

EXTRATERRITORIAL APPLICATION OF  
FEDERAL SECURITIES LAW: WHAT  
HATH MORRISON WROUGHT?

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*In Morrison v. National Australia Bank Ltd., the Supreme Court held that section 10(b) of the Securities Exchange Act applies only to transactions in the United States. This essay looks at developments in the extraterritorial application of section 10(b) since Morrison. First, Congress amended the Securities Exchange Act to reintroduce the conduct and effects tests for actions brought by the U.S. government. Second, lower courts developed an “irrevocable liability” test to determine the locations of transactions in unlisted securities, but the test has proven complex to apply. Third, the lower courts have divided over whether it is permissible to supplement Morrison’s transactional test with additional limitations for transactions in unlisted securities that are “predominantly foreign.” Although Morrison has provided predictability for listed securities, it has created a mess for unlisted securities—a mess that only Congress or the Securities and Exchange Commission can fix.*

I. INTRODUCTION . . . . .	183
II. CONGRESSIONAL AMENDMENT . . . . .	186
III. UNLISTED SECURITIES . . . . .	188
IV. PREDOMINANTLY FOREIGN CLAIMS . . . . .	193
V. CONCLUSION . . . . .	196

I. INTRODUCTION

In 2009, Linda Silberman and Stephen Choi argued that U.S. courts should adopt a new test for extraterritoriality in securities fraud class actions under section 10(b) of the Securities Exchange Act.<sup>1</sup> They complained that the conduct and effects tests that lower courts were then using were unpredictable,

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1. Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class Action Lawsuits*, 2009 WIS. L. REV. 465.

discussing at length the Second Circuit's recent decision in *Morrison v. National Australia Bank*.<sup>2</sup> In place of these tests, they proposed "a clear bright-line rule tracking the exchange on which the transaction is executed."<sup>3</sup> In other words, section 10(b) should apply only to transactions on U.S. exchanges.<sup>4</sup>

As luck would have it, the Supreme Court soon granted certiorari in *Morrison* to consider the reach of section 10(b). Writing for the Court, Justice Scalia similarly criticized the conduct and effects tests as "unpredictable and inconsistent," citing Choi and Silberman among others.<sup>5</sup> Scalia applied the presumption against extraterritoriality to section 10(b). He first found that the provision gave no clear indication that it applied extraterritorially.<sup>6</sup> He then looked to the focus of the provision to determine whether applying it would be domestic or extraterritorial.<sup>7</sup> Because "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States,"<sup>8</sup> he concluded that section 10(b) applies "only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities."<sup>9</sup> *Morrison*'s "transactional test" was supposed to be a "clear test" that would avoid conflicts with the laws of other countries.<sup>10</sup>

But *Morrison*'s bright-line test began to blur soon after the decision came down. First, Congress reintroduced the conduct and effects tests for civil and criminal actions by the U.S. government.<sup>11</sup> Second, lower courts found that *Morrison*'s "transactional test" was hard to apply to unlisted securities—that is,

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2. *See id.* at 472–76, 491–92 (discussing *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167 (2008)).

3. *Id.* at 468.

4. For unlisted securities, they similarly proposed looking to the "primary location where the transaction takes place." *Id.* at 468 n.8.

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

6. *Id.* at 261–65.

7. *Id.* at 266–71. Scalia's two-step framework, and particularly his focus step, made a substantial change in the presumption against extraterritoriality. *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (providing an overview of the pre-*Morrison* presumption and how the post-2010 presumption departed from the canon's prior formulation).

8. *Morrison*, 561 U.S. at 266.

9. *Id.* at 267.

10. *Id.* at 269.

