

## COMMENT

### Innocent Abroad? *Morrison*, *Vilar*, and the Extraterritorial Application of the Exchange Act

During the fall of 1919, two American sailors bound for Rio de Janeiro hatched a plan to defraud the United States government.<sup>1</sup> When their scheme—which involved an unscrupulous Standard Oil agent, a Rio-based shipbuilder, and a large quantity of fuel—came to the attention of American authorities, the sailors offered a simple defense: since their crimes were committed on the high seas, outside the territorial jurisdiction of the United States, they were presumptively beyond the reach of American law.<sup>2</sup>

Unfortunately for the conspirators, the Supreme Court did not agree. Instead, in *United States v. Bowman*, the Court held that some criminal statutes “are, as a class, not logically dependent upon their locality for the Government’s jurisdiction,” and are therefore presumed to apply extraterritorially even if they contain no explicit indication to that effect.<sup>3</sup> The *Bowman* decision was remarkable: in most contexts, courts assume that ambiguous statutes do not have extraterritorial application.<sup>4</sup> Yet *Bowman*’s exception to the general rule, which many subsequent courts chose to read as a broad carve-out for all criminal statutes,<sup>5</sup> has proven highly influential. It helped give rise to a comparatively liberal approach to the extraterritorial application of criminal law that has endured for decades.<sup>6</sup>

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1. *United States v. Bowman*, 260 U.S. 94, 95-96 (1922).

2. *Id.* at 96-97.

3. *Id.* at 98.

4. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* app. 34 & n.158 (4th ed. 2007).

5. See, e.g., *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (“The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”).

6. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *LAW & POL’Y*

Some eighty-eight years after *Bowman*, though, the Supreme Court handed down another landmark ruling that seemed to question the presumptive extraterritorial application of criminal statutes. In *Morrison v. National Australia Bank*,<sup>7</sup> the Court significantly limited the extraterritorial reach of section 10(b) of the Securities Exchange Act of 1934, holding that this provision only barred frauds committed in connection with domestic securities transactions.<sup>8</sup> Since section 10(b) covers both civil and criminal violations, the Court's reasoning, which relied heavily on the principle that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none,"<sup>9</sup> potentially implied that criminal statutes were not exempt from the presumption against extraterritoriality. Yet *Morrison* did not make this point explicit. Its holding—which arose from a shareholder lawsuit brought against an Australian bank by Australian investors—only directly addressed "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants."<sup>10</sup> The opinion therefore left a question of tremendous importance unanswered: Did its narrow reading of the Exchange Act's reach apply to criminal violations of section 10(b) as well? Or did *Bowman*, and the corresponding tradition of construing criminal statutes to permit extraterritorial enforcement, limit *Morrison's* approach to civil actions?

In August 2013, the Second Circuit offered a definitive answer: "*Morrison* does apply to criminal cases."<sup>11</sup> In its opinion in *United States v. Vilar*, the court roundly rebuffed the government's assertion that *Bowman* confined *Morrison's* presumption against extraterritoriality to civil contexts. While noting that some opinions interpreting *Bowman* had been "broadly worded," *Vilar* returned to a narrow reading of the ninety-year-old decision, restricting its carve-out to crimes committed against the United States itself.<sup>12</sup> Even more significantly, the Second Circuit rebuked the government for providing "little reason, beyond its misplaced reliance on *Bowman*, for why the presumption

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INT'L BUS. 1, 51-54 (1992) ("In the wake of *Bowman* . . . lower federal courts fashioned a variety of important exceptions to the territoriality presumption in criminal cases.").

7. 130 S. Ct. 2869 (2010).

8. *Id.* at 2888. Specifically, *Morrison* establishes a "transactional test," *id.* at 2886, that defines section 10(b)'s reach in terms of where a fraudulent transaction takes place. According to the opinion, "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." *Id.* at 2888.

9. *Id.* at 2878.

10. *Id.* at 2875.

11. *United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013).

12. *Id.* at 73.

against extraterritoriality should not apply to criminal statutes.”<sup>13</sup> There was simply “no reason,” the court argued, why the justifications for the presumption—which it identified as a belief that Congress “legislates with domestic concerns in mind” and a reluctance to create conflicts with foreign laws—were any “less pertinent in the criminal context.”<sup>14</sup>

*Vilar* has far-reaching implications for a world in which financial markets, and the enforcement actions that police them, have grown increasingly transnational.<sup>15</sup> The Second Circuit’s decision strips the government of its ability to prosecute overseas securities frauds—including those committed against American citizens—and therefore poses a major impediment to regulators. This Comment argues that the court should have taken a different approach. While the Second Circuit rightly concluded that nothing about the substance of criminal law renders the presumption against extraterritoriality inapplicable in criminal contexts, it ignored a related—and far more relevant—distinction between the civil shareholder suit evaluated in *Morrison* and the criminal fraud prosecution in *Vilar*: the identity of the party bringing the case.

