Article

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People don’t always say exactly what they mean. Judges and legislators are no exception. Judicial opinions sometimes painstakingly interpret the language of a statute or articulate some other legal rule and then summarize their holding in a sentence or two, often preceded by language such as “We therefore hold that.” What follows this phrase may not coincide precisely with what is said in the rest of the opinion, even if the summary encompasses the particular facts of the case. In subsequent cases with other facts, the difference between those facts and the court’s summarizing language can lead to litigation over what exactly the court meant.

Such is likely to happen with respect to Morrison v. National Australia Bank, the Supreme Court’s most recent opinions directed at extraterritorial enforcement of securities laws. Throughout this opinion, Justice Scalia, writing for the majority, defined the reach of the federal securities laws based on a single inquiry: whether the United States was the place of the securities transaction. In summarizing the holding, Justice Scalia wrote that the Securities Exchange Act of 1934 (Exchange Act) Section 10(b) applies only to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”

The problem with this summary is that the National Australia Bank (NAB) securities at issue in the case were in fact listed in the United States, which was required so NAB could have American Depository Receipts (ADRs) trade in New York. For the many issuers that list the same securities both in the United States and in another country, the confusion created by Justice Scalia’s summary of the holding could be problematic. The Supreme Court almost certainly did not intend to grant a right to sue in the United States when such securities are bought outside the United States. Federal district and appeals courts, however, will likely have to adjudicate the claims of plaintiff’s raising this very argument.

The Supreme Court is not alone in creating this confusion; Congress has had its own drafting problems. In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress wanted to respond to Morrison by giving the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) power to pursue the type of fraud

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2 Id. at 2884; see also id. at 2886, 2888 (reiterating the reach of Section 10b).
alleged in *Morrison*—fraudulent conduct inside the United States that affects securities transactions outside the United States. The result would, in effect, reverse *Morrison* and make United States securities laws apply. Congress drafted the Dodd-Frank Act provisions based on the assumption that the question they were addressing was whether disputes involving the application of securities laws to transactions outside the United States could be considered questions of subject matter jurisdiction. For forty years before *Morrison*, various circuit courts had analyzed the issue in just such a manner. The Dodd-Frank Act provisions responded to *Morrison* by expressly giving federal courts jurisdiction in certain circumstances over SEC and DOJ suits concerning securities transactions outside the United States.

The problem with the Dodd-Frank Act provisions is that the Supreme Court in *Morrison* had already decided that under existing law, federal courts had jurisdiction over these cases. Rather, the Supreme Court held that securities transactions outside the United States were not covered by the language of Section 10(b) of the Exchange Act, a question of the merits. Indeed, several months before, in late 2009, the Supreme Court in *Union Pacific Railroad v. Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region* clarified its position that anything that does not go to the power of the courts to hear a case is a question of the merits, and not of jurisdiction. As long ago as 1959, in *Romero v. International Terminal Operating Co.*, the Supreme Court had approached extraterritoriality as a merits question. Furthermore, in October 2009, the Solicitor General and the SEC, in their brief opposing the certiorari petition in

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4 Congress titled the section the “Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws” and amended three securities acts to add the following new subsection:

> (c) EXTRATERRITORIAL JURISDICTION.—The jurisdiction of the district courts of the United States and the United States courts of any Territory described under subsection (a) includes violations of section 17(a), and all suits in equity and actions at law under that section, involving—(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.


5 See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir.), modified on other grounds en banc, 405 F.2d 215, 217 (2d Cir. 1968); *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313 (11th Cir. 2009); Cont’l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979).

6 See Dodd-Frank Act, § 929P(b) (2010).

7 See *Morrison*, 130 S. Ct. at 2877.

8 See *Union Pac. R.R. Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region*, 130 S. Ct. 584, 598–99 (2009).

Morrison, recognized that the extraterritorial question was not jurisdictional.\(^{10}\) Combined, these developments make it all the more puzzling that Congress still approached extraterritoriality as a question of jurisdiction when drafting the Dodd-Frank Act.

While the Congress’s intent in passing the Dodd-Frank Act seems directed at empowering the SEC and DOJ to combat securities fraud, one can credibly argue that they failed to do so.\(^{11}\) The Dodd-Frank Act provisions merely restated what Morrison had already clearly stated: specifically, that federal courts had jurisdiction in these types of cases. Because the Dodd-Frank Act only approached the question of jurisdiction, and did not address the substantive reach of Section 10(b) of the Exchange Act, Congress arguably left the SEC and DOJ with no more power than they had the day Morrison was decided.

Many lower court judges are not eager to frustrate the intent of Congress, and Congress obviously intended the Dodd-Frank Act to empower the SEC and DOJ to pursue transnational securities fraud. Other judges might say, however, that the intent of Congress is in the language of the statute, and nothing more;\(^{12}\) if the statute is worded so as to be meaningless, so be it. The Supreme Court also has rarely been shy of saying when Congress fails to draft a statute that reflects its true intentions.\(^{13}\) It is possible that before a case reaches the Supreme Court, Congress will change the legislative language and directly address the substantive reach of Section 10(b) of the Exchange Act. If not, sooner or later, there will be a litigant who chooses to challenge a SEC or DOJ suit, and run the risk of losing on the basis that Congress did not empower the SEC.

\(^{10}\) See Brief for the United States as Amicus Curiae at 9, Morrison v. National Australia Bank, 130 S. Ct. 2869 (2010) (No. 08-1191) (“If a particular suit is otherwise an appropriate means of enforcing a “liability or duty created by” the Exchange Act or rules promulgated thereunder by the Commission, Section 78aa unambiguously vests the district courts with jurisdiction to resolve it.”). See id. (“Thus, under the plain terms of Section 78aa, the geography of an alleged fraudulent scheme—i.e., whether it was conceived and executed in whole or in part outside the United States—is irrelevant to the district court's subject-matter jurisdiction.”).

\(^{11}\) Indeed, the day the President signed the Dodd-Frank Act, George Conway, the lawyer who argued and won the Morrison case for NAB, published a memo to his firm’s clients stating that Congress’s Dodd-Frank Act provisions may have done nothing meaningful at all. See George T. Conway III, Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged, WACHTELL, LIPTON, ROSE & KATZ (June 21, 2010), http://www.wlrk.com/webdocs/wlrgnew/WLRKMemos/WLRK/WLRK.17763.10.pdf.

\(^{12}\) See, e.g., Mwasaru v. Napolitano, 2010 WL 3419458, at *4 (6th Cir. Sept. 1, 2010) (“[L]egislative intent should be divined first and foremost from the plain language of the statute. If the text of the statute may be read unambiguously and reasonably, our inquiry is at an end.”) (citation omitted).

\(^{13}\) See, e.g., Union Bank v. Wolas, 502 U.S. 151, 157–58 (1991) (rejecting what Congress may have intended and explaining “[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning”) (citation omitted); Toibb v. Radloff, 501 U.S. 157, 164 (1991) (noting that "it makes no difference whether the legislative history affirmatively reflects” a certain intent, if "the plain language of the statute” is to the contrary).
or DOJ to bring the suit. The litigant would argue that Congress may have meant to create a cause of action for the SEC and DOJ, but did not do so.

I. Morrison v. National Australia Bank

In late June 2010, the Supreme Court ruled in *Morrison v. National Australia Bank* that securities fraud suits could not be brought under U.S. law against foreign defendants by foreign plaintiffs who bought their securities outside the United States ("f-cubed" securities litigation). In *Morrison*, Australian plaintiffs attempted to pursue claims under U.S. federal securities law after purchasing shares of an Australian bank on the Australia stock exchange and claiming they had been misled in Australia by statements by Australian bank officials regarding the performance of a U.S. subsidiary. The Supreme Court rejected alleged fraudulent concealment of bad mortgage loans in a U.S. subsidiary as sufficient justification to apply Section 10(b) of the Exchange Act extraterritorially to transactions on the Australian stock exchange.

In its opinion, the Supreme Court held that Section 10(b) of the Securities Exchange Act of 1934 does not apply extraterritorially, and that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." Thus, the Supreme Court rejected the proposal of the Solicitor General and the SEC to apply the Exchange Act to fraud in extraterritorial securities transactions that "[involve] significant conduct in the United States that is material to the fraud's success." The Supreme Court concluded that Section 10(b) reaches only fraud 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."

In February 2010, twenty-one law professors from around the country filed an amicus brief with the Supreme Court in *Morrison*. The brief urged the Supreme Court to establish a bright line rule limiting the application of the federal securities fraud statute to securities bought

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14 See *Morrison* 130 S. Ct. at 2888.
15 See id. at 2875–76.
16 See id. at 2883–84.
17 See id. at 2883.
18 Id. at 2884.
20 Id. at 2888.
or sold in the United States.\textsuperscript{22} The law professors’ position was that the place of the transaction is the determining factor for deciding whether Section 10(b) applies.\textsuperscript{23}

The fundamental premise of both the amicus brief and the Supreme Court’s holding is that U.S. securities laws were intended to protect U.S. markets.\textsuperscript{24} Congress has enacted specific provisions that allow the SEC to pursue conduct in foreign markets in particular situations that affect the securities of U. S. issuers or where conduct abroad is intended to evade the purposes of U.S. securities laws.\textsuperscript{25} Otherwise, U.S. securities laws do not apply to securities traded abroad.\textsuperscript{26}

The first part of this article will address whether there are any logical exceptions that can be found to the Supreme Court’s limitation of the federal securities laws to transactions taking place within the United States. This article concludes that the answer to this question is no. The second part of this article will address whether the confusion arising out of Congress’ language choices in the Dodd-Frank Act is such as to merit amendment to the statute. This article concludes that, while the statutory language probably gives the SEC the authority that Congress intended, the statute should still be amended.

\textsuperscript{22} See id. at 2. (arguing that such a bright line rule aligns with the legislative history and congress’s original intent to cover only those foreign securities traded within the United States).
\textsuperscript{23} See id. at 6, 31.
\textsuperscript{24} See id. at 14–18; Morrison, 130 S. Ct. at 2877–85 (2010).
\textsuperscript{25} See Law Professors Amicus Br., supra note 21 at 19–20 (describing the purpose of Section 30 of the Exchange Act).
\textsuperscript{26} See id.