11. *See infra* Part II.

securities that do not trade on an exchange. To determine where transactions in unlisted securities occur, the lower courts developed a test that looks to where the parties incur irrevocable liability.<sup>12</sup> This “irrevocable liability” test, however, depends on the governing law and the details of the parties’ transaction and therefore fails to provide clear answers in some cases. Moreover, the answers it does provide may make little sense. The Second Circuit faced such a nonsensical situation in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*,<sup>13</sup> where investors who purchased securities-based swaps referencing a foreign company’s stock, traded on foreign exchanges, sued foreign defendants for misleading statements abroad in U.S. court based simply on the fact that they purchased the swaps in the United States. The Second Circuit addressed this problem in *Parkcentral* by supplementing *Morrison*’s transactional test with a “predominantly foreign” test, but this addition is problematic and other circuits have rejected it.<sup>14</sup>

Although *Morrison* brought some clarity to the transnational regulation of listed securities, it has made a mess of the rules for unlisted securities. After reviewing the post-*Morrison* mess, I suggest in the Conclusion that Congress and the administrative agencies have it in their power to clean up what *Morrison* hath wrought.<sup>15</sup>

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12. See *infra* Part III. For an earlier look at the post-*Morrison* cases, see Hannah L. Buxbaum, *Remedies for Foreign Investors Under U.S. Federal Securities Laws*, 75 LAW & CONTEMP. PROBS. 161 (2012).

13. 763 F.3d 198 (2d Cir. 2014) (per curiam).

14. See *infra* Part IV.

15. See *infra* Part V. This essay focuses on the lower court decisions applying *Morrison* to section 10(b) of the Securities Exchange Act. Federal courts have also applied *Morrison*’s transactional test to other antifraud provisions of the securities acts. See, e.g., *In re Petrobras Securities*, 862 F.3d 250, 262 (2d Cir. 2017) (applying transactional test to claims under sections 11, 12(a)(2), and 15 of the Securities Act). Courts have also applied *Morrison*’s transactional test to provisions of the Commodity Exchange Act. See, e.g., *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272–75 (2d Cir. 2014) (applying *Morrison* to § 22 of the Commodity Exchange Act and finding that its private right of action is limited to commodities transactions within the United States).

Some courts have recognized that differences in the wording of some provisions might require modifications to *Morrison*’s test. See, e.g., *SEC v. Tourre*, No. 10 CIV. 3229(KBF), 2013 WL 2407172, at \*6 (S.D.N.Y. June 4, 2013) (holding that because section 17(a) of the Securities Act “is concerned with [fraudulent] conduct in either the offer or the sale of securities, the requirement of domestic conduct under Section 17(a) must be extended

## II. CONGRESSIONAL AMENDMENT

Congress took the first action to blur *Morrison*'s bright-line test. When the decision came down, Congress was in the last stages of considering the Dodd-Frank Act to overhaul U.S. financial regulation after the 2008 financial crisis.<sup>16</sup> Dodd-Frank reinstated the conduct and effects tests for civil and criminal actions by the United States under the Securities Exchange Act, section 17(a) of the Securities Act, and section 80b-6 of the Investment Advisers Act.<sup>17</sup> For section 10(b), it provided:

### (b) Extraterritorial Jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

- (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
- (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.<sup>18</sup>

Congress placed this provision in the Exchange Act's section conferring subject matter jurisdiction rather than in section 10(b) because, prior to *Morrison*, lower federal courts treated extraterritoriality as a question of subject matter jurisdiction.<sup>19</sup>

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accordingly. This means that a domestic offer may be actionable regardless of whether it results in a sale.”).

16. For an exhaustive review of the legislative history, see *SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1288–94 (D. Utah 2017), *aff'd sub nom. SEC v. Scoville*, 913 F.3d 1204 (10th Cir. 2019).

17. 15 U.S.C. § 77v(c); *id.* § 78aa(b); *id.* § 80b-14(b). The Act called for the Securities and Exchange Commission (SEC) to study whether the conduct and effects tests should be reinstated for civil actions brought by private parties. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010), § 929Y, 124 Stat. 1376. But Congress has taken no further action on this question.

18. 15 U.S.C. § 78aa(b).

19. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 176 (2008) (dismissing for lack of subject matter jurisdiction).

*Morrison* changed this, holding that the reach of section 10(b) “is a merits question.”<sup>20</sup> By clarifying that extraterritoriality does not go to subject matter jurisdiction, *Morrison* opened the door to arguments that Congress’s amendment of the federal courts’ jurisdiction did nothing to change the scope of the act’s substantive provisions, like section 10(b). The district court’s opinion in *SEC v. Chicago Convention Center, LLC*<sup>21</sup> fed fears that Dodd-Frank’s effort to reinstate the conduct and effects tests would fail. Although finding it unnecessary to resolve the question definitively, the court observed that “the plain language of Section 929P(b) seems clear on its face. Specifically, the provision uses the word ‘jurisdiction,’ and it appears in the jurisdictional portions of the Exchange Act.”<sup>22</sup>

More recent decisions, however, have held that Dodd-Frank should be interpreted as reinstating the conduct and effects tests for government enforcement actions. In *SEC v. Scoville*,<sup>23</sup> the Tenth Circuit examined the legislative history of the amendment, noting that it was adopted shortly after *Morrison* and that its purpose was to extend the antifraud provisions extraterritorially. “Notwithstanding the placement of the Dodd-Frank amendments in the jurisdictional provisions of the securities acts,” the court reasoned, “given the context and historical background surrounding Congress’s enactment of those amendments, it is clear to us that Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied.”<sup>24</sup>

But even with this clarification, Dodd-Frank’s amendment has made section 10(b)’s geographic scope more complicated. First, it remains unclear whether the revived conduct and effects tests are meant to replace *Morrison*’s transactional test in actions by the U.S. government or to supplement it. In other words, if neither the conduct nor the effects test were satisfied, could a court still apply section 10(b) simply because the transaction occurred in the United States? In *SEC v. Morrone*,<sup>25</sup> both the Securities Exchange Commission (SEC) and the First Circuit

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20. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010).

21. 961 F. Supp. 2d 905 (N.D. Ill. 2013).

22. *Id.* at 912.

23. *SEC v. Scoville*, 913 F.3d 1204 (10th Cir. 2019).

24. *Id.* at 1218.

25. *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021).

assumed that the answer is no and that, in government enforcement actions, “*Morrison*’s transactional test only governs conduct occurring before” that case was decided.<sup>26</sup> But extraterritorial jurisdiction provisions like Dodd-Frank’s generally expand the existing reach of a statute rather than replacing it. Moreover, *Morrison* treated the application of section 10(b) to transactions in the United States as a “domestic application.”<sup>27</sup> It is hard to see how a test for the *domestic* application of a provision can be replaced by a provision entitled “Extraterritorial Jurisdiction.”

Second, and more obviously, Dodd-Frank bifurcated the geographic scope of section 10(b). In actions by the government, section 10(b) applies if there is significant conduct or substantial effects in the United States, even if the transaction occurs abroad.<sup>28</sup> In actions by private parties, section 10(b) applies to transactions in the United States, even in the absence of significant conduct or substantial effects there.<sup>29</sup>

### III. UNLISTED SECURITIES

*Morrison* held that section 10(b) applies “only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”<sup>30</sup> This transactional test seems clear enough for trades on major exchanges like the New York Stock Exchange (NYSE)— transactions on the NYSE occur in New York. But uncertainties lurk in this seemingly clear test, both in what constitutes a “domestic exchange” and in how to locate transactions in unlisted securities.

The Third Circuit held in *United States v. Georgiou* that “domestic exchange” refers to “national securities exchanges” registered with the SEC under Securities Exchange Act

26. *Id.* at 60 n.7.

27. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010); *see also* *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 337 (2016) (using the focus to “determine whether the case involves a domestic application of the statute”).

28. 15 U.S.C. § 78aa(b).

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

30. *Id.*; *see also id.* at 269–70 (asking “whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange”); *id.* at 273 (“Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”).

section 6.<sup>31</sup> Section 10(b)'s textual reference to "national securities exchange[s]" supports this interpretation.<sup>32</sup> As of this writing, there are twenty-four such exchanges, seventeen associated with the Chicago Board Options Exchange, NASDAQ, or the New York Stock Exchange plus seven others.<sup>33</sup> Securities not traded on one of these exchanges are referred to as "over-the-counter" (OTC) securities. There are quotation systems for OTC securities.<sup>34</sup> But *Georgiou* held that OTC quotation systems did not qualify as domestic exchanges for purposes of *Morrison*'s transactional test.<sup>35</sup>

How then to tell whether a transaction in unlisted securities is "domestic"? The Second Circuit first addressed this question in *Absolute Activist Value Master Fund Ltd. v. Ficeto*,<sup>36</sup> which remains the leading case. *Absolute Activist* held "that transactions involving securities that are not traded on a domestic exchange are domestic if irrevocable liability is incurred or title passes within the United States."<sup>37</sup> In a previous case, the Second Circuit had used the point at which the parties become irrevocably bound to determine the *time* of a transaction,<sup>38</sup> and it reasoned that the same point could determine the *place* of a transaction.<sup>39</sup> But the court observed that this was not "the only way to locate a securities transaction"—"a sale of securities can [also] be understood to take place at the location in which title is transferred."<sup>40</sup> The First, Third, and Ninth Circuits have each adopted the "irrevocable liability" part of the

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31. United States v. Georgiou, 777 F.3d 125, 134–35 (3d Cir. 2015).

32. 15 U.S.C. § 78j(b).

33. U.S. Securities and Exchange Commission, Self-Regulatory Organization Rulemaking, <https://perma.cc/8DKW-FJ85> (listing national securities exchanges).

34. U.S. Securities and Exchange Commission, Over-the-Counter Market, <https://perma.cc/5FAS-C84V> (discussing quotation systems).

35. *Georgiou*, 777 F.3d at 135. The Ninth Circuit, in contrast to the Third, has expressed doubt that *Morrison*'s reference to "domestic exchange" is limited to "national securities exchanges," but has nevertheless held that the market for OTC securities is not an exchange. *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 945–47 (9th Cir. 2018).

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

37. *Id.* at 67.

38. *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876 (2d Cir. 1972).

39. *Absolute Activist*, 677 F.3d at 67–68.

40. *Id.* at 68. The Eleventh Circuit had previously held that transferring title in the United States was sufficient to establish a domestic transaction

Second Circuit's test.<sup>41</sup> Thus, in the First, Third, and Ninth Circuits, a transaction is domestic if irrevocable liability is incurred in the United States irrespective of where title passes, whereas in the Second Circuit a transaction is domestic if either irrevocable liability is incurred *or* title passes in the United States.

The irrevocable liability test has in turn raised further questions about how to tell where the parties become bound. This is obviously a question of contract law, and the answer may depend on what law governs the contract. But even when the governing law is clear, the answer may not be. In *Cavello Bay Reinsurance Ltd. v. Shubin Stein*,<sup>42</sup> a Bermudan corporation bought shares in a Bermudan holding company headquartered in New York. The seller sent a subscription agreement from New York to Bermuda where the buyer signed and returned it. The seller then signed the agreement in New York and mailed an executed copy to Bermuda. Title to the shares passed at the closing in Bermuda. The subscription agreement provided that it was governed by New York law. But the parties disagreed about whether, under New York law, the agreement became binding when it was signed by the seller or only when it was received in Bermuda. "Here, the place of transaction is difficult to locate," the Second Circuit noted, "and impossible to do without making state law."<sup>43</sup> Ultimately, the court resolved the case on the alternative ground, discussed in Part III, that section 10(b) did not apply because the transaction was predominantly foreign.<sup>44</sup>

Further complications arise when a transaction may be canceled or is subject to approval. In *Choi v. Tower Research*

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without making this the exclusive test. *Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307, 1310–11 (11th Cir. 2011).

41. *SEC v. Morrone*, 997 F.3d 52, 60 (1st Cir. 2021) ("We agree with the reasoning of the Second, Third, and Ninth Circuits and hold that a transaction is domestic under *Morrison* if irrevocable liability occurs in the United States."); *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 949 (9th Cir. 2018) ("We are persuaded by the Second and Third Circuits' analysis and therefore adopt the irrevocable liability test to determine whether the securities were the subject of a domestic transaction."); *United States v. Georgiou*, 777 F.3d 125, 137 (3d Cir. 2015) ("We now hold that irrevocable liability establishes the location of a securities transaction.")

42. *Cavello Bay Reinsurance Ltd. v. Shubin Stein*, 986 F.3d 161 (2d Cir. 2021).

43. *Id.* at 165.

44. *Id.*



*Capital LLC*,<sup>45</sup> plaintiffs bought futures on the “night market” of a South Korean exchange. Orders placed in South Korea when the exchange was closed were matched with counterparties on a trading platform in Illinois and then settled in South Korea the next day. The defendant argued that irrevocable liability was not incurred when the trades were matched in the United States because the exchange could cancel transactions in case of errors. But the Second Circuit held that the parties incurred irrevocable liability in the United States because, absent error, the parties were bound when the trades were matched.<sup>46</sup> In *Giunta v. Dingman*,<sup>47</sup> the plaintiff invested in the defendant’s business in the Bahamas after a series of meetings in New York. The district court agreed with the defendant that irrevocable liability was not incurred in New York because Bahamian authorities still had to approve the issuance of shares.<sup>48</sup> But the Second Circuit reversed, holding that the existence of “a condition subsequent does not mean that either party was effectively free to revoke its acceptance, or change its mind until the approval of the shares abroad.”<sup>49</sup> But these two cases do not exhaust the factual situations in which transactions are subject to cancellation or approval. If the investors had reserved the right to cancel in *Choi*, or if regulatory approval had been a condition precedent rather than a condition subsequent in *Giunta*, those cases might have turned out differently.

Securities class actions pose special difficulties for the irrevocable liability test—or perhaps one should say that the irrevocable liability test poses special difficulty for securities class actions. In *In re Petrobras Securities*,<sup>50</sup> investors who bought notes issued by the Brazilian oil company Petrobras, either in the initial debt offering or on the global secondary market, alleged that the company made material misrepresentations

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45. *Choi v. Tower Research Capital LLC*, 890 F.3d 60 (2d Cir. 2018). *Choi* was a suit under the Commodity Exchange Act (CEA), but the Second Circuit has extended *Morrison* and *Absolute Activist* to the CEA. See *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272–75 (2d Cir. 2014) (applying *Morrison* and *Absolute Activist* to § 22 of the CEA and finding that petitioner must demonstrate that the transfer of title or the incurring of irrevocable liability occurred in the United States).

46. *Choi*, 890 F.3d at 67–68.

47. *Giunta v. Dingman*, 893 F.3d 73 (2d Cir. 2018).

48. *Id.* at 80.

49. *Id.* at 81.

50. *In re Petrobras Securities*, 862 F.3d 250 (2d Cir. 2017).

in its registration statements. The Second Circuit vacated the district court's class certification because, with respect to *Morrison's* domestic transaction requirement, common issues did not predominate. The court observed that "the potential for variation across putative class members—who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered in support of domesticity—appears to generate a set of individualized inquiries."<sup>51</sup> In other words, the variety of ways that investors may purchase unlisted securities may hinder them bringing class actions.

These cases show that *Morrison's* "transactional test," and *Absolute Activist's* "irrevocable liability" gloss, have not produced a clear, bright-line rule for unlisted securities. The problem with the rule is not just its fuzziness but also the randomness of its results. For listed securities—on which Choi, Silberman, and Scalia all focused—tying section 10(b) to the location of the exchange makes sense because it coincides with the expectations of the parties and allows them to choose a level of antifraud protection they desire. For unlisted securities, however, there seems to be no good reason why the applicability of section 10(b) should turn on where the buyer signs the subscription agreement or where orders for futures on a foreign stock exchange are matched. Indeed, as Hannah Buxbaum noted, sellers of securities can manipulate the place of acceptance in ways that are not transparent to buyers, depriving them of the protection of U.S. law without their knowledge or consent.<sup>52</sup>

A more extreme example of randomness is presented by the *Parkcentral* case, discussed in the next Part. There, investors bought securities-based swaps in the United States to bet on the price of foreign securities on a foreign exchange and suffered losses because of false statements by foreign persons abroad. Should the investors be able to sue the foreign persons who made the statements—persons not parties to the swap agreements—in U.S. court under section 10(b) simply because the transactions occurred in the United States? The Second Circuit answered no, but only by blurring *Morrison's* bright-line test even further.

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51. *Id.* at 273.

52. Buxbaum, *supra* note 12, at 173.

## IV. PREDOMINANTLY FOREIGN CLAIMS

Lower courts have also struggled with whether *Morrison*'s transactional test is exclusive. The Second Circuit held in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*,<sup>53</sup> that a domestic transaction is a necessary but not a sufficient condition for applying section 10(b).<sup>54</sup> Even when securities are purchased in a domestic transaction, the court held, section 10(b) does not apply if the plaintiffs' claims "are so predominantly foreign as to be impermissibly extraterritorial."<sup>55</sup> The First and Ninth Circuit's, however, have rejected *Parkcentral*'s "predominantly foreign" test as inconsistent with *Morrison*.<sup>56</sup>

In *Parkcentral*, plaintiffs bought securities-based swaps referencing Volkswagen stock. Plaintiffs alleged that Porsche and its executives made false statements in Germany, some of which were repeated in the United States, denying Porsche's plans to acquire Volkswagen. Although plaintiffs alleged that the swap agreements were concluded in the United States, the Volkswagen stock referenced by the swaps traded only on European exchanges. In other words, the question facing the Second Circuit was whether section 10(b) should apply to conduct in a foreign country, concerning securities of a foreign company, traded exclusively on foreign exchanges, just because the swap agreements were concluded in the United States.

The Second Circuit said no. First, the court reasoned that, although *Morrison* held that a domestic transaction is necessary for section 10(b) to apply, it did not say that a domestic transaction is sufficient.<sup>57</sup> The court also noted that treating a domestic transaction as sufficient would require courts to apply section 10(b) to foreign activities subject to regulations by foreign authorities simply because persons in the United States made a domestic transaction referencing foreign securities.<sup>58</sup> The court went on to hold that section 10(b) does not apply

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53. *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014) (per curiam).

54. *Id.* at 215.

55. *Id.* at 216.

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

57. *Parkcentral*, 763 F.3d at 215.

58. *Id.*

to domestic transactions when the plaintiffs' claims are "predominantly foreign."<sup>59</sup> That was true in *Parkcentral* "because of the dominance of . . . foreign elements," including the place of the false statements, the nationality of the company, and the location of the exchanges where its stock trades.<sup>60</sup> Rather than attempting to articulate a test for when claims are predominantly foreign, the panel said that "courts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases, so as eventually to develop a reasonable and consistent governing body of law on this elusive question."<sup>61</sup>

