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THE EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES FRAUD PROHIBITIONS IN AN INCREASINGLY GLOBAL TRANSACTIONAL WORLD

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'Shared risks, shared burdens, shared benefits' -- . . . a good prescription for America's role in the world.¹

INTRODUCTION

In 2012, nearly every investment in securities carries some international risk exposure. Multinationals abound, and very few firms can avoid engagement with cross-border contracts in their business operations. Investors and issuers both struggle with the implications of global markets. In owning the equity or debt instruments of any single firm, an investor must be prepared to endure, among other things, the risk of international operations (including subsidiary and affiliate entities in multiple jurisdictions), cross-border investments, repatriations of funds, multiple taxation theories and schemes, and currency fluctuations. Moreover, “[t]he globalization of financial markets has made the world an exceedingly small place for securities issuers.”² The number of laws and legal regimes governing international activities connected with these global markets can be staggering.

In this increasingly global environment, there has been significant concern about securities fraud on a domestic and international level.

It has reached the point that, regardless of where a public statement originates, it quickly winds its way through international waters. A company need only place a press release on its website for it to be accessible worldwide. Every foreign fraud seemingly has some connection to the United States, and every fraud perpetrated from within the United States finds its prey, at least in part, in the pool of foreign investors.³

¹ WESLEY K. CLARK, *WAGING MODERN WAR* 461 (2001).

² Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1073 (2010).

³ Daniel S. Kahn, *The Collapsing Jurisdictional Boundaries of the Antifraud Provisions of the U.S. Securities Laws*:

In sum, as business operations, money, and securities increasingly cross borders, financial fraud also increasingly crosses borders.⁴ These “border crossings” put strain on the multiplicity of laws governing business entities and their internal and external constituents, a strain that is not easily relieved.

Federal securities regulation in the United States has been slow to respond to many of these changes, leaving key areas of U.S. securities fraud regulation unclear, to the potential detriment of investors, businesses, and others with whom they interact (e.g., regulators, lawyers, and other advisors). The lack of clarity in U.S. federal securities fraud regulation has extended to the most basic jurisprudential considerations: e.g., the extent to which U.S. federal law governs securities fraud that has a limited nexus to the United States. The extraterritorial application of U.S. securities fraud principles is the subject of an important recent U.S. Supreme Court opinion and related congressional legislative efforts, regulatory endeavors, and public commentary. It also is the subject of this paper.

The paper proceeds in three main parts. Part I summarizes the key antifraud rules in context, Part II describes in brief the history and current state of the academic and political debate, and Part III suggests a way forward in light of the current state of the debate. Part IV offers a brief, summary conclusion.

I. THE APPLICABLE U.S. SECURITIES FRAUD RULES IN CONTEXT

The most all-encompassing and most commonly litigated securities fraud prohibitions⁵ in the U.S. federal regulatory scheme are those under Section 10(b)⁶ of the Securities Exchange Act of

The Supreme Court and Congress Ready to Redress Forty Years of Ambiguity, 6 N.Y.U. J. L. & BUS. 365, 417 (2010).

⁴ *See id.* (“As a result of the continued and unending globalization of the world’s financial markets, there is no longer such a thing as a solely domestic fraud.”).

⁵ *See* Theresa A. Gabaldon, *Assumptions about Relationships Reflected in the Federal Securities Laws*, 17 WIS. WOMEN’S L.J. 215, 241 (2002) (referencing “Rule 10b-5’s broad prohibitions”); Lewis D. Lowenfels & Alan R. Bromberg, *SEC Rule 10b-5 and Its New Statute of Limitations: The Circuits Defy the Supreme Court*, 51 BUS. LAW. 309, 310 (1996) (“[I]mplied private actions for damages and other relief under Exchange Act section 10(b) and Rule 10b-5 are the most common actions for relief by defrauded investors in our system of democratic capitalism”).

⁶ 15 U.S.C. § 78j(b) (2006).

1934, as amended (the “1934 Act”), and Rule 10b-5⁷ adopted by the U.S. Securities and Exchange Commission (“SEC”)⁸ under Section 10(b). The prominence and complexity of litigation involving Section 10(b) and Rule 10b-5 derive largely from the broad scope and vagueness of the statute and rule. In a world deeply affected by the recent international financial crisis—a crisis that reflects the globalization of financial markets—the indistinct parameters of Section 10(b) and Rule 10b-5 raise ever more challenging judicial questions.

In principal part, Section 10(b) provides that it is unlawful

for any person . . . by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.⁹

“Interstate commerce” is defined in the 1934 Act to include “trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof” and “intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality.”¹⁰ This definition is quite broad and leaves open the possibility that Section 10(b) has extensive extraterritorial reach.¹¹ Moreover, other terms used

⁷ 17 C.F.R. § 240.10b-5 (2011).

⁸ The U.S. Congress created the SEC under the 1934 Act as the federal authority for the regulation of securities in the United States. *See* 15 U.S.C. § 78d (2006).

⁹ 15 U.S.C. § 78j(b).

¹⁰ 15 U.S.C. § 78c(a)(17).

¹¹ *See generally* Elizabeth Cosenza, *Paradise Lost: § 10(b) after Morrison v National Australia Bank*, 11 CHI. J. INT’L L. 343, 388 (2011) (“By its express terms, then, the statute covers any deceptive or manipulative conduct that employs any means or instrumentality of interstate commerce. In other words, conduct that has a transnational, or cross-border, component falls within § 10(b)’s prohibition.”); Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court’s “Transactional Test”*, 52 VA. J. INT’L LAW 405, 416 (2012) (“The Exchange Act applies to ‘interstate commerce.’ . . . By including foreign states within the definition of interstate commerce, it is possible to include foreign transactions within the scope of the Exchange Act.”).

in Section 10(b) (including those involved in the critical “manipulative or deceptive device or contrivance” portion of the rule) are not defined in the 1934 Act and are susceptible of expansive meanings. Because of Section 10(b)’s potential extraterritorial application and lack of explicit definitional content, the precise contours of Section 10(b), as a highly significant antifraud provision in U.S. federal securities law, are uncertain after even a close reading of the law and the relevant cases.¹²

Helpfully, the U.S. Congress expressly delegated significant regulatory responsibility under Section 10(b) to an expert federal independent agency, the SEC, by making manipulation and deception unlawful if it contravenes: “such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”¹³ Under that delegated authority, the SEC has adopted a series of rules, including Rule 10b-5, that provide additional information about prescribed and proscribed conduct under Section 10(b). Unfortunately, Rule 10b-5 (the key SEC rule under Section 10(b) for most securities fraud actions), like Section 10(b) itself, is both broad and unclear. Under Rule 10b-5, it is

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.¹⁴

¹² See, e.g., Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511 (2011) (describing doctrinal confusions in the law governing U.S. securities fraud and suggesting possible avenues for reform).

¹³ 15 U.S.C. § 78j(b).

¹⁴ 17 C.F.R. § 240.10b-5.

This regulatory provision, standing alone, does not adequately describe specific conduct that is permissible or prohibited under Section 10(b) and does not set forth the elements of a possible claim that Section 10(b) has been violated.

Accordingly, although Section 10(b) and Rule 10b-5 prohibit deceptive and manipulative conduct in connection with the purchase or sale of securities, the nature of a violation of or claim under Section 10(b) and Rule 10b-5 remain uncertain based on a facial review of those provisions.¹⁵ The U.S. Congress and the SEC have authority to further clarify the antifraud mandates of Section 10(b) and Rule 10b-5, but they have rarely done so. Greater clarity typically has been achieved through federal judicial opinions.¹⁶

In particular, the U.S. Supreme Court plays a strong role in the development of the law under Section 10(b) and Rule 10b-5 for several reasons. First, legal actions under Section 10(b) and Rule 10b-5 are federal court actions based on a federal statutory framework, making appeal to the Supreme Court more likely. Private actions (which are implied, since Section 10(b) does not expressly provide for or prohibit them), civil administrative actions, civil enforcement actions, and criminal enforcement actions (for willful violations) all may be brought to enforce the fraud prohibitions in Section 10(b) and Rule 10b-5.¹⁷ A private plaintiff or class of plaintiffs (people who have bought or sold securities) may bring an action in federal court, the SEC may bring an action in its administrative court (from which appeals may be taken only in a federal court) or in federal court, or (if requisite conditions for a criminal action are met) the U.S. Department of Justice may bring an action in federal court. In the United States, the same set of facts may give rise to more than one cause of action (private and public, civil and criminal, administrative and

¹⁵ See Buell, *supra* note 12, at 543 (“As a matter of statutes and rules, the law of securities fraud is extremely broad. It can be read to cover both core fraud - in its talk of ‘schemes,’ ‘fraud,’ and ‘deceit’ - and cases of misrepresentation that involve only a harm-focused inquiry - in its talk of false statements and acts that ‘operate as’ deceits.”).

¹⁶ *Id.* at 545 (“The law of securities fraud is one of the most heavily judicially created bodies of federal law.”). Securities fraud claims under Section 10(b) and Rule 10b-5 (other than enforcement claims brought by the SEC in its administrative law courts) must be brought in federal court. 15 U.S.C. § 78aa(a) (2006 & Supp. 2010).

¹⁷ See generally *id.*, at 543-44; see also Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission’s Authority*, 107 HARV. L. REV. 963, 964 (1994) (describing public and private enforcement under the federal securities regime generally); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2174 (2010); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1310-11 (2008) (discussing civil and criminal enforcement under Rule 10b-5).

judicial) under Section 10(b) and Rule 10b-5, but these legal proceedings all occur in, or are appealable only to, federal courts. In addition, state court securities fraud class actions have been curtailed by federal legislation. A federal statute enacted in the United States in the late 1990s effectively requires that securities fraud class actions be brought in federal court.¹⁸

Second, as already noted, the statute and the rule are written in a manner that begs for interpretation. Although the SEC has engaged in some interpretation,¹⁹ most of the law under Section 10(b) and Rule 10b-5 is judicially constructed.²⁰ The very elements of a claim under Section 10(b) and Rule 10b-5 are, in significant part, a matter of federal common law. For example, courts have determined that liability under Section 10(b) and Rule 10b-5 depends on proof of a specific state of mind (scienter), generally acknowledged to comprise a reckless disregard for the possibility that one's actions may manipulate the market for a security or deceive investors.²¹ This strong common law basis for actions under Section 10(b) and Rule 10b-5 is a distinctive feature of U.S. securities fraud regulation that has a number of effects on the development of the law in this area. Because securities fraud actions and judicial opinions often turn on difficult doctrinal and political questions that have important ramifications for investors, businesses, and markets, actions engaging issues of first impression under Section 10(b) and Rule 10b-5 often are appealed to the highest level for resolution. The U.S. Supreme Court has granted *certiorari* to hear a number of these high-impact securities fraud cases over the years.

