

MORRISON V. DODD-FRANK: **DECIPHERING THE CONGRESSIONAL REBUTTAL** **TO THE SUPREME COURT’S RULING**

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ABSTRACT

In recent years, the Supreme Court of the United States has generally taken a strict, textualist approach to statutory interpretation. As a result, in several instances the Supreme Court has ruled one way on a specific issue, only to have its holding swiftly rebuked by Congressional legislation shortly thereafter. The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “Dodd-Frank Act”), passed in July 2010, is a prime example of such legislative response.

In Dodd-Frank, Congress in essence reinstated the “conduct and effects” approach to determining the extraterritorial application of anti-fraud provisions, at least as far as Securities and Exchange Commission (“SEC”) and Government-initiated actions are concerned. This provision largely undermined the landmark Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), decided just three weeks prior to Dodd-Frank’s passage. In *Morrison*, the Supreme Court had rejected the “conduct and effects” tests and instead relied upon the default presumption against extraterritorial application of American laws abroad, absent express statutory designation.

Here, I explore the roots of the presumption against extraterritoriality and consider the presumption’s utility in the field of Securities Law. I evaluate the application of both the “conduct and effects” and “transactional” tests and their implications on private shareholder and SEC- or Government-initiated cases through the use of a series of illustrative hypotheticals, and propose that the “transactional” test, though simple in theory, is unworkable in modern Securities Law. I propose that,

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nevertheless, the judiciary should continue a faithful application of the presumption against extraterritorial application of American law, as a useful mechanism for provoking clarity in statutory language from Congress.

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I. INTRODUCTION

On June 24, 2010, the Supreme Court of the United States, in a strongly-worded opinion by Justice Scalia, issued its decision in the case of *Morrison v. National Australia Bank Ltd.*,¹ and revived and strengthened the presumption against extraterritoriality once more—this time in the context of Section 10(b) securities fraud actions. The presumption against extraterritoriality is a default presumption that American law applies only within the territorial sovereignty of the United States, absent a clear, contrary intent from Congress within the statute.² This decision effectively rejected and nullified decades of prior circuit court jurisprudence that had weakened and muddled the application of this presumption in securities litigation, particularly in actions with foreign components, replacing it with a judicially-malleable “conduct and effects” standard instead.³ “Other Circuits [had] embraced the Second Circuit’s approach, though not its precise application[,] . . . produc[ing] a proliferation of vaguely related variations on the ‘conduct’ and ‘effects’ tests [set forth by the Second Circuit].”⁴

However, this decisive pronouncement of the role of the presumption against extraterritorial application of domestic law was short-lived. Less than three weeks later, Congress responded to the Supreme Court’s decision. Embedding its reply in the upwards of 2300 pages of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “Dodd-Frank Act”), Congress largely rejected the Court’s holding which had bolstered the presumption against extraterritoriality by restricting the application of Section 10(b) abroad.

This instance was not the first in which the Supreme Court ruled one way on a particular issue, only to have its conclusion severely cut down by a swift Congressional response shortly after. Nor was it the first instance in which the Supreme Court ruled, more specifically, on the extent of extraterritorial application that should be given to a particular American law, only to have Congress respond, re-legislate, and clarify that, in fact, the Court reached the wrong conclusion in interpreting legislative intent. Such questions of extraterritorial application of American law raise issues in the area of Conflict of Laws because often the American law in question, when applied to activities occurring abroad, would find a violation, while

1. 130 S. Ct. 2869 (2010).

2. *Id.* at 2877.

3. *Morrison* was on writ of certiorari to the Supreme Court of the United States from the United States Court of Appeals for the Second Circuit, which had long been the leading circuit on the issue of extraterritorial application of Section 10(b) of the Securities Exchange Act of 1934 in “predominantly foreign” transactions.

4. *Morrison*, 130 S. Ct. at 2880.

the local law abroad would not.

Here, I do not attempt to give the reader a comprehensive overview of all Conflicts law. I begin by discussing, in considerable detail, the historical evolution of domestic conflicts of laws to allow the reader to first fully recognize the failings and flaws of the strictly territorial approach that necessitated the rise of the modern approaches. Surprisingly, the recognition by scholars and courts of the limits of the territorial approach and their willingness to adopt new approaches in “domestic conflicts” between states has contrasted sharply from American courts’ treatment of international conflicts of laws in various areas. This recurring tendency, most recently in securities litigation, will be the primary focus of the remainder of this work.

Specifically, I will review the Supreme Court’s decision in *Morrison*, and attempt to reconcile the Court’s holding with both Congress’s swift subsequent response in the Dodd-Frank Act, and the current state of flux in this area of the law.⁵ As discussed, *Morrison* is only the most recent case in a long history of Supreme Court attempts to first rule definitively on the issue of extraterritorial application of a particular American law (generally finding a presumption against extraterritoriality), only to have its decision then pointedly overturned by a subsequent Act of Congress.

I will analyze whether the Court or Congress reached the wrong conclusion as far as Securities Law is concerned, and evaluate the practicality of the “transactional” test established in *Morrison*. I will then consider whether a presumption in favor of territoriality in judicial decisions does a poor job of interpreting and matching Congressional intent and will also consider the validity of using the presumption against extraterritoriality as a judicial mechanism. The work will also explore why the Supreme Court is holding on to such a presumption in the international context and thus acting differently in the international context than virtually all other modern-day American courts in the domestic context.

II. DOMESTIC CONFLICT OF LAWS: A BRIEF HISTORY

Conflict of Laws in the domestic context has undergone several transformations in the last hundred years, resulting in markedly different approaches from its nineteenth century comity-based origins.⁶ Professor Joseph Beale’s “vested rights” or “territoriality” approach replaced the haphazard and often inconsistent application of the principle of comity, and

5. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301 *et seq.*) [hereinafter Dodd-Frank Act].

6. DAVID P. CURRIE, HERMA H. KAY, LARRY KRAMER & KERMIT ROOSEVELT, CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS 4–5 (8th ed. 2010).

remained the universally adopted approach by American courts for the first half of the twentieth century.⁷ Its key principle was simple: “[A]ll laws are territorially bounded in their operation.”⁸ These “*lex loci*,” or “place of the,” principles placed great emphasis on localizing a particular transaction of events, such as the place of an injury, or the place of execution of a contract.⁹

Professor Beale’s approach was grounded in the idea that a sovereign possesses exclusive authority to create laws to govern all events and actions arising within its own territorial boundaries, but lacks authority to create laws that govern the events and actions occurring outside of its boundaries, in another sovereign’s jurisdiction.¹⁰ However, as one conflicts scholar artfully described, “The ink was hardly dry on the First Restatement of Conflicts [which reflected Professor Beale’s approach] when the attacks began.”¹¹ Professor Beale’s territorial approach was fiercely criticized almost from its inception.¹²

Professor Beale’s territorialist approach prioritized three core values: uniformity, predictability, and discouragement of forum-shopping.¹³ Ease of application emerged as a secondary benefit, at least in theory.¹⁴

However, as Professor Beale’s critics had already forecasted, courts quickly realized that the steadfast, mechanical adherence to *lex loci* principles of territoriality often led to absurd, arbitrary results.¹⁵ As technology and transportation advanced, many courts began to find that the theoretical value of neatly defined territoriality, based strictly on state lines, no longer held pragmatic appeal. Parties gained mobility, and “identify[ing] the unique location in which the rights ‘vested’ . . . was not so easy when the transactions in question were spread across state lines.”¹⁶

By the mid-twentieth century, it had become common practice for courts to consider “escape devices,” such as characterization or public policy, to achieve more intuitively equitable results. By doing so, courts creatively circumvented otherwise absurd outcomes that resulted from strict territoriality.¹⁷ Though these escape devices were “quick-fix” options

7. *Id.*

8. KERMIT ROOSEVELT, CONFLICT OF LAWS (CONCEPTS AND INSIGHTS SERIES) 3 (2010).

9. *Id.* at 6–14.