There are good reasons to believe that the justifications underlying the presumption against extraterritoriality are, indeed, “less pertinent” when the party bringing an action is the United States government rather than a private individual—no matter whether that action is criminal or civil. This Comment accordingly argues that it would be wise to limit *Morrison* to its facts, reading the case to apply to private lawsuits but not government enforcement actions. This approach would ensure an effective regulatory regime that avoided unnecessary conflicts with foreign laws and faithfully effectuated congressional intent.

## I. CIVIL AND CRIMINAL OR PUBLIC AND PRIVATE?

*Vilar* astutely observed that the substantive interests protected by civil and criminal statutes provide “no reason” to apply the presumption against extraterritoriality to one but not the other.<sup>16</sup> After all, the government’s asserted rationale for extraterritorial criminal application—that criminal fraud

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13. *Id.* at 74.

14. *Id.* (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

15. See Carl H. Loewenson, Jr. et al., *The Second Circuit Speaks: The Presumption Against Extraterritoriality Applies to Criminal Prosecutions*, MORRISON FOERSTER (Sept. 3, 2013), <http://www.mofo.com/files/Uploads/Images/130903-The-Presumption-Against-Extraterritoriality-Applies-to-Criminal-Prosecutions.pdf>.

16. *Vilar*, 729 F.3d at 74.

statutes “are concerned with prohibiting individuals . . . from defrauding American investors”<sup>17</sup>—holds with equal force in the civil context. Just as applying the presumption against extraterritoriality to criminal statutes creates “broad immunity for criminal conduct simply because the fraudulent scheme culminates in a purchase or sale abroad,”<sup>18</sup> so too does applying the presumption to civil statutes create broad immunity for civil frauds that take place overseas.<sup>19</sup>

However, the *Vilar* court’s summary dismissal of restrictions on the presumption against extraterritoriality ignored a more powerful argument for distinguishing between the shareholder lawsuit addressed in *Morrison* on the one hand, and a criminal fraud prosecution on the other. While the action in *Morrison* was brought by private plaintiffs (Australian ones, no less), the *Vilar* case was filed by the executive branch of the United States government.

Unlike a distinction between criminal and civil statutes—which, as the Second Circuit noted, is supported by little more than courts’ historical willingness to apply criminal statutes extraterritorially—a distinction between public and private plaintiffs rests on solid theoretical footing because it cuts to the heart of why courts apply the presumption against extraterritoriality in the first place. While the presumption could be seen as nothing more than a background assumption against which Congress can legislate, this approach is unsatisfying.<sup>20</sup> The choice of statutory interpretation defaults has consequences, and therefore the selection of one possible baseline (e.g., no extraterritorial application) over another (e.g., universal extraterritorial application) requires some justification.<sup>21</sup> Indeed, judges and scholars have long provided a variety of reasons for selecting no extraterritorial application as the starting point for interpretation.<sup>22</sup> *EEOC v. Arabian American Oil Co.*, a quintessential modern statement of the presumption against

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17. Brief for the United States at 98, *Vilar*, 729 F.3d 62 (No. 10-521-cr(L)).

18. *Id.* at 99.

19. See *Vilar*, 729 F.3d at 74.

20. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 277 (1994).

21. *Id.* at 279 (“The canon against extraterritorial application of United States law systematically advantages transnational companies, for example. Because the default rule is that there is no extraterritorial application, the burden of inertia is on those who want the statute to apply extraterritorially . . . . [These consequences] require normative justification.”).

22. See, e.g., William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 90 (1998) (identifying six different potential justifications for the presumption against extraterritoriality that have been offered by courts and commentators, but arguing that only one, the “notion that Congress generally legislates with domestic concerns in mind,” is legitimate).

extraterritoriality,<sup>23</sup> grounds the canon in a belief that Congress “is primarily concerned with domestic conditions,”<sup>24</sup> and a desire to avoid the “international discord” that could arise from clashes between American and foreign law.<sup>25</sup> If the presumption against extraterritoriality rests on these grounds, then it should extend only as far they do.<sup>26</sup>

Yet, as *Vilar* demonstrates, these justifications founder when the presumption is used to block public enforcement actions rather than private suits. In keeping with the Supreme Court’s extraterritoriality jurisprudence, *Vilar* laid out two reasons for adhering to the presumption against extraterritoriality: “because the presumption ‘serves to protect against unintended clashes between our laws and those of other nations which could result in international discord,’”<sup>27</sup> and “because we understand that ‘Congress generally legislates with domestic concerns in mind.’”<sup>28</sup> Both—particularly the first—apply with far less force when the party bringing an action is the federal government.