As a matter of doctrinal law, the extraterritorial reach of Section 10(b) and Rule 10b-5 had been a somewhat unsettled issue until recently.²² Although judicial opinions in lower federal

¹⁸ 15 U.S.C. § 78bb(f)(1); see also Jennifer J. Johnson, *Secondary Liability for Securities Fraud: Gatekeepers in State Court*, 36 DEL. J. CORP. L. 463, 487-88 (2011) (describing the state of securities fraud class actions since 1998); Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 ALA. L. REV. 325, 325 (2004) (same).

¹⁹ E.g., 17 C.F.R. §§ 240.10b5-1 & 240.10b5-2.

²⁰ See *supra* note 16 and accompanying text.

²¹ See generally *Ernst & Ernst v. Hochfelder et al.*, 425 U.S. 185 (1976) (finding that scienter is a required element of a claim under Section 10(b) and Rule 10b-5).

²² See Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 17 (2007) ("Considering the stakes involved, one might expect that the scope of . . . jurisdiction under the federal securities laws would by now be firmly established. Quite the opposite is true. Congress has enacted no legislation on the point, the Supreme Court has declined to address the question, and

courts typically had articulated and applied broad-based, common standards to determine whether to hear the cases before them, the outcomes of cases were not always certain or predictable.²³ This open-textured common law environment invited prospective plaintiffs, especially foreign plaintiffs, to test—and sometimes successfully extend—the potential reach of Sections 10(b) and Rule 10b-5 in federal court actions.²⁴ A number of these legal actions were based on facts that had few connections to the United States, including what came to be known as f-cubed cases (involving a foreign plaintiff’s shares in a foreign issuer bought or sold in a foreign country).²⁵

The U.S. Supreme Court’s 2010 opinion in *Morrison v. Nat’l Austl. Bank Ltd.*²⁶ purported to settle the extraterritoriality issue and curtail this kind of opportunism.²⁷ In *Morrison*, the Court held that “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.”²⁸ This one sentence profoundly affects international business law and practice and has the capacity to change the complexion of securities fraud enforcement around the world. Most commentators believe that the *Morrison* Court failed to fully consider the implications of the simple rule it established.

the lower federal courts apply in inconsistent and therefore unpredictable ways a pair of judicially created jurisdictional tests that are now almost 40 years old.” (footnote omitted); Reuveni, *supra* note 2, at 1073 (“Considering the financial stakes, one might expect that the question of the extraterritorial reach of the securities laws would be clearly established by now. But that is not the case.” (footnote omitted)).

²³ Buxbaum, *supra* note 22, at 67 (noting the unpredictability and uncertainty associated with jurisdictional issues in securities fraud actions before the *Morrison* decision).

²⁴ See Kahn, *supra* note 3, at 418 (“Foreign shareholders have . . . begun to turn to U.S. courts to provide recovery where their own country’s systems do not. As a report by PricewaterhouseCoopers notes, ‘due to limited shareholder rights and protections currently available outside the US, foreign investors and pension funds continue to seek recovery of losses from US courts by filing claims and participating in US class actions.’” (footnote omitted)); Ventruruzzo, *supra* note 11, at 410-15 (describing reasons why foreign investors bring securities fraud claims in U.S. courts).

²⁵ See, e.g., Buxbaum, *supra* note 22, at 17; Cosenza, *supra* note 11, at 345 n.2.

²⁶ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

²⁷ One international business law scholar describes the circumstances in florid terms.

Justice Rehnquist famously defined Rule 10b-5 as a “legislative acorn” from which a “judicial oak” developed. In the view of its critics, the conduct-effects test was an overgrown branch of that tree, one that trespassed on the jurisdiction of other nations.

. . . [T]he Supreme Court picked up the shears in *Morrison*

Ventruruzzo, *supra* note 11, at 408.

²⁸ *Morrison*, 130 S. Ct. at 2888.

II. THE ACADEMIC AND POLITICAL DEBATE ON THE EXTRATERRITORIAL REACH OF U.S. SECURITIES FRAUD UNDER SECTION 10(B) AND RULE 10B-5

Securities—common stock, preferred stock, evidences of indebtedness, and other financial instruments—trade across state borders. Yet the law of securities regulation is not international law. Rather, each state asserts regulatory authority over transactions of interest to it. In some cases, more than one state may assert regulatory authority over a single transaction. Enforcement activities (e.g., regulatory inquiries and investigations, as well as public and private legal actions) in this environment are predictably complex. Debate over the law applicable to particular international securities transactions is fundamental to the continued viability and efficacy of securities markets and securities regulation. The *Morrison* case is at the center of that debate.²⁹

Before *Morrison*, U.S. federal courts typically followed a Second Circuit line of cases that used judicially constructed “conduct” and “effects” tests³⁰ to exercise expansive authority over international cases brought under Section 10(b) and Rule 10b-5.³¹ The two tests often were combined, expressly or impliedly, into a single test that assessed both the defendant’s activities in the United States and the impact on U.S. markets and investors.³² Many commentators were critical of the broad assertion of adjudicative authority permitted under the conduct and effects

²⁹ Among the *amicus curiae* briefs filed with the Supreme Court in the *Morrison* case are briefs from the Republic of France and from several business organizations, including the French Business Confederation. See <http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.Republic-of-France-in-Support-of-REsp.pdf> and <http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.International-Chamber-of-Commerce-Swiss-Bankers-Association-Economiesuisse-the-Federation-of-German-Industries-and-the-French-Business-Confederation-in-Support-of-REsp.pdf>.

³⁰ See, e.g., *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336-37 (2d Cir. 1972) (conduct test); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-09 (2d Cir.), *rev'd with respect to holding on merits*, 405 F.2d 215 (2d Cir. 1968) (in banc), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969) (effects test); see also Hannah L. Buxbaum, *Investor Suits in the Era of the Roberts Court: Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 LAW & CONTEMP. PROB. 161 (2012) (“Historically, courts determined the reach of U.S. antifraud law - that is, its applicability to securities fraud claims with foreign elements - by applying the ‘conduct’ and ‘effects’ tests.”); Ventrizzo, *supra* note 11, at 418-21 (providing a history and overview of the conduct and effects tests).

³¹ 17 C.F.R. § 229.10b-5 (2012).

³² See *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995) (“There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, 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.”)

tests and questioned the origin of the conduct and effects tests³³—including the Court in *Morrison*.

The Second Circuit never put forward a textual or even extratextual basis for these tests. . . . [I]t confessed that “if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond”³⁴

The *Morrison* Court changed the “game” by creating a new, clearer, narrower rule based on the ostensible location of the questioned securities transaction on an American stock exchange or in the United States.

Yet, the Court’s new expression of the extraterritorial reach of Section 10(b) and Rule 10b-5 in *Morrison* may restrict a U.S. investor from bringing a securities fraud action in the United States merely because, for example, she purchased shares in a foreign market—unless the security (and perhaps even the precise share or other unit transacted) is “listed on an American stock exchange.”³⁵ Similarly, the rule in *Morrison* would compel dismissal of an action brought by a non-U.S. investor under Section 10(b) and Rule 10b-5 if the investor did not purchase the related securities in the United States—even if the investor’s loss involves conduct that occurs in the United States or involves, e.g., a class of listed securities in a U.S. issuer.³⁶ Neither result seems appropriate given the general policies underlying U.S. securities regulation—to foster

³³ See, e.g., Reuveni, *supra* note 2, at 1075 (noting, before *Morrison* was decided, that “A growing consensus is emerging in legal and business circles regarding the drawbacks of the current jurisdictional regime” and citing to examples).

³⁴ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2879 (2010).

³⁵ See Luis A. Aguilar, Commissioner, U.S. Sec’s & Exch. Comm’n, *Defrauded Investors Deserve Their Day in Court* (April 11, 2012) (“Under *Morrison*, as applied, a private plaintiff trading outside the U.S. may not be able to recover for fraud ‘even if the securities at issue were registered and listed on a U.S. exchange unless it also can establish that the *particular* shares it traded were registered and listed on a U.S. exchange.”); Buxbaum, *supra* note 30, at 164 (“[A]fter *Morrison*, courts have dismissed all claims arising out of foreign exchange transactions. This is true even if the buyer is American” (footnote omitted)); Nidhi M. Geevarghese, Note: *A Shocking Loss of Investor Protection: The Implications of Morrison v. National Australia Bank*, 6 BROOK. J. CORP. FIN. & COM. L. 235, 243 (2011) (“The Supreme Court’s holding in *Morrison* is a bright-line rule barring any American investor who purchases securities trading only on a foreign exchange from bringing suit under U.S. securities laws.”).

³⁶ See Buxbaum, *supra* note 30, at 165 (“The Court’s apparent intention . . . was to limit the reach of section 10(b) to claims of purchasers whose particular investment transactions had taken place within the United States. The Court emphasizes this intention elsewhere in its opinion”).

fair play, protect investors, and keep the market honest.”³⁷

In sum, before *Morrison* was decided, many observers welcomed and desired a clear statement of the substantive reach of Section 10(b) and Rule 10b-5. However, many find the new extraterritoriality test established in *Morrison* to be too narrow or otherwise objectionable. Both the rule of the case and the reasoning of the Court in *Morrison* have been and continue to be criticized by scholars and other commentators in the United States. Yet, despite its potential weaknesses, the rule in *Morrison* is likely to have significant effects on the regulation of securities fraud—both in terms of deterrence and enforcement in individual cases and as a matter of comparative analysis.

Although the Supreme Court has spoken, the state of U.S. law on the extraterritorial application of Section 10(b) and Rule 10b-5 in the post-*Morrison* era remains contestable. For example, since *Morrison*, courts have been asked to interpret whether a security purchased abroad that is of a class of securities that are cross-listed on a U.S. securities exchange is “a security listed on an American stock exchange” gives rise to a valid securities law claim under Section 10(b) and Rule 10b-5.³⁸ Most courts have held that this type of claim is not cognizable under Section 10(b) under the rule in *Morrison*.³⁹ Other issues involving interpretations of the *Morrison* rule also have arisen and been resolved in the lower courts.⁴⁰

In the uncertainty following *Morrison*, Congress appeared to be ready to step into the void. As the legislative branch of federal government, Congress retains the power to propose and adopt an amendment to Section 10(b) to achieve a different result if it does not agree with the U.S. Supreme Court’s rule in *Morrison*. Although Congress has not often used its constitutional

³⁷ Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 194 (2006). See also *infra* notes 60-62 and accompanying text.

³⁸ See, e.g., *In re UBS Sec. Litig.*, 2011 U.S. Dist. LEXIS 106274, at *11-22 (S.D.N.Y. Sept. 13, 2011).

³⁹ *Id.* at *14 (“[T]he Court rejects Plaintiffs’ hyper-technical parsing of the opinion and finds, consistent with the overwhelming majority of other courts to have addressed the issue, that foreign-cubed claims asserted against issuers whose securities are cross-listed on an American exchange are outside of the scope of § 10(b).”).

⁴⁰ See U.S. Sec’s Exch. Comm’n, Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934, at iv, 28-39 (April 2012), available at <http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf> (describing various issues addressed by lower courts applying the *Morrison* rule) [hereinafter SEC Study Report].

authority in this regard for actions brought under Section 10(b) and Rule 10b-5, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) has revived congressional intervention in the scope of private actions under Section 10(b) and suggested a more vocal future congressional role in establishing the extraterritoriality of U.S. securities fraud prohibitions in two ways.

First, Dodd-Frank expressly authorizes the SEC and the U.S. Department of Justice to bring public enforcement actions for securities fraud if the case involves “conduct within the U.S. that constitutes significant steps in furtherance of a violation” or “conduct occurring outside the U.S. [that] has a foreseeable substantial effect within the U.S.”⁴¹ Oddly, this provision is crafted as a conferral of jurisdiction rather than an expression of the extraterritorial reach of the substance of Section 10(b) and Rule 10b-5.⁴²

Second, Dodd-Frank mandates that the SEC “solicit public comment and conduct a study to determine the extent to which private rights of action under the antifraud provisions” of the 1934 Act

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

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.⁴³

⁴¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P(b), 124 Stat. 1376 (2010), available at http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_929P.html (codified at 15 U.S.C. § 78aa(b)) [hereinafter Dodd-Frank].

⁴² See Richard Painter et al., *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 17-18 (2011).

⁴³ Dodd-Frank, *supra* note 41, § 929Y(a), available at http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_929Y.html.

As provided in Dodd-Frank, the SEC’s follow-on study on the extraterritorial reach of U.S. private rights of action for securities fraud must

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.⁴⁴

This congressional edict, on its face, directs the SEC to engage in both positive and normative analyses (the latter being indicated by the use of the word “should” in the first and fourth labeled elements of analysis).⁴⁵ It is noteworthy that Congress also expressly directed the SEC to engage in an economic cost/benefit analysis.⁴⁶

Dodd-Frank required that the SEC’s report on the study “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 Dodd-Frank was enacted.⁴⁷ The SEC requested comments in October 2010, and the comment period closed in February 2011.⁴⁸ Numerous comments were received, raising issues and attempting to balance considerations as wide-ranging as the appropriate boundaries of international comity—

⁴⁴ *Id.* § 929Y(b).

⁴⁵ *Id.* § 929Y(b)(1) & (4).

⁴⁶ *Id.* § 929Y(b)(3).

⁴⁷ *Id.* § 929Y(c). On this schedule, the report would have been due in late January 2012.

⁴⁸ U.S. Sec’s & Exch. Comm’n, Study on Extraterritorial Private Rights of Action, Release No. 34-63174 (Oct. 25, 2010), available at <http://www.sec.gov/rules/other/2010/34-63174.pdf>.

respect for foreign states manifested through limitations on the application of U.S. law or jurisdiction—to concerns about the reasonable expectations and protection of investors.⁴⁹

The SEC released the study report authored by its staff on April 11, 2012. In the report, the staff suggests both options using aspects of the conduct and effects tests and options involving modifications to the transaction-based rule in *Morrison*.⁵⁰ The staff also states its belief that “each of the specific options . . . is consistent with the recognized principles of prescriptive jurisdiction – *i.e.*, legislative authority – as set forth in the *Restatement (Third) of Foreign Relations Law of the United States*” and summarizes the scope of appropriate jurisdictional authority in that context.⁵¹ This statement and other analyses noted in the report address directly Congress’s request for an analysis of international comity implications. In addition, relevant cost/benefit research is summarized in Appendix B to the report.⁵² However, as one SEC Commissioner⁵³ has noted, the report does not directly engage in the normative analyses requested by Congress as to “whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise” and as to “whether a narrower extraterritorial standard should be adopted.”⁵⁴

By directing that the SEC submit its report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House, Congress hinted at the possibility that the report could be the basis for future congressional action. At the time work on this paper was completed (a mere three weeks after the release of the SEC’s study report), Congress no doubt was still in the process of digesting the report’s contents; no hearings had been scheduled. It remains to be seen at this point whether Congress will, in fact, take action to alter the extraterritorial reach of Section 10(b) and Rule 10b-5 as established in the *Morrison* case.

⁴⁹ See SEC Study Report, *supra* note 40, at v-vi, 39-58; U.S. Sec’s & Exch. Comm’n, Comments on Study on Extraterritorial Private Rights of Action, *available at* <http://www.sec.gov/comments/4-617/4-617.shtml>.

⁵⁰ SEC Study Report, *supra* note 40, at vi-vii, 58-69 (describing those suggested options).

⁵¹ *Id.* at 59-60.

⁵² *Id.* at B1-B21.

⁵³ See Aguilar, *supra* note 35 (“[T]he Study fails to satisfactorily answer the Congressional request, contains no specific recommendations, and does not portray a complete picture of the immense and irreparable investor harm that has resulted, and will continue to result, due to *Morrison v. National Australia Bank, Ltd.*”).

⁵⁴ See *supra* notes 44 & 45 and accompanying text.

III. PLOTTING OUT A WAY FORWARD FOR CONGRESSIONAL ACTION

Assuming that Congress does determine to respond to *Morrison* and alter the current extraterritorial application of Section 10(b) and Rule 10b-5, on what basis should it proceed? What role should the SEC's study report serve in congressional deliberations? What principles should direct congressional decision-making, and what outcome likely would result?

In Dodd-Frank, Congress appeared to be asking the SEC for help in framing a response to the *Morrison* rule that is consistent with the policies underlying Section 10(b), Rule 10b-5, and the 1934 Act generally. Congress's request expressly comprised both positive and normative analyses.⁵⁵ While there may have been nefarious purposes in asking the SEC for its views on what the extraterritorial reach of Section 10(b) and Rule 10b-5 ought to be (given that Congress has not been a strong supporter of the SEC in the aftermath of the financial crisis⁵⁶), Congress got half a loaf.⁵⁷

However, the SEC's report does include a significant amount of valuable information about the conducts and effects tests, the rule established by the Court in *Morrison*, and alternative approaches (some of which are used in other jurisdictions). This positive analysis provides a strong foundation for Congress's potential future work. In addition, scholars have weighed in on various approaches offering supportive analyses.⁵⁸ Congress needs a framework, however, for

⁵⁵ See *supra* note 45 and accompanying text.

⁵⁶ See, e.g., Joan MacLeod Heminway, *Sustaining Reform Efforts at the SEC: A Progress Report*, 30 BANKING & FIN. SVCS. POLICY REP. 1, 8-12 (April 2011) (describing the overall political climate for the SEC in the post-Dodd-Frank era). Among other things, the SEC has been under recent attack for not engaging in rigorous cost/benefit analyses of its rulemaking initiatives. See, e.g., S. 2373, 112th Cong. (2012), available at <http://www.govtrack.us/congress/bills/112/s2373/text>; *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

⁵⁷ Since this paper is being translated into French and I cannot guarantee that this idiom will translate effectively, I will offer an Internet reference to assure that my meaning is understood. <http://idioms.thefreedictionary.com/half+a+loaf>.

⁵⁸ See, e.g., Cosenza, *supra* note 11, at 386-87 (“The correct standard for the transnational application of § 10(b) is the one proposed by then-Solicitor General Elena Kagan in the Government’s amicus brief to the Supreme Court. Under that standard, a transnational securities fraud violates § 10(b) when the fraud involves significant conduct in the US that is material to the fraud’s success and that fraud directly caused the plaintiff’s injury.” (footnote omitted)); Ventrizzo, *supra* note 11, at (“[A]n ‘effects-only’ test[should be adopted. . . . [P]rivate plaintiffs should be required to plead that the illegal conduct . . . created direct, substantial, and reasonably foreseeable effects in the United States.”).

sorting through the options posited by the SEC and scholars and defining the appropriate extraterritorial reach of Section 10(b) and Rule 10b-5.

A simple framework tied to the policies underlying Section 10(b) and Rule 10b-5 makes the most sense. Congress should begin by stepping back and taking stock of private rights of action under Section 10(b) and Rule 10b-5. What function does Congress want Section 10(b) and Rule 10b-5 to serve in the area of securities fraud? Who should Section 10(b) and Rule 10b-5 benefit, and who should seek relief elsewhere or not at all? What investor, issuer, and other conduct should be deterred and what conduct should be encouraged? What is the overall purpose of Section 10(b) and Rule 10b-5 in the scheme of federal securities regulation? And when do we want to encourage or discourage private litigation as opposed to public enforcement?⁵⁹

As noted in Part I above, Section 10(b), taken together with Rule 10b-5, has been a relatively malleable fraud prohibition, shaped principally by the actions of public and private enforcement agents, lawyers, and (above all) judges. Yet, each of these constituents must, in theory, acknowledge and conform their arguments and actions to the policy underpinnings of Section 10(b) and the 1934 Act as a whole. In an earlier work, in summarizing the applicable policy landscape, I noted (citing to relevant authority) that, “[f]rom a more general policy perspective, Section 10(b) and Rule 10b-5 were designed to protect investors and promote the integrity of our securities markets by preventing fraud, manipulation, and deception in connection with the purchase or sale of a security.”⁶⁰

The Supreme Court has variously cited to the policies underlying Section 10(b), Rule 10b-5,

⁵⁹ This last question is a particularly tricky one. The federal courts have both supported and failed to support private actions based on varying policy considerations. *See, e.g.*, *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 307-11 (1985) (articulating policy justifications for private rights of action under Section 10(b) and Rule 10b-5); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-49 (1975) (using policy considerations to restrict private action plaintiffs under Section 10(b) and Rule 10b-5 to purchasers and sellers of securities); *In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 (D. Mass. 1994) (“The Supreme Court’s decision in *Central Bank* makes clear that the policy undergirding it is to constrict the ambit of private actions under Section 10(b) and to thereby reduce the number of parties implicated by that statute.”). “At times, principles of public policy have informed the interpretation of Section 10(b) without any reference to the principles underlying the carefully designed structure of the securities laws.” Edward A. Fallone, *Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action under a Structuralist Approach*, 1997 U. ILL. L. REV. 71, 125.

⁶⁰ Joan MacLeod Heminway, *Materiality Guidance in Insider Trading: A Call to Action*, 52 AM. U.L. REV. 1131, 1169 (2003).

and the 1934 Act to similar effect. In the mid-1970s, for example, the Court cited to the legislative history of the 1934 Act in elucidating the policy foundation of the 1934 Act.

Senator Fletcher, Chairman of the Senate Committee on Banking and Currency, reviewed the general purposes of the legislation: S in introducing S. 2693,

“Manipulators who have in the past had a comparatively free hand to befuddle and fool the public and to extract from the public millions of dollars through stock-exchange operations are to be curbed and deprived of the opportunity to grow fat on the savings of the average man and woman of America. . . .”⁶¹

More than 20 years later, in a seminal insider trading case, the Court stated that “an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence.”⁶²

Thus, there is general agreement that Section 10(b), as effectuated through Rule 10b-5, as part of the 1934 Act, protects investors in securities from deception in connection with a securities transaction and protects securities markets from manipulation. But which investors and which markets? Addressing this question from the standpoint of extraterritoriality, it seems fair to conclude that Congress intended to protect U.S. investors and U.S. markets. The Court’s opinion in *Morrison* addresses this issue well, albeit to different effect.⁶³ It does not appear from existing research and commentary that Congress ever directly addressed the extraterritorial reach of Section 10(b).