10. *Id.* at 3.

11. LEA BRILMAYER, PERSPECTIVES ON THE LAW: CONFLICT OF LAWS 22 (1991).

12. ROOSEVELT, *supra* note 8, at 33.

13. CURRIE ET AL., *supra* note 6, at 9.

14. ROOSEVELT, *supra* note 8, at 29–31.

15. *See, e.g.,* Ala. Great S. R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892) (denying recovery to an Alabama employee-plaintiff who had entered into an employment contract in Alabama, with his Alabama employer-defendant for an injury sustained in Mississippi, in order to avoid giving Alabama tort law extraterritorial scope).

16. BRILMAYER, *supra* note 11, at 22.

17. *See, e.g.,* Levy v. Daniels’ U-Drive Auto Renting Co., 143 A. 163, 164–65 (Conn.

available to the courts on a case-by-case basis, they gradually chiseled away at territoriality's proclaimed benefits of uniformity and predictability.

The second half of the twentieth century witnessed the development of two major "modern approaches" in the United States by legal scholars and courts.¹⁸ The first, Professor Brainerd Currie's articles on "Governmental Interest Analysis," marked an instrumental divergence from Professor Beale's traditional approach.¹⁹ The second, the American Law Institute's Second Restatement of Conflict of Laws, was completed in 1971.²⁰ Both modern approaches demonstrated an awareness of the need for a flexible approach by emphasizing a thorough inquiry into the state interest, public policy, and relative significance of relationships between the involved parties and different possible jurisdictions, when determining whether to apply a particular state's law over another's in a given case.²¹

Although a few state jurisdictions still apply Professor Beale's strict geographical approach to conflicts of law, variations on interest analysis or the Second Restatement have largely replaced territoriality in the domestic arena.²² Yet, in the foreign affairs arena involving causes of action that often contain certain international elements, there has been longstanding dissonance between Supreme Court jurisprudence that has clung to the presumption against extraterritoriality in its treatment of American laws, and an often swift subsequent Congressional reaction against such an approach in response.

III. INTERNATIONAL CONFLICT OF LAWS: A BRIEF HISTORY

A. *Roots of Extraterritorial Application of American Law: American Banana Company v. United Fruit Company*

In the early twentieth century, during the heyday of Professor Beale's territorial approach to Conflicts, the Supreme Court decided a landmark case that affirmatively entrenched the application of principles of

1928) (characterizing plaintiff's cause of action as arising from a contract formed in Connecticut, rather than a tort occurring in Massachusetts, to apply Connecticut law to allow plaintiff to recover).

18. See CURRIE ET AL., *supra* note 6, ch. 2.

19. See Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958) (analyzing a hallmark *lex loci contractus* case from the perspective of interest analysis).

20. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

21. *Id.* § 6.

22. Because the focus of this work is on territoriality's role in international affairs, I will not elaborate on the variations of Interest Analysis as they exist today. For a more comprehensive discussion of the different approaches, see ROOSEVELT, *supra* note 8, ch. 2–3.

territoriality (and its corollary, a presumption *against* extraterritoriality), which had been applied in domestic conflicts of law between sister-states, in resolving international conflicts between nations.

In *American Banana Co. v. United Fruit Co.*,²³ the Supreme Court faced the issue of interpreting whether the reach of the Sherman Act antitrust provisions extended to activities occurring outside of the United States. An Alabama-incorporated plaintiff sued a New Jersey-incorporated defendant, alleging that the New Jersey defendant-corporation had induced Costa Rica to interfere with the Alabama plaintiff-corporation's banana export business venture in Costa Rica through improper collusion with the neighboring Panamanian government.²⁴ Among its factual allegations, the plaintiff claimed that defendants "outbid . . . [and drove] purchasers out of the market . . . and . . . prevented the plaintiff from buying for export and sale."²⁵ In alleging these facts, plaintiffs cited and relied upon the antitrust provisions of the Sherman Act.²⁶

The trial court was not convinced, and subsequently dismissed the complaint.²⁷ The United States Court of Appeals for the Second Circuit ("Second Circuit") affirmed, and the Supreme Court upheld the lower courts' decisions. The Supreme Court, in its opinion, marveled at the plaintiff's attempt to invoke the Sherman Act, given that "the acts causing the damage were done . . . outside the jurisdiction of the United States."²⁸ The Court found it "surprising to hear it argued that [the activities occurring outside the United States] were governed by the act of Congress."²⁹ The Court held that "[a]ll legislation is *prima facie* territorial."³⁰

B. Impact of American Banana on Subsequent Questions of Extraterritoriality

In other words, when the reach of a statute is unclear, it should be interpreted "to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."³¹ After *American Banana*, courts applied this default presumption against extraterritorial application in similar antitrust cases without complication or

23. 213 U.S. 347 (1909).

24. *Id.* at 354–55.

25. *Id.* at 355.

26. *Id.* at 353.

27. *Id.*

28. *Id.* at 355.

29. *Id.*

30. *Id.* at 357.

31. *Id.*

confusion for almost three decades.³² However, the phrasing of the doctrine evolved and, by the mid-1940s, the Supreme Court had slowly modified the original language of *American Banana* through each application. Eventually, the phrasing of the standard allowed for the application of American law to control activities abroad that merely “affected” United States commerce.³³ The Supreme Court eventually found extraterritorial application of the Sherman Act proper when applied to “conduct abroad that is intended to and does affect United States commerce.” Ironically, this was the very interpretation rejected in *American Banana*.³⁴

Having unwittingly and inadvertently turned its holding in *American Banana* on its head, the Supreme Court began applying this “effects” approach to cases stemming from the anti-fraud provisions of the Securities Exchange Act of 1934 (“1934 Act”).³⁵ This dilution of *American Banana*’s original clear presumption against extraterritoriality led to great inconsistencies in different contexts and areas of law.

Territoriality connotes an idea of a *limitation* on a given law’s applicability to the confines of the jurisdiction that had the power to create the law; its converse, extraterritoriality, can be thought of as an *expansion* of the force of a law beyond the geographical boundaries of the jurisdiction that created it. It is important to note that in perpetuating the presumption against extraterritoriality, courts have not explicitly held that the extraterritorial application of American law is categorically forbidden per se.

To the contrary, when Congress explicitly specifies its intent that a statute apply to certain activities occurring abroad, then extraterritorial application of the statute is upheld by courts.³⁶ However, more often than not, the statutory language is silent on this issue. In these cases, without a clear, express indication from Congress, most courts have held that the jurisdictional scope of American law should be confined to apply only to events occurring within American territorial boundaries. This is an illustration of the presumption against extraterritoriality at work.

In the decades since *American Banana*, courts have generally followed this “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within

32. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179 (1991).

33. *Id.* at 180.

34. *Id.*

35. *Id.*

36. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 213(f) (1982) (stating applicability of Act to “[e]mployment in foreign countries and certain United States territories”).

the territorial jurisdiction of the United States.”³⁷ Courts have traditionally held that without first finding clear, express intent in the legislation itself, courts will interpret the laws to limit their applicability and effect to the United States; in other words, there is a presumption *against* extraterritoriality.³⁸ If an American law’s application to events with international elements abroad is intended by Congress, then Congress should take care to so state in clear, unambiguous terms within the statute.

IV. *MORRISON* AND ITS IMPACT ON EXISTING SECURITIES LITIGATION

By October Term 2009, securities litigation in American courts—particularly in cases involving activities with certain international implications—was primed for a decisive ruling by the Supreme Court. *Morrison* was decided against a backdrop of several decades of cases where the litmus test for whether to apply Rule 10b-5’s anti-fraud provisions, which banned fraud in securities transactions, depended on whether a court had “discern[ed] that] Congress would have wanted the statute to apply” to a given set of facts.³⁹ This *post facto* case-by-case speculation of “what Congress would have wanted” contributed to high unpredictability and inconsistency within the case law.

The Supreme Court issued its unanimous ruling in *Morrison* on June 24, 2010, in an 8–0 opinion written by Justice Scalia.⁴⁰ In *Morrison*, the Court addressed the question of “whether [S]ection 10(b) gives rise to a private cause of action [arising from alleged fraud in the trade of] securities that are traded outside of the territory of the United States.”⁴¹ In holding that it did not, the Supreme Court sought to clarify the standards for determining when and whether Section 10(b) should be applied to alleged fraudulent activities occurring abroad, in securities litigation initiated by private shareholders.

37. *Equal Emp’t Opportunity Comm’n v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (internal quotation marks omitted).

38. “Extraterritoriality” is used here to describe the application of American laws to events or activities occurring abroad. For more detail, see *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (finding a narrow interpretation of American antitrust laws in the absence of clear extraterritorial application in statutory language, regardless of the fact that challenged activities abroad were conducted by American companies).

39. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

40. *Id.* at 2869. Justice Sotomayor took no part in the consideration or decision of the case.

41. Luke Green, *Morrison v. National Australia Bank—The Dawn of a New Age?*, RISKMETRICS GROUP INSIGHT SECURITIES LITIGATION BLOG (June 25, 2010, 5:54 PM), <http://www.blog.riskmetrics.com/slw/2010/06/morrison-v-national-australia-bank---the-dawn-of-a-new-age.html>.

A. *Securities Litigation, Prior to Morrison*

The 1934 Act and its key anti-fraud provisions in Section 10(b), along with Rule 10b-5, have been “famously silent” as to their extraterritorial application.⁴² On its face, the anti-fraud provision of Section 10(b) does not seem to apply extraterritorially, since the plain language of the statute does not clearly state that it will. Section 10(b) of the 1934 Act states that:

[I]t 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 . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe.⁴³

Rule 10b-5 states, in relevant part, that it is unlawful for any person to “engage in any act, practice, or course of business which . . . would operate as a fraud . . . upon any person, in connection with the purchase or sale of any security.”⁴⁴

Because Rule 10b-5 was promulgated by the Securities and Exchange Commission (“SEC”) under the authority granted in Section 10(b), Rule 10b-5’s application “does not extend beyond conduct encompassed by [S]ection 10(b)’s prohibition.”⁴⁵ In other words, if Section 10(b) has no extraterritorial application, Rule 10b-5 does not either. Rule 10b-5’s breadth is only as wide as Section 10(b)’s breadth.⁴⁶

Theoretically, this appears simple enough. It would make sense to deduce that because Section 10(b) does not clearly state that it will apply extraterritorially, it will not. Correspondingly, Rule 10b-5 would not either. However, in the decades prior to the long-overdue *Morrison* decision, securities litigation instead involved great exercise of discretion by the courts.⁴⁷ During the forty years leading up to *Morrison*, courts considered the “extraterritorial application of the securities laws to foreign transactions as a question of subject matter jurisdiction.”⁴⁸

42. Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1081 (2010).

43. 15 U.S.C. § 78j (cited in *Morrison*, 130 S. Ct. at 2882).

44. 17 C.F.R. § 240.10b-5 (2011).

45. *Morrison*, 130 S. Ct. at 2881 (citing *United States v. O’Hagan*, 521 U.S. 642, 651 (1997)).

46. *Id.*

47. Reuveni, *supra* note 42, at 1074.

48. *Id.*

Starting in 1968, the Second Circuit adopted a case-by-case approach, and on that basis decided whether it would be reasonable to apply Rule 10b-5 anew each time questions of its applicability arose in a particular case.⁴⁹ Under this approach, courts considered the “underlying purpose of the anti-fraud provisions” to determine “whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to such transactions.”⁵⁰

A line of cases from the Second Circuit applied the “conduct test” and “effects test” in determining the reach of Section 10(b).⁵¹ In applying these so-called “conduct and effects tests,” the court inquired whether (1) the *conduct* giving rise to the claim occurred in the United States, and (2) “whether the wrongful conduct had a *substantial effect* in the United States or upon United States citizens.”⁵² The Court would then apply this test to determine whether it had subject matter jurisdiction to hear the claim.⁵³

Unsurprisingly, the repeated application of the “conduct and effects tests” on a case-by-case basis resulted in great unpredictability and arbitrariness, creating “a collection of tests for divining what Congress *would have wanted*, complex in formulation and unpredictable in application.”⁵⁴

However, prior to the *Morrison* decision and the Dodd-Frank Act shortly thereafter, Congress had seemed perfectly content in allowing the judiciary to continue this case-by-case inquiry in determining whether to hear Rule 10b-5 claims arising out of allegedly wrongful international activities in securities litigation cases.⁵⁵ For decades, Congress made no attempts to clarify the extraterritorial reach of the 1934 Act’s anti-fraud provisions by statute.⁵⁶ In essence, the courts had stepped into a quasi-legislative role—this should give democratic societies pause. In fact, in the *Morrison* opinion, Justice Scalia criticized the “judicial-speculation-made-law” that resulted from courts taking it upon themselves to decide when and whether Section 10(b) should apply.⁵⁷

49. Lyle Denniston, *Stock Fraud Law: For U.S. Only*, SCOTUSBLOG (June 24, 2010, 5:43 PM), <http://www.scotusblog.com/?p=22167>.

50. *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citing *Eur. & Overseas Commodity Traders S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998)), *aff’d*, 130 S. Ct. 2869 (2010).

51. *Id.* at 171 (citing *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983)).

52. *Id.* (emphasis added).

53. *Id.* at 172.

54. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010) (emphasis added).