Other circuits have found *Parkcentral's* approach to be inconsistent with *Morrison*. In *Stoyas v. Toshiba Corp.*,<sup>62</sup> the plaintiffs purchased American Depositary Receipts (ADRs) representing beneficial interests in Toshiba's stock, which trades on the Tokyo Stock Exchange.<sup>63</sup> Toshiba's ADRs were unsponsored, which means that the depository institution registered them without Toshiba's participation.<sup>64</sup> The Ninth Circuit followed the Second Circuit in adopting the "irrevocable liability" test for unlisted securities, holding that the ADRs involved a domestic transaction because they were purchased on the over-the-counter market in the United States.<sup>65</sup> But the Ninth Circuit rejected *Parkcentral's* additional "predominantly foreign" test for four reasons. First, the court said, *Parkcentral* "carves-out 'predominantly foreign' securities fraud claims from Section 10(b)'s ambit" in a way that is inconsistent with its text.<sup>66</sup> Second, *Parkcentral* did so based on "speculation about Congressional intent, an inquiry *Morrison* rebukes."<sup>67</sup> Third, "*Parkcentral's* test for whether a claim is foreign is an open-ended, under-defined multi-factor test, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace

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59. *Id.* at 216.

60. *Id.* at 217.

61. *Id.*; see also *id.* at 218 (Leval, J., concurring) (defending the panel's decision to avoid relying on "any single factor or bright-line rule").

62. *Stoyas v. Toshiba Corp.* 896 F.3d 933 (9th Cir. 2018).

63. See U.S. Securities and Exchange Commission, *Investor Bulletin: American Depositary Receipts* (Aug. 2012), <https://perma.cc/HTH4-SEW2> (describing ADRs).

64. *Stoyas*, 896 F.3d at 941.

65. *Id.* at 948–49.

66. *Id.* at 950 (internal citations omitted).

67. *Id.*

with a ‘clear,’ administrable rule.”<sup>68</sup> Fourth, “*Parkcentral*’s analysis relies heavily on the foreign location of the allegedly deceptive conduct, which *Morrison* held to be irrelevant to the Exchange Act’s applicability.”<sup>69</sup>

The First Circuit similarly rejected *Parkcentral* in *SEC v. Morrone*.<sup>70</sup> Bio Defense, a U.S. company, solicited investors in Europe through call centers without disclosing the large fees it was paying to raise funds. The First Circuit also followed the Second Circuit in adopting the “irrevocable liability” test for unlisted securities, holding that Bio Defense incurred such liability when it executed the subscription agreements in the United States.<sup>71</sup> But the First Circuit also “reject[ed] *Parkcentral* as inconsistent with *Morrison*.”<sup>72</sup> “*Morrison* says that § 10(b)’s focus is on transactions,” the court noted.<sup>73</sup> “The existence of a domestic transaction suffices to apply the federal securities laws under *Morrison*. No further inquiry is required.”<sup>74</sup>

*Morrison* has thus failed to clarify when section 10(b) applies to transactions in securities that reference other securities traded abroad. In *Parkcentral*, the Second Circuit held that a court could refuse to apply section 10(b) to such transactions, but in doing so, reintroduced the case-by-case approach to the extraterritorial application of section 10(b) that *Morrison* seemed to reject. In contrast, the First and Ninth Circuits rejected *Parkcentral*’s additional inquiry into the foreignness of the claims with the result that the applicability of section 10(b) to such transactions may depend on where the claims are brought.

It is hard to fault either the Second Circuit or the First and the Ninth Circuits for the positions they have taken. The Second Circuit is likely correct that section 10(b) should not apply in cases like *Parkcentral*, whereas the First and Ninth Circuits are right that *Parkcentral*’s solution to the problem is inconsistent with *Morrison*.<sup>75</sup> The problem, it would seem, is that *Morrison*

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68. *Id.*

69. *Id.*

70. *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021).

71. *Id.* at 60.

72. *Id.*

73. *Id.*

74. *Id.*

75. See also Buxbaum, *supra* note 12, at 170–71 (noting “that the “bright line” test established by *Morrison* may be over-inclusive, permitting the application of U.S. law in circumstances in which that application would appear unreasonable.”).

failed to anticipate cases where the location of the transaction bears little relationship to the substance of the claims.