The breadth of the interstate commerce definition in the 1934 Act does not alter the conclusion that U.S. investors and markets were the focus of the 1934 Act. It is significant to note in this regard that the references to interstate commerce in both the statute and the rule describe the nature of the violative conduct, not the location of the injured party or the acting

⁶¹ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 765 (1975).

⁶² *United States v. O’Hagan*, 521 U.S. 642, 658 (1997).

⁶³ *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-79, 2882-83 (2010) (describing the presumption against extraterritoriality and citing to various parts of the 1934 Act that relate to extraterritorial application).

party or the transaction in securities.⁶⁴ Read literally, the statute appears to call for the protection of investors and markets regardless of where the conduct takes place, as long as that conduct employs a “means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.”⁶⁵ In adopting a transactional test (focusing on “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”⁶⁶) to define the extraterritorial application of Section 10(b) and Rule 10b-5, the Court appears to have chosen a path that has the potential to conflict with the text of Section 10(b), violating the “plain meaning” rule of statutory interpretation.⁶⁷

The *Morrison* Court likely is right that we should apply a presumption against extraterritoriality in the 1934 Act—at least as to the core policy considerations of Congress in enacting the statute: the protection of U.S. investors and markets. But the Court chose the wrong path by not matching its rule to those core policies as implemented through Section 10(b) and Rule 10b-5. Instead, the Court focused on the type and location of the market activity at issue in a transaction in securities. While securities fraud under Section 10(b) and Rule 10b-5 can arise from or in connection with the market activity targeted in the *Morrison* rule, it also can arise from or in connection with other conduct that injures U.S. investors or markets. Unless the Court intended to alter the foundational policies of the 1934 Act, the focus of the *Morrison* rule appears to be too narrow from a policy perspective.⁶⁸

Granting Section 10(b) and Rule 10b-5 protection to U.S. investors and U.S. markets should

⁶⁴ See *supra* notes 9 & 14 and accompanying text.

⁶⁵ *Id.*

⁶⁶ *Morrison*, *supra* note 63, at 2888.

⁶⁷ See, e.g., William N. Eskridge, Jr., *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990) (“The beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language.”); James M. Underwood, *Supplemental Serendipity: Congress’ Accidental Improvement of Supplemental Jurisdiction*, 37 AKRON L. REV. 653, 694 (2004) (“[A] court is to ‘follow the plain meaning of the statutory text, except when the text suggests an absurd result or a scrivener’s error.’”). Although the rule is still used by the judiciary, its force has been weakened over time to incorporate, among other things, a review of relevant legislative history. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983) (“[A]lthough the Court still refers to the ‘plain meaning’ rule, the rule has effectively been laid to rest. . . . When the plain meaning rhetoric is invoked, it becomes a device . . . for shifting onto legislative history the burden of proving that the words do not mean what they appear to say.”).

⁶⁸ The Court’s reliance on the text of Section 30(b) of the 1934 Act, 15 U.S.C. § 78dd(b) (2006), to support its extraterritoriality rule is questionable. Section 30 relates to the application of the 1934 Act to brokers and dealers and (to the extent that subsection (b) can be read to encompass others) “any person insofar as he transacts a business in securities without the jurisdiction of the United States.” 15 U.S.C. § 78dd.

neither shock nor place undue burdens on foreign issuers. Foreign issuers can take precautions to prevent their securities from harming U.S. investors and markets by imposing restrictions on record and beneficial ownership and trading. The SEC, consulting with Congress, can work with the International Organization of Securities Commissions (“IOSCO”)⁶⁹ and its member states to help ensure that any proposed bill is analyzed in light of normative trading practices and the tenets of securities regulation in other countries (for this and other reasons). Presumably, comity concerns can be addressed through similar channels.

This process may lead Congress toward adoption of a modified version of the effects test—where the inquiry focuses on the effects of the conduct, wherever it may occur, on U.S. investors or U.S. markets. In crafting the new extraterritoriality rule, Congress will, of course, have much work to do in determining the type of conduct that triggers U.S. investor protection and market protection concerns. A number of commentators have proposed new extraterritoriality or jurisdictional rules along these lines.⁷⁰ These commentaries, along with the SEC’s report under Dodd-Frank, may be helpful. Here, too, ongoing consultation with the SEC, working with IOSCO seems to be a productive path.

If Congress decides to extend or change the extraterritorial application of Section 10(b) and Rule 10b-5, it then should determine whether (and, if so, when) private actions should lie for this type of process in U.S. federal courts. Perhaps Congress should start its deliberative process on this issue by invoking a rebuttable presumption that a private right of action exists for all types of conduct proscribed by Section 10(b) and Rule 10b-5 after giving effect to the extended or changed extraterritorial scope of the rule (i.e., regardless of whether the security purchased or sold was listed on an American stock exchange or occurred in the United States). The Court then could determine whether the presumption of a private right of action is rebutted by policy considerations long focused on by the federal judiciary in determining their jurisdiction to hear claims under Section 10(b) and Rule 10b-5, weighing the benefits of the private right of action in specific circumstances against its detriments (e.g., matters of judicial economy, encouragement

⁶⁹ More information about IOSCO is available at <http://www.iosco.org/>.

⁷⁰ See, e.g., Ventrone, *supra* note 11, at 441 (“[A]n ‘effects-only’ test should be adopted.”); Geervarghese, *supra* note 35, at 260 (proposing “that Congress legislate on the issue and adopt a modified ‘effects’ test in conjunction with a ‘reasonability’ inquiry” fashioned in the form of a rebuttable presumption).

of vexatious litigation, and similar considerations).⁷¹ SEC Commissioner Aguilar addresses some of these matters in his dissenting statement on the SEC's study under Dodd-Frank.⁷²

IV. CONCLUSION

To date, the U.S. Supreme Court (together with lower federal courts) has been the primary actor in shaping the contours of actions—especially private actions—for securities fraud under Section 10(b) and Rule 10b-5. With its 2010 decision in the *Morrison* case, the Supreme Court extended its influence over these important securities fraud actions. In *Morrison*, the Court set more precise boundaries for the extraterritorial application of Section 10(b) and Rule 10b-5. Specifically, the Court determined that actions for securities fraud under Section 10(b) and Rule 10b-5 are only available for transactions in securities listed on an American stock exchange or made in the United States.

The rule established in *Morrison*, now only two years old, has been widely analyzed and criticized from the start, principally for unduly limiting the reach of U.S. securities fraud regulation. As a result, in Dodd-Frank (enacted shortly after the Court released its opinion in *Morrison*), Congress asked the SEC to gather comments and conduct a study on the extraterritoriality of Section 10(b) and Rule 10b-5 and submit a report on its study in or before January 2012. That report was issued in April 2012. It now is time for Congress to determine what, if anything, it will do to change the *Morrison* rule in light of the SEC's report and other commentary and counsel.

This paper suggests a way forward in that effort that refocuses Congress on the policies underlying the 1934 Act (and federal securities regulation as a whole). The ideas shared here establish a foundation for congressional efforts, assuming that Congress is not intent on altering the policy underpinnings of Section 10(b). The *Morrison* case and the SEC study have brought to light in the public arena many factual scenarios that Congress should process during the legislative deliberations in order to establish precise, consistent territorial boundaries for private

⁷¹ See sources cited *supra* note 59.

⁷² See Aguilar, *supra* note 35.

securities fraud actions under Section 10(b) and Rule 10b-5. To be effective, the processing of these scenarios will involve more than just the consideration of the substantive policy underpinnings of Section 10(b) and Rule 10b-5. Congress will need to take into account various additional considerations (some of which it foresaw in Dodd-Frank), including comparative law analyses, comity concerns, cost/benefit questions (including budgetary support for public enforcement efforts), and matters of judicial economy and federal securities enforcement policy.

These considerations should enable a rich and potentially productive discussion about many larger questions (some of which can be generalized to areas beyond securities regulation), among others:

- the judicialization of securities fraud regulation in the United States;
- the attributes, benefits, and detriments of a common law system for the regulation of securities fraud relative to a civil law system;
- the propriety and desirability of the assertion by the United States of enforcement control over securities markets regulated by other states; and
- the consequences (positive and negative) of different, individual state systems of securities fraud regulation in a transactional environment that increasingly crosses state borders.⁷³

The exploration of these questions, while beyond the scope of this paper, is important and will expose a number of interesting features of U.S. securities regulation, including the current ability of the U.S. Supreme Court to engage in litigation/docket management by establishing common law rules and standards that permit or foreclose participation by certain plaintiffs or defendants

⁷³ I note in this regard that one post-*Morrison* opinion involved a French corporation, Vivendi Universal, S.A. In the case, both U.S. and non-U.S. shareholders sued Vivendi under Section 10(b) and Rule 10b-5 based on transactions in Vivendi's ordinary shares (which did not trade in the U.S.) and American Depositary Receipts representing Vivendi's ordinary shares (which traded on the New York Stock Exchange. In an opinion released earlier this year, the claims of Vivendi investors who purchased the ordinary shares outside the United States (including both U.S. and non-U.S. investors) were dismissed based on an application of the *Morrison* rule. *In re Vivendi Universal, S.A. Sec. Litig.*, 2011 U.S. Dist. LEXIS 17514 (S.D.N.Y. Feb. 17, 2011). There has been French commentary on the *Vivendi* case, which was decided after, but brought and tried before, *Morrison* was decided. See <http://lecercle.lesechos.fr/economie-societe/politique-eco-conjoncture/221130396/maintenir-lattractivite-de-la-france> and <http://www.leclubdesjuristes.com/publications/articles/class-actions-l-exequatur-peut-elle-etre-invoquee-en-france>.

or different types of securities fraud actions. Historically, this ability has been relatively unchecked by the U.S. Congress. What Congress has not effectively done by its own action or by delegation to the SEC, the federal courts, and ultimately the U.S. Supreme Court, must or may do in response to individual cases and controversies that come before them. At present, however, because of congressional abdication of its potential legislative role in determining the extraterritorial application of Section 10(b) and Rule 10b-5, we are left with the Supreme Court's simple substantive line-drawing in *Morrison*.

In Dodd-Frank, Congress has opened the door to a more serious look at defining the extraterritorial reach of Section 10(b) and Rule 10b-5 in light of the Supreme Court's decision in *Morrison*. Having opened this door, Congress should step into the room and join in the festivities. In taking action, Congress should bear in mind that what it fails to do in solidifying the extraterritorial bases for U.S. private securities fraud actions will likely fall to federal courts to sort out, thereby allowing the judiciary to shape the substance of U.S. securities regulation and the policies underlying the federal securities laws in important ways. Congress cannot eliminate the Supreme Court's continuing, important role in interpreting congressional rules in this rapidly changing global economy. Congress can, however, importantly shape and constrain the range of activity of the Supreme Court and retain more control over the policies served by its laws if it takes a serious, well-considered approach in responding to the Court's opinion in *Morrison*.