55. Reuveni, *supra* note 42, at 1073.

56. The potential motivations for this will be explored later in the analysis found in Part VI below.

57. *Morrison*, 130 S. Ct. at 2881; *see also* Denniston, *supra* note 49 (asserting that

B. *Morrison in the District Court and Second Circuit*

In *Morrison*, the key issue presented was whether Section 10(b) of the 1934 Act provided a viable cause of action to “foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.”⁵⁸ This so-called “foreign-cubed,” or “f-cubed,” securities case presented an issue of first impression for the Second Circuit.⁵⁹

Defendant-respondent National Australia Bank Limited (“NAB”) “was, during the relevant time, the largest bank in Australia.”⁶⁰ The three plaintiffs-petitioners were Australians who had purchased NAB’s “Ordinary Shares” in 2000 and 2001.⁶¹ “Ordinary Shares” are similar to American “common stock,” but are “traded on the Australian Stock Exchange Limited and on other foreign securities exchanges, but not on any exchange in the United States.”⁶² In 1998, NAB had purchased a Florida-based mortgage servicing company and reported the value of the U.S. subsidiary’s assets in NAB’s financial statements.⁶³ From 1998 until 2001, these financial statements, along with the public statements of both NAB’s and its subsidiary’s directors and executives, “touted the success” of the subsidiary’s value in assets.⁶⁴

Suddenly, in 2001, NAB wrote down the value of the subsidiary’s assets twice, resulting in a major slump in Ordinary Shares prices.⁶⁵ Petitioners alleged that this slump in prices negatively affected the value of their investments in NAB’s stock.⁶⁶

Australian Petitioners brought suit against NAB in the United States District Court for the Southern District of New York.⁶⁷ Having bought their Ordinary Shares before the write-downs, Petitioners alleged that they suffered financial losses as a result of NAB’s actions.⁶⁸ Petitioners alleged that NAB was aware of the deception in its financial models as early as July 2000, “but did nothing about it” and continued to misrepresent the

“[w]ith evident sarcasm, Justice Antonin Scalia’s opinion for the Court rapped Circuit Courts for having created, by judicial invention, the authority to decide such lawsuits when filed by private investors”).

58. *Morrison*, 130 S. Ct. at 2875 (emphasis added).

59. *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008).

60. *Morrison*, 130 S. Ct. at 2875.

61. *Id.* at 2876.

62. *Id.* at 2875.

63. *Id.*

64. *Id.*

65. *Id.* at 2876.

66. Denniston, *supra* note 49.

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

68. *Id.*

supposed worth of its and its subsidiary's assets, to Petitioners' detriment.⁶⁹ Petitioners relied on the anti-fraud provisions of Section 10(b) of the 1934 Act, as well as Section 20(a), in their claim against NAB.⁷⁰

The district court dismissed Petitioners' claim for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).⁷¹ The Second Circuit affirmed on similar grounds, applying its Circuit precedent in asking what "conduct" Section 10(b) reaches, as part of its developed "conduct and effects tests."⁷²

C. *Morrison in the Supreme Court*

The Supreme Court took a much stricter textualist approach and, although it affirmed the Second Circuit's decision, it affirmed on different grounds, definitively discarding the "conduct and effects tests." The Supreme Court rejected the Second Circuit's affirmation of the district court's dismissal on subject matter jurisdiction grounds, stating that an inquiry into the reach of Section 10(b) is a merits question, while subject matter jurisdiction "refers to a tribunal's power to hear a case."⁷³ Nevertheless, the Supreme Court affirmed the Second Circuit's ruling on alternative grounds, relying instead on Federal Rule of Civil Procedure 12(b)(6).⁷⁴

Once the Supreme Court decided that the issue presented was a merits-based question subject to a possible 12(b)(6) dismissal, it considered the extraterritorial reach of Section 10(b). In doing so, it revived the strength of the longstanding presumption that "unless there is the affirmative intention . . . clearly expressed to give a statute extraterritorial effect, [the Court] must presume it is primarily concerned with domestic conditions."⁷⁵

The Court then "reviewed the sequence of Second Circuit . . . cases applying [S]ection 10(b) to various foreign transactions, summarizing the Second Circuit's jurisprudence with evident distaste."⁷⁶ The Court criticized the Second Circuit's longtime practice of "discern[ing] whether Congress would have wanted the statute to apply" in these Section 10(b) securities fraud cases.⁷⁷ The Court distinguished the differences between

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2876–77.

73. *Id.* at 2877 (internal quotation marks omitted).

74. *Id.*

75. *Id.* (internal quotation marks omitted).

76. John R. Crook, *U.S. Supreme Court Limits Extraterritorial Reach of Securities Laws*, 104 AM. J. INT'L L. 654, 655 (2010).

77. *Morrison*, 130 S. Ct. at 2878 (internal quotation marks omitted).

the practices of using “congressional silence as a justification for judge-made rules,” from the traditional presumption that silence simply means no extraterritorial application, and rebuked the former.⁷⁸ The Court made clear its abrogation of the Second Circuit jurisprudence’s “conduct and effects tests,” citing among its reasons both the difficulty in administering these tests as well as the unpredictability in their application.⁷⁹

Ultimately, the Court held that the focus of the 1934 Act did not turn upon “where the deception originated, but upon purchases and sales of securities in the United States.”⁸⁰ By so finding, the Court limited the applicability of Section 10(b) of the 1934 Act, and therefore Rule 10b-5, to “only *transactions* in securities listed on domestic exchanges, and domestic transactions in other securities.”⁸¹ Merely because there is *some* connection with the United States, for instance if one or both parties are American citizens, is not enough to trigger the application of Section 10(b).

In reaching this conclusion, the Supreme Court rejected the longtime “conduct and effects tests” of Second Circuit jurisprudence in favor of the more decisive, bright-line “transactional” test. In so holding, the Court stated that Section 10(b) applies to prohibit fraud or deception in “the use of a manipulative or deceptive device . . . 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.”⁸² The Court’s opinion in *Morrison* seems to be clear and unambiguous, “drastically rein[ing] in the extraterritorial reach of U.S. securities fraud laws.”⁸³ Because Petitioners in *Morrison* purchased Ordinary Shares on a foreign exchange, not traded in the United States, they were unable to rely on Section 10(b) and Rule 10b-5 in their claim for relief under the new “transactional” test, and the Court held for Respondent NAB.

D. *Post-Morrison Federal Jurisprudence*

While investors and courts everywhere awaited the decision in *Morrison*, many other private securities fraud actions against major multinational corporations were pending. Though not all were “f-cubed” cases, many did involve stocks that were purchased on foreign stock exchanges, often by American shareholders. Since the *Morrison* opinion was handed down, lower federal district courts have generally tried to adhere to the Supreme Court’s revival of the presumption against

78. *Id.* at 2881.

79. *Id.* at 2879.

80. *Id.* at 2884.

81. *Id.* (emphasis added).

82. *Id.* at 2888 (emphasis added).

83. Green, *supra* note 41.

extraterritoriality.⁸⁴ These courts have recognized that the prior “conduct and effects tests” developed by the Second Circuit is now “dead letter”⁸⁵ and instead are deferring to the “transactional” test set out in *Morrison*. A faithful adherence to *Morrison* has already resulted in the “dismissal of several significant securities fraud class actions.”⁸⁶

However, the purportedly bright-line “transactional” test in *Morrison* has met with criticism from other courts, for the difficulty in its application and arbitrariness of such a territoriality-dependent test. Recall that these are reminiscent of the criticism of Professor Beale’s territorial approach in domestic Conflict of Laws, described above in Part II.

1. Support for the “Transactional” Test

Since the Supreme Court’s decision in *Morrison*, several lower district courts have begun applying the “transactional” test, which has resulted in dismissals of pending claims. For instance, in *Cornwell v. Credit Suisse Group*, plaintiffs filed a Second Amended Class Action Complaint on March 10, 2010, several weeks before *Morrison* was argued at the Supreme Court.⁸⁷ In July 2010, in light of the *Morrison* decision, Credit Suisse Group (“CSG”) moved to dismiss a certain subset of the class of American resident plaintiffs (“subclass”) who had purchased CSG shares on the Swiss Stock Exchange.⁸⁸

Faithfully upholding the strict holding in *Morrison*, the trial court granted CSG’s motion to dismiss this subclass of plaintiffs.⁸⁹ Unfortunately for these subclass plaintiffs, their arguments and attempts to distinguish their case from *Morrison* by pointing out that this subclass “made an investment decision and initiated a purchase . . . from the U.S.” fell on deaf ears.⁹⁰ The *Cornwell* court cited the Supreme Court’s “unequivocal[] repudiat[ion of the] longstanding jurisprudence” of the Second Circuit’s “conduct and effects tests,” and rejected plaintiffs’ attempt to limit *Morrison* to its facts.⁹¹ In faithfully following the Supreme

84. See, e.g., *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010) (granting Defendant’s motion to dismiss and rejecting Plaintiffs’ Section 10(b) arguments on the grounds that the foreign transaction involved *some* U.S. contact).

85. *Id.* at 622.

86. E-mail from Frank Partnoy et al., to Elizabeth M. Murphy, Secretary of the Securities and Exchange Commission, Comments by Forty-Two Law Professors in Response to SEC Study on Extraterritorial Private Rights of Action (Feb. 18, 2011), available at <http://www.sec.gov/comments/4-617/4617-28.pdf>.

87. *Cornwell*, 729 F. Supp. 2d at 621.

88. *Id.*

89. *Id.* at 622.

90. *Id.* (internal quotation marks omitted).

91. *Id.* at 623.

Court's holding in *Morrison*, the *Cornwell* court rejected the subclass's attempt to carve out a distinction from *Morrison*, on the argument that the foreign transaction did involve the "occurrence of some activities or contracts in the United States."⁹²

The *Cornwell* court, following *Morrison*, stated that "even in strictly foreign securities purchases or sales to which the reach of [S]ection 10(b) squarely does not extend, some connection of the transaction with the United States is always highly likely," and found such incidental connections insufficient for extraterritorial application.⁹³ The *Cornwell* court further bolstered the new bright-line "transactional" test set forth in *Morrison*, reiterating that the focus of the 1934 Exchange Act is "not upon the place where the deception originated[,] but instead on purchases and sales of securities *in the United States*."⁹⁴ Many other courts have since dismissed private shareholder actions as well, as a result of *Morrison*.⁹⁵

2. Criticism of the "Transactional" Test

In theory, the "transactional" test appears simple: alleged fraud in transactions on foreign exchanges will not give rise to Section 10(b) claims, "even if [the transactions caused] some domestic impact or effect."⁹⁶ Recall that in *American Banana*, the Supreme Court declined to apply the Sherman Act to activities in Costa Rica, even though these activities arguably impacted American companies stateside.

However, despite the Supreme Court's best efforts to create a bright-line rule in *Morrison*, certain situations have already presented the shortcomings of the *Morrison* "transactional" test. For example, *In re Vivendi Universal, S.A. Securities Litigation*⁹⁷ was a consolidated class action originally filed in 2002, on behalf of U.S. and foreign shareholders of Vivendi, a French company.⁹⁸ These shareholders had purchased either ordinary shares, listed and traded on foreign exchanges, or American Depositary Receipts ("ADRs"), listed and traded on the New York Stock Exchange ("NYSE").⁹⁹ The plaintiff shareholders alleged that the company

92. *Id.* at 626.

93. *Id.*

94. *Id.* (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2874 (2010)).

95. *See, e.g., In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327 (S.D.N.Y. 2011); *Elliot Assocs. v. Porsche Automobil Holding SE*, 759 F. Supp. 2d 469 (S.D.N.Y. 2010); *see also Partnoy et al., supra* note 86, at 13–18 (reviewing several recent developments in high-profile private securities litigation cases, many of which have been dismissed in the wake of the *Morrison* decision).

96. *Denniston, supra* note 49.

97. 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

98. *Id.* at 520.

99. *Id.* at 521.

violated Section 10(b) anti-fraud provisions by making misrepresentations that resulted in artificially-inflated prices, which led to their eventual financial losses.¹⁰⁰

After a lengthy pre-trial period, the case went to a jury trial in late 2009.¹⁰¹ In early 2010, the jury rendered its verdict against Vivendi, finding that Vivendi had violated Section 10(b) by making fifty-seven specific misstatements which resulted in artificially-inflated prices during the relevant period.¹⁰² Post-trial motions in *Vivendi* were pending when the Supreme Court issued its decision in *Morrison* in June 2010. In light of this decision, the *Vivendi* court requested that the parties “submit supplemental briefs addressing the impact of *Morrison* on the pending motions.”¹⁰³

Neither party disputed that “*Morrison* ha[d] no impact on the claims of ADR purchasers since [the] ADRs were listed and traded on the NYSE.”¹⁰⁴ However, the plaintiffs claimed that because Vivendi was required to register the number of ordinary shares on the NYSE in the process of its public offering in ADR form, these ordinary shares “listed” on the NYSE satisfied *Morrison*’s transactional test for Section 10(b) application to “securities listed on domestic exchanges.”¹⁰⁵ Vivendi disagreed, arguing that these “listed” shares were not for trading purposes, and thus this technicality was not consistent with the Supreme Court’s rationale in *Morrison*.¹⁰⁶

The *Vivendi* court ultimately rejected the plaintiffs’ argument, finding “no indication that the *Morrison* [opinion] read Section 10(b) as applying to securities that may be cross-listed on domestic and foreign exchanges . . . where the purchase and sale does not arise from the domestic listing.”¹⁰⁷ Instead, the court relied on the “spirit of *Morrison*” analysis employed by other trial courts, which considered the *Morrison* “transactional” test holistically, focusing primarily on the territorial location of the action.¹⁰⁸

Though the Supreme Court’s attempt to clarify and define an easy-to-use, bright-line “transactional” test in *Morrison* is commendable from a jurisprudential perspective, *Vivendi* illustrates the narrowness of the

100. *Id.* at 533.

101. *Id.* at 523.

102. *Id.* at 524.

103. *Id.* at 525.

104. *Id.* at 527.

105. *Id.* (emphasis added) (internal quotation marks omitted).

106. *Id.* at 527–28.

107. *Id.* at 531.

108. *Id.* at 530 (internal quotation marks omitted) (citing *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472 (S.D.N.Y. 2010); *Sgalambo v. McKenzie*, 739 F. Supp. 2d 453, 487 (S.D.N.Y. 2010)).

Morrison holding, and the Supreme Court's failure in contemplating the "transactional" test's application in other real-life, practical circumstances in securities litigation, such as cross-listing or ADRs.¹⁰⁹

V. THE DODD-FRANK ACT, SECTIONS 929P AND 929Y

A. Introduction to the Act

The Supreme Court's sweeping reaffirmation of the presumption against extraterritoriality in *Morrison* did not last. Whatever force the Court may have intended to restore to the presumption in securities fraud litigation on Section 10(b) claims was quickly frustrated by Congress's swift passage of the Dodd-Frank Act on July 10, 2010, less than three weeks after the *Morrison* opinion was issued.¹¹⁰ To say the Dodd-Frank Act is exceedingly comprehensive would be an understatement.¹¹¹ Legal scholars, policy makers, courts, lawyers, and financial institutions have waded through its upwards of 2300 pages, searching for "hidden provisions of the bill that most people have yet to notice."¹¹² The United States Senate Committee on Banking, Housing, and Urban Affairs issued a brief summary outlining the impetus for the legislation to aid the public's understanding of the new legislation.¹¹³ Among the highlights listed in the summary include Dodd-Frank's new provisions to "[s]trengthen[] oversight and empower[] regulators to aggressively pursue financial fraud . . . that benefits special interests at the expense of American families and businesses."¹¹⁴ The pertinent section of Dodd-Frank that impacts the Supreme Court's decision in *Morrison* is Section 929 of the Act.

B. Section 929 of the Dodd-Frank Act

Section 929 has the greatest direct impact on the Supreme Court's holding in *Morrison*. Section 929P is titled, "Strengthening enforcement

109. Additional real-life scenarios in which the "transactional" test falls short are explored below. See discussion *infra* Part VI.B.

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

111. See, e.g., Steven M. Davidoff, *Finding a Good Financial Bill in 2,300 Pages*, THE NEW YORK TIMES DEALBOOK (July 15, 2010, 12:05 PM), <http://dealbook.nytimes.com/2010/07/15/finding-a-good-financial-bill-in-2300-pages/>.

112. *Id.* (internal quotation marks omitted).

113. See STAFF OF S. COMM. ON BANKING, HOUSING, & URBAN AFFAIRS, 111TH CONG., DODD-FRANK WALL STREET REFORM: CONFERENCE REPORT SUMMARY (Comm. Print 2010) (highlighting various provisions of the Dodd-Frank Act to help the public navigate through the legislation), http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf.

114. *Id.* at 2.

by the [Securities and Exchange] Commission.”¹¹⁵ Section 929P provides in relevant part that:

[D]istrict courts of the United States . . . shall have *jurisdiction* of an action or proceeding brought or instituted by the [Securities and Exchange] Commission or the United States alleging a violation of the antifraud provisions . . . 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.¹¹⁶

In other words, the plain statutory language in Section 929P of Dodd-Frank apparently rebukes the Supreme Court’s *Morrison* decision, to the extent that it applies to actions brought by the SEC and the Federal Government. At least, this is the understanding that much of the legal community seems to have agreed upon. However, it is important to note that Section 929P itself is poorly drafted and ambiguous; specifically, it never deliberately states that it is expressly reversing the Court’s opinion in *Morrison*, nor does it explicitly state that it is restoring the Second Circuit’s “conduct and effects test.” Instead, Section 929P states in clear, unambiguous terms that any United States court will, going forward, have jurisdiction to hear any action brought by the SEC or the Government with respect to violations, even those occurring outside the United States, of the anti-fraud provisions of the 1934 Act.¹¹⁷ Having jurisdiction, or “power to hear a case,” is “an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.”¹¹⁸

Assuming, *arguendo*, the validity of what the legal community has presumed is a rejection of *Morrison*, at least with respect to SEC and Government actions, Section 929P extends the application of Section 10(b) and Rule 10b-5’s reach, when relied on by the SEC in pursuing violations or by the Government in criminal prosecutions, even when the securities transaction occurred outside of the United States.¹¹⁹ Dodd-Frank provides that Section 10(b) may apply to such purely foreign transactions *if* the proceeding is commenced by the SEC or the Government.

115. Dodd-Frank Act § 929P.

116. *Id.* (emphasis added).

117. Edward F. Greene, *Dodd-Frank: a lesson in decision avoidance*, 6 CAPITAL MKTS. L.J. 29, 70 (2010).

118. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

119. *Id.*

C. *Section 929's Impact on Morrison*

After Dodd-Frank, the Act's impact on the Supreme Court's holding in *Morrison* can best be understood by conceptualizing the Supreme Court's finding of a presumption against extraterritoriality in *Morrison* as bifurcated, between two discrete categories: (1) actions brought by private litigants and (2) actions brought by the SEC or the Government.

Because the Dodd-Frank Act, as it currently reads, is silent on the restriction of Section 10(b)'s applicability to private causes of action, the holding in *Morrison* barring extraterritorial application of Section 10(b) to Category (1) private litigant actions remains undisturbed. At first blush, Congressional silence on the issue of Section 929P's effect on private actions seems to be, ironically, the same lack of clarity that created the initial confusion regarding Section 10(b)'s extraterritorial application in the first place. However, Section 929Y requires the SEC to solicit public commentary on whether this "conduct and effects" analysis should be extended to private actions, and file a report with Congress accordingly.¹²⁰ Additional discussion of these public comments follows in Part VI.A.

Considering the *Morrison* opinion together with Sections 929P and 929Y of Dodd-Frank, it is clear that the Act weakened the force of the Supreme Court's opinion in Category (2) SEC- and Government-enforcement actions. Dodd-Frank severely curtailed the Supreme Court's blanket prohibition of extraterritorial application of Section 10(b) without clear, explicit congressional intent, and rejected the strong presumption against extraterritoriality, specifically in cases where foreign stocks were purchased on foreign exchanges.

Dodd-Frank effectively reinstated the "conduct and effects test" that *Morrison* had discarded, at least in the context of SEC- and Government-initiated actions.

VI. ANALYSIS

A. *The Ultimate Significance of the Private Versus SEC- or Government-Initiated Distinction Might Be Rendered Moot*

The ultimate importance of whether an action is brought by private litigants, as opposed to the SEC or the Government, is yet to be determined. As written, Section 929P has generally been understood to partially reverse *Morrison*, at least to the extent that it reinstated a similar "conduct and effects test" for determining extraterritorial application of Section 10(b) anti-fraud provisions to actions brought by the SEC or

120. Dodd-Frank Act § 929Y.

Government.¹²¹ However, Section 929Y of the Dodd-Frank Act required the SEC to conduct a study as to whether *private* rights of action should be subject to the same “conduct and effects” analysis.¹²² Accordingly, the SEC requested public commentary by February 18, 2011, regarding the potential expansion of Section 929P’s application from SEC- or Government-initiated actions to private actions and “the circumstances, if any, in which a private plaintiff should be allowed to pursue [a Section 10(b) securities fraud claim under] the Exchange Act with respect to a particular security where the plaintiff has purchased or sold the security outside the United States.”¹²³ Section 929Y further required that the SEC submit a report of the study to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House within eighteen months of Dodd-Frank’s enactment.¹²⁴

Among the more prominent comments submitted was a joint submission by forty-two law professors from law schools around the country.¹²⁵ In the comment, the professors stated that, despite their acknowledged personal differences of opinion regarding the efficacy of securities class actions and the extent of private shareholders’ rights, as a group they “believe[d] reform efforts should be applied consistently and logically to both domestic and affected foreign issuers” and, thus, “support[ed] extending the test set forth in Section 929P of the Dodd-Frank . . . Act . . . to [actions brought by] private plaintiffs.”¹²⁶

Legal scholars, interested parties, and foreign governments alike can expect to see the SEC’s recommendations and report to Congress by January 2012, at which time the SEC’s eighteen-month period to submit a report to Congress will expire. Currently, it is impossible to predict not only what the agency will recommend, but furthermore whether Congress will take steps to extend the restored “conduct and effects-like” test in Section 929P to private rights of action after receiving the report. It will be interesting to see what legislative changes, if any, public commentary such as this may yield, and important to note how the SEC will consider public opinions such as the one from the professors, moving forward. Perhaps

121. *Id.* § 929P.

122. *Id.* § 929Y.

123. Study on Extraterritorial Private Rights of Action Request for Comments, Exchange Act Release No. 34-63174, 2010 WL 4196006 (October 25, 2010).

124. Dodd-Frank Act § 929Y.

125. Partnoy et al., *supra* note 86; see also Barbara Black, 42 *Law Profs Support Extending Dodd-Frank’s Extraterritorial Test to Private Claims*, SEC. LAW PROF BLOG (Feb. 28, 2011), <http://lawprofessors.typepad.com/securities/2011/02/law-profs-support-extending-dodd-franks-extraterritorial-test-to-private-claims.html> (reporting the joint submission by law professors and its implications, on blog site maintained by Barbara Black, one of the forty-two professors who submitted the joint commentary).

126. Partnoy et al., *supra* note 86, at 5.

Congress will attempt to legislate more definitively on the issue of extraterritorial application of anti-fraud provisions to extend Dodd-Frank's Section 929P language to private causes of action in the future. If Congress does in fact amend the statutory language to apply the two-prong test in Section 929P of Dodd-Frank to private actions as well, as the professors are recommending, the force of the *Morrison* opinion will be fully reversed and rendered virtually toothless.

B. Pragmatically, Morrison's Substantive Outcome and Effect on Securities Litigation Was Wrong

As a substantive legal issue for securities law, the Court's holding in *Morrison* that Section 10(b) of the 1934 Act had no extraterritorial application to allegedly fraudulent activities occurring on foreign exchanges was impractical. It is important to distinguish between the "substantive outcome" and "procedural outcome" of *Morrison*. The "procedural outcome" is discussed in Part VI.C below.

1. The Decision in *Morrison* Was Impractical for Modern Securities Litigation

There is a practical problem with the Court's attempt to set forth the bright-line "transactional" test in *Morrison*. Simply put, geographically localizing the listing of the transacted share as "domestic" or "foreign" to decide whether Section 10(b) "does apply" or "does not apply," respectively, is arbitrary. As discussed previously in Part II above, such a strictly geographically-focused approach, though easy in its application, often reaches absurd and counter-intuitive results. Potential for such arbitrariness and unfairness exists under the *Morrison* "transactional" test.

For example, consider the following hypothetical scenario:¹²⁷

Vroom! Motor Corporation stock is listed and traded on both the New York Stock Exchange (NYSE) and the Tokyo Stock Exchange (TSE).

127. Interview with Jill Fisch, Perry Golkin Professor of Law and Co-Director of the Inst. for Law and Econ., Univ. of Pa. Law Sch., in Phila., Pa. (Mar. 24, 2011). Professor Fisch is an expert in the fields of securities regulation and corporate governance, and is one of the forty-two professors who submitted the joint comment to the SEC, as discussed above in Part VI.A. Many thanks to Professor Fisch for her time and, particularly, for using this hypothetical in explaining the concrete effects of the *Morrison* holding. A graphical representation of these hypothetical scenarios in Part VI.B can be found in the Appendix, in Figures 1 and 2.

Investor A decides to purchase Vrooom! stock and calls her stockbroker with this investment in mind. The stockbroker acts accordingly and purchases shares on the NYSE.

Investor B decides to purchase Vrooom! stock and calls his stockbroker with this investment in mind. The stockbroker acts accordingly and purchases shares on the TSE.

Evidence of fraudulent activity comes to light, and both Investors A and B incur identical substantial financial losses.

To illustrate the practical realities of territoriality's drawbacks, under the "transactional" test set forth in *Morrison*, Investor A would have access to a legal remedy in a United States court by asserting a Section 10(b) claim, because her stock was listed and purchased on the NYSE, a domestic exchange. Investor B would be barred from recovery. Yet ironically, Investors A and B might not have ever realized (nor cared), but-for their eventual losses, *where* their particular shares were listed or purchased. Furthermore, under the "transactional" test, the nationalities of Investors A and B are immaterial. The test is primarily concerned with whether the stock was listed on a domestic or foreign exchange.

In contrast, under the prior "conduct and effects test," a court would likely have analyzed additional factors, such as "whether the harmed investors were Americans or foreigners . . . [or whether the] acts 'of material importance' performed in the United States 'significantly contributed' to [the alleged damages]" in deciding whether to apply Section 10(b) to grant plaintiffs recovery.¹²⁸ The "conduct and effects test" was malleable, unpredictable, and difficult to apply. However, at least in the area of Securities Law, it allowed for great flexibility, enabling intuitively equitable outcomes by thoroughly considering unique factual scenarios.

2. *Morrison*, After Dodd-Frank

Congress's attempt to reject the Court's holding in fact only further muddled the confusion. By essentially reinstating the "conduct and effects test" for SEC and Government actions, while leaving the "transactional" test in place for private actions, Congress created an additional possibility for arbitrariness in application of the law. The Dodd-Frank provision in Section 929P, coupled with *Morrison*, is illustrated in the following scenarios:

American Investor C purchases Vrooom! stock on the NYSE. Fraud ensues.

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

American Investor D purchases Vroom! stock on the TSE.
Fraud ensues.

Foreign Investor E purchases Vroom! stock on the NYSE.
Fraud ensues.

Foreign Investor F purchases Vroom! stock on the TSE.
Fraud ensues.¹²⁹

In American Investor C's case, the SEC and Government are able to bring actions against alleged wrongdoers, under both *Morrison* and Section 929P. American Investor C also has a private right of action under the *Morrison* "transactional" test, because the stock was listed on a domestic exchange. This is the easy case.

In American Investor D's case, the SEC and Government are also able to bring actions against alleged wrongdoers, if the SEC or Government can show under Section 929P the requisite "substantial effect" with the United States. Here, given Investor D's American citizenship, this "substantial effect" would likely be found. Unfortunately for American Investor D, he has no private legal right to recovery because his stock was listed and purchased on a foreign exchange, despite his citizenship ties to the United States. *Morrison*'s transactional test applies, and because Section 929P fails to grant the more flexible "conduct and effects test" analysis to private actions, Investor D's recovery in United States courts is barred.

Meanwhile, foreign Investor E, who does not have any ties to the United States at all, except for having purchased Vroom! shares on the NYSE, is entitled to a private cause of action in United States court under *Morrison*, simply because the stock was listed on the domestic exchange. Here, the SEC and Government can also bring a cause of action against alleged wrongdoers.

Lastly, in foreign Investor F's case, under *Morrison*, foreign Investor F cannot file a private cause of action in a United States court under Section 10(b), because the shares were listed on a foreign exchange. However, the SEC or Government would be able to commence a proceeding or criminal prosecution against the alleged wrongdoers if it could prove the second prong of the Dodd-Frank Section 929P "conduct and effects" analysis—that foreign Investor F's purchase of shares on the TSE, though certainly "conduct occurring outside the United States[,] . . . has a foreseeable substantial effect within the United States."¹³⁰

A careful consideration of each of these hypothetical outcomes reveals just how arbitrarily and unfairly certain private individuals might be afforded or denied legal remedies under the current law in United States

129. A graphical representation of Investors C–F's outcomes can be found in the Appendix, Figure 2.

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

courts. After all, in each scenario, the underlying wrong remains unchanged: fraud ensues after an investor purchases a share of Vroom! stock. Such drastically different outcomes that turn upon where the stock is listed seem arbitrary. It is arguments such as these that legal scholars and commentators have made in urging an extension of Section 929P to actions brought by private individual investors. Arguably, this extension and effective restoration of the “conduct and effects” analysis would be the best for securities litigation, as a substantive area of law. The “conduct and effects” test has its shortcomings in unpredictability and malleability; however, from a public policy perspective, it may be preferable to the “transactional” test for securities litigation, given the commonly cross-border manner in which business is conducted today.

C. The Procedural Approach of Morrison, Bolstering the Presumption Against Extraterritoriality, Was Right and Thus the Presumption Retains Its Value

Despite the occasionally bizarre results discussed in Part VI.B above, the value of the Supreme Court’s approach in *Morrison* should not be discounted from a jurisprudential perspective. Though the substantive law implications of the case’s outcome, coupled with the subsequent Section 929P provision in Dodd-Frank, have created confusion and ambiguity in this area, the broad presumption against extraterritoriality remains a useful judicial tool in spurring Congress to legislative action. Consistent application of the presumption demands from Congress clarity of legislative intent in drafting new laws and taking action in amending old laws.

Consideration of these post-*Morrison* events illustrates the presumption’s utility. The Supreme Court employed a strictly textualist approach in its analysis. Congress disagreed in part and clarified what it “meant to say” about the extraterritorial reach of Section 10(b), at least with respect to SEC and Government actions in Dodd-Frank. Congress also charged the SEC with soliciting public opinion and conducting more research with respect to private shareholder actions. This process for dialogue, diligent research, and debate is a means to dynamically fine-tune the process of lawmaking, utilizing the duties of different branches in doing so.

Though some may argue that, in the short term, this is highly inefficient, or perhaps sacrifices the interests of parties such as the foreign plaintiffs in *Morrison* purely for the evolution of the law, over time the judiciary’s consistent and faithful application of the presumption against extraterritoriality will send a clear message to Congress indicating sections of statutes that require more explicit clarification. This will help avoid

instances of “judicial activism” and “judge-speculation-made law.”¹³¹

Although, logically, a default presumption in favor of territoriality (and against extraterritoriality) may initially appear to do a poor job of matching with Congressional intent in a particular area of substantive law, it remains and should continue to remain an effective presumption for courts to use. This default presumption is effective and desirable because it, when consistently applied over time, forces Congress to carefully state what it means to say more explicitly. It is for this reason that, despite swift Congressional action in crafting and passing Section 929P of the Dodd-Frank Act just three weeks after the Supreme Court issued its *Morrison* opinion, the Supreme Court still arguably reached the correct conclusion in its holding.

The reasons for supporting the Supreme Court’s decision to renew a default presumption against extraterritoriality are twofold: (1) damage-minimization and (2) efficiency. Past jurisprudence has shown that failure to faithfully and consistently apply the presumption against extraterritoriality leads to undesirable results. An example of such undesirable results, as discussed above, is the forty-year-old line of Second Circuit jurisprudence in which “judge-speculation-made-law” piecemeal-constructed the “conduct and effects tests” to determine the extraterritorial application of Section 10(b) in securities fraud claims. This was the very same undesired result that the Supreme Court originally wished to avoid in *American Banana*, decades earlier, when it affirmatively endorsed the presumption against extraterritoriality.

*D. Territoriality Is Nearly Obsolete Domestically, Yet Valued Abroad—
Diplomacy in Foreign Relations Accounts for This Difference*

As discussed above in Part II, Professor Beale’s bright-line territorial approach, though initially lauded for its “simplicity” in application, eventually gave way to the flexibility of the modern approaches in the domestic arena. However, to appreciate the role that territoriality and ideas of sovereignty continue to play on the international stage, one must realize that conflicts between domestic sister-state laws are often a matter of differing public policy concerns between each state. In contrast, in the

131. This is not the first instance of this interlude between the Supreme Court’s first issuing a ruling, only to have Congress swiftly overturn it with clearer, less ambiguous statutory language. Consider *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1991), which held that Title VII protections against discrimination did not apply to an American citizen’s claim of alleged discrimination abroad, without clear statutory language of extraterritorial application, and the Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (codified at 42 USC §§ 2000e(f), 2000e-1) for an illustration.

international arena, as a matter of foreign policy, United States courts should not insensitively impose our domestic laws on activities occurring in foreign countries, without very careful consideration of diplomacy and comity. Heuristically, one would hope that if Congress had exercised the foresight to explicitly and in clear, unambiguous terms indicate the extraterritorial application of a particular statute, then presumably significant research and debate would already have taken place regarding such extraterritorial application, prior to the statute's enactment.

VII. CONCLUSION

Where the next few months or even years will take this issue, and how the currently pending cases will come out in light of *Morrison* and Section 929, remains yet to be seen. Although, substantively for the area of securities litigation, the Supreme Court's decision in *Morrison* when coupled with the Dodd-Frank Act created a flawed mechanism for analysis by courts, the application of the presumption as a procedural mechanism remains valuable.

APPENDIX

	Investor A (Purchased Vroom! Stock on the NYSE)	Investor B (Purchased Vroom! Stock on the TSE)
<i>Private Shareholder (SH) Action</i>	YES	NO
<i>SEC/Government (Gov't) Action</i>	YES	NO

Figure 1. Graphical representation of the outcomes of Investors A and B, under the Morrison “transactional” test.

		American Investor C (Purchased Vroom! Stock on NYSE)	American Investor D (Purchased Vroom! Stock on TSE)	Foreign Investor E (Purchased Vroom! Stock on NYSE)	Foreign Investor F (Purchased Vroom! Stock on TSE)
<i>Pre-Morrison</i> (Conduct and Effects Test)	<i>Private SH Action</i>	YES	YES	YES	Likely, YES
	<i>SEC/Gov't</i>	YES	YES	YES	Likely, YES
<i>Morrison</i> (Transactional Test)	<i>Private SH Action</i>	YES	NO	YES	NO
	<i>SEC/Gov't</i>	YES	NO	YES	NO
<i>Morrison + DFA</i>	<i>Private SH Action</i>	YES	NO	YES	NO
	<i>SEC/Gov't</i>	YES	YES	YES	Likely, YES

Figure 2. Graphical Representation of the outcomes of Investors C, D, E, and F, under each scenario: (1) Pre-Morrison, (2) Morrison, and (3) Morrison, together with Section 929P of the Dodd-Frank Act.