## V. CONCLUSION

*Morrison* promised a clear test for when section 10(b)—and potentially other provisions of U.S. securities law—applies to securities transactions with foreign elements. For listed securities, it has largely delivered on that promise. When shares are traded on an exchange, it is simple to determine the location of the transaction and sensible to apply U.S. law if the exchange is in the United States. Congress made the situation more complicated by reintroducing the conduct and effects tests for government enforcement actions and by not making clear where these tests replace *Morrison*'s transactional test or supplement it.<sup>76</sup> But Congress's meddling is not *Morrison*'s fault.

*Morrison* deserves more blame for the difficulties lower courts have faced with unlisted securities. The Supreme Court appears not to have foreseen that the place of the transaction might be difficult to locate for securities not traded on an exchange and that, even when the place of the transaction is located, that place may bear little relationship to the plaintiffs' claims. The lower courts have tried to clean up the Supreme Court's mess by adopting an "irrevocable liability" test to determine the place of the transaction. But this test depends on the law governing the transaction and may turn on facts (like the place where a subscription agreement is signed) that bear little relationship to whether section 10(b) should apply.<sup>77</sup> Some lower courts have tried to reach more sensible results by supplementing the transactional test with a "predominantly foreign" test, while others have rejected this innovation as inconsistent with *Morrison*.<sup>78</sup> The fundamental problem is that *Morrison*'s transactional test is not well adapted for securities that do not trade on an exchange.

Congress might fix the problem by passing legislation to specify the geographic scope of section 10(b) for unlisted securities. In the process it could also reconsider whether to continue treating government enforcement actions differently from private suits. Congress might even review the geographic

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76. See *supra* Part II.

77. See *supra* Part III.

78. See *supra* Part IV.

scope of other provisions of the Securities Exchange Act, the Securities Act, and the Commodity Exchange Act, tailoring each to address the most serious problems for U.S. investors and issuers, while seeking to avoid unnecessary conflicts with the laws of other countries.<sup>79</sup>

Alternatively, the SEC and Commodity Futures Trading Commission (CFTC) could issue regulations addressing the geographic scope of section 10(b) and other provisions for various kinds of unlisted securities. Congress has delegated rule-making authority to the SEC and CFTC,<sup>80</sup> and these agencies have already exercised such authority to define the geographic scope of various provisions.<sup>81</sup> I have argued that agencies are better positioned than Congress—and certainly better positioned than federal courts—to decide when different aspects of securities regulations should apply to transactions that cross borders.<sup>82</sup> Moreover, at least until the Supreme Court overrules *Chevron*,<sup>83</sup> the SEC’s and the CFTC’s reasonable interpretations of the statutes they administer are entitled to judicial deference.<sup>84</sup> *Morrison* may have created a mess when it comes to unlisted securities, but the SEC and CFTC have it in their power to clean this up.

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79. See *supra* note 15.

80. See, e.g., 15 U.S.C. § 78j(b) (prohibiting use of manipulative and deceptive devices “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”).

81. See, e.g., Regulation S, 17 C.F.R. §§ 230.901-905 (2016) (exempting certain transactions outside the United States from the registration requirements of the Securities Act).

82. William S. Dodge, *Chevron Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911, 944–48 (2017).

83. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As this piece was nearing completion, the Supreme Court granted certiorari in *Loper Bright Enterprises v. Raimondo*, No. 22-451, 2023 WL 3158352, at \*1 (U.S. May 1, 2023) to decide whether to overrule or limit *Chevron*. Although predictions are always dangerous, it is worth noting that express delegations of rulemaking authority (such as section 10(b)’s) may present a stronger claim for deference than implicit delegations found in congressional silence.

84. See *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002) (holding that the SEC’s interpretation of Section 10(b) in a formal adjudication is entitled to deference provided it is reasonable). I have even argued that the SEC has the authority to reverse *Morrison* by regulation and reinstate the conduct and effects tests, see Dodge, *supra* note 82, at 971–72, though I would not advise this for listed securities.