Extraterritorial public enforcement poses a considerably smaller threat to international comity than extraterritorial private rights of action do. As courts and commentators have noted, “private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.”<sup>29</sup> While private plaintiffs have little incentive to consider the broad foreign policy goals of the federal government before deciding whether to pursue a suit, components of the executive branch can and do take such matters into account.<sup>30</sup> As a result,

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23. See, e.g., *id.* at 91 (describing the modern presumption against extraterritoriality as the “*Aramco* Presumption” and stating that the case “breathed new life into the presumption”).
  24. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).
  25. *Id.*
  26. Gary Born, for example, argues that the presumption against extraterritoriality should be abandoned because the rationales for implementing the canon have become obsolete. Born, *supra* note 6, at 1. This Comment makes a similar, but narrower, point solely with regard to the extraterritorial application of statutes giving rise to public enforcement.
  27. *United States v. Vilar*, 729 F.3d 62, 74 (2d Cir. 2013) (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)).
  28. *Id.* (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).
  29. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999)).
  30. See Brief for the United States as Amicus Curiae Supporting Respondents at 26, *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191) [hereinafter Brief for the United States] (noting that the SEC “routinely works with its overseas counterparts to

insofar as the presumption against extraterritoriality stems from a desire to avoid international conflicts, it should apply far more vigorously to statutory provisions granting private rights of action.<sup>31</sup>

Structural considerations also favor allowing the executive branch—the “sole organ of the federal government in the field of international relations”<sup>32</sup>—to determine when the balance of interests supports enforcing a particular U.S. law overseas. The presumption against extraterritoriality is often presented as a form of judicial modesty, stemming from courts’ reticence to “run interference in such a delicate field of international relations.”<sup>33</sup> Yet while judges may be institutionally ill-equipped to determine whether to apply statutes extraterritorially, executive actors have precisely the sort of competence required to make such determinations.<sup>34</sup> As a result, it seems reasonable for

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develop coordinated approaches to enforcement”). This argument might seem problematic in light of the fact that the SEC is an independent agency (though the objection is somewhat softened by the fact that criminal securities prosecutions are brought by the Department of Justice, which is not). However, there is considerable evidence that the Commission pays attention to international comity when bringing enforcement actions in spite of its independence. Empirical studies have found that that the SEC has historically been reluctant to enforce American securities laws against foreign companies listed in the United States without cooperation from foreign regulatory authorities. See Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319, 349 (2005) (“[T]he SEC has not been able and/or willing to be the world’s governance enforcement agency. The commission . . . relies on the case-by-case cooperation of foreign law enforcement agencies.”); see also David Ruder, Chairman, SEC, Remarks at the Lecture Program of the School of Business Administration at the University of Wisconsin—Milwaukee: Internationalization of Securities Markets 18 (Sept. 26, 1988), <http://www.sec.gov/news/speech/1988/092688ruder.pdf> (noting that the SEC’s response to the globalization of securities markets “has been to develop international surveillance and information sharing arrangements that are effective from an enforcement standpoint while sensitive to national sovereignty concerns”).

31. See Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137, 186–88 (2011). In a related example, courts have been far more willing to permit extraterritorial antitrust prosecutions than extraterritorial private antitrust suits. See *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1269, 1279 (2011).
32. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).
33. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 694 (2000) (“[I]nstitutional concerns may explain why courts should apply the presumption against extraterritoriality . . . . But this explanation does not weigh against giving *Chevron* deference to an extraterritorial interpretation by the executive branch.”).
34. See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1205 (2007) (“[T]he executive branch is in a better position to understand the benefits of foreign reciprocity or the likelihood and costs of retaliation than the judiciary.”).

courts to defer to the executive's judgment of whether a particular law should be enforced abroad.<sup>35</sup>

This logic of deference speaks most directly to the Second Circuit's first rationale for the presumption against extraterritoriality—the desire to avoid international conflict—but to some degree it also undermines the second. A presumption that Congress “legislates with domestic concerns in mind” has little content absent a specification of what types of concerns count as “domestic.” Is a fraud committed against an American citizen by an overseas con-man, for example, a “domestic concern” or not?<sup>36</sup> By advocating for the extraterritorial enforcement of a law, the executive is effectively offering its opinion on the answer to this question. It seems reasonable, in line with accepted principles of deference, for courts to take this guidance into account.<sup>37</sup>

## II. MORRISON AND THE ENFORCEMENT OF THE EXCHANGE ACT

The distinction between public and private plaintiffs is particularly apposite to securities regulation.<sup>38</sup> Indeed, a proper understanding of the

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35. See *id.* at 1228 (arguing that because “the executive is in the best position to make the appropriate consequentialist judgments” regarding whether to apply a statute extraterritorially, “courts should defer to executive interpretations”).
36. See Dodge, *supra* note 22, at 119 (“To say that Congress is ‘primarily concerned with domestic conditions,’ then, is really to say that Congress is primarily concerned with conduct that causes effects in the United States.” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))).
37. See Clopton, *supra* note 31, at 188 (suggesting that courts should defer to executive judgments on whether extraterritorial conduct falls within the ambit of a statute because “the executive is in a better position to effectuate congressional intent”).
38. In fact, securities law has long been characterized by differential approaches to public and private enforcement. Private rights of action under section 10(b) are implied, whereas public enforcement authority is explicit. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 n.5 (2010) (“[T]he implied private cause of action under § 10(b) and Rule 10b-5 is a thing of our own creation . . .”). Accordingly, private plaintiffs looking to recover under section 10(b) bear the burden of proving a variety of elements that public enforcers need not demonstrate, