ It also overrules the case law advancing the conduct and effects tests and overlooking the lack of legislative

global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore” (footnote omitted)); Chang, *supra* note 44, at 104-06 (noting that by implementing Regulation S, which exempts foreign issuers from SEC registration requirements, “SEC is embracing a territorial approach to the extraterritorial application of the Securities Act;” and that “Regulation S also reserves a significant role for itself in bringing about comity and cooperation among various regulatory regimes in global markets”); Choi & Silberman, *supra* note 44, at 502-03 (citing Regulation S as example of U.S. rule limiting U.S. authority to regulate to “where it has the power to enforce its laws,” and arguing that Rule 10b-5 should have similar limitation); Kelly, *supra* note 2, at 501 (citing Regulation S, “Rule 15a-6, which provides an exemption from the broker-dealer registration requirement for foreign brokers and dealers,” and SEC statement regarding “purely territorial approach to section 5 of the Securities Act” as examples of reforms SEC has made to make rules “limited to activities within the territory of the United States”).

For a thorough discussion of Regulation S, see Jeffry S. Hoffman, *Regulation S*, 1443 PLI/CORP 531 (2004); Jaime M. Jackson, Note, “*Regulation S*” and the Territorial Approach to Securities Regulation: Are They Effective? A Study of United States Securities Regulation in Light of British and Chinese Securities Regulations, 28 BROOK. J. INT’L L. 613 (2003).

171. SEC. AND EXCH. COMM’N, PUTTING INVESTORS FIRST; 2009 PERFORMANCE AND ACCOUNTABILITY REPORT 6 (2009), <http://sec.gov/about/secpar/secpar2009.pdf> (emphasis added).

172. See Himes, *supra* note 2 (indicating that *Morrison* decision “minimizes conflict with other countries over securities transactions” and reduces “interference with their securities regulation caused by application of Section 10(b) internationally”).

173. See § 929Y, 124 Stat. at 1871 (requiring SEC study); *Morrison v. Nat’l Austl. Bank*, 130 S. Ct. 2869, 2884 (2010) (“[I]t is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.”).

174. See Cave, *supra* note 3 (noting that under *Morrison*, Exchange Act does not provide cause of action for “F-cubed claims”); Himes, *supra* note 2 (noting that after *Morrison*, “F-cubed” claims “should be a thing of the past”); Smerek & Hamilton, *supra* note 23 (stating that Exchange Act does not apply extraterritorially to “F-cubed” claims after *Morrison*).

jurisdiction.¹⁷⁵ The Dodd-Frank Act fails to properly define the federal government's powers in applying the U.S. antifraud provisions abroad because it speaks only to the power of the federal district courts to hear such matters.¹⁷⁶ This drafting error invites increased litigation in these courts as challenges to SEC and DOJ actions will inevitably arise.¹⁷⁷ Given the opportunity, lower courts ought to apply the *Morrison* test for both private plaintiffs and the federal government when construing the amended language of Section 10(b) of the Exchange Act.¹⁷⁸ Such an interpretation would serve to uphold U.S. obligations under principles of international law by respecting the sovereignty of nations with their own regulatory frameworks for securities fraud and whose own markets are primarily affected by such fraud.¹⁷⁹

Andrew Rocks*

175. See *supra* notes 89-96 and accompanying text.

176. See *supra* notes 107-62 and accompanying text.

177. See Conway, *supra* note 11 (concluding that despite drafting error in Section 929P(b), "some judges may be tempted to find substantive extraterritorial reach in Section 929P(b)").

178. See *supra* notes 159-62 and accompanying text.

179. See *supra* notes 27-60, 160-62 and accompanying text. It must be stressed that such an interpretation would not represent an example of ad hoc judicial lawmaking argued against earlier in this Note. See *supra* note 56 and accompanying text. Rather, such an analysis is in fact merely recognizing that the moderation of the United States' reach abroad in the area of securities fraud, as defined by *Morrison*'s transactional test and Congress's inadvertent deference in the Dodd-Frank Act, reflects the appropriate basis for jurisdiction under international law. See generally Knox, *supra* note 55 (arguing that extraterritorial application of U.S. law should be based on whether it has "basis" to do so according to international law).

* J.D. Candidate 2012, Villanova University School of Law; B.A. 2009, Franklin & Marshall College. I would like to thank Professors Miller, Murphy, and Samahon for their guidance and feedback throughout the development of this Note, as well as my fellow members of the *Villanova Law Review* for their diligent editorial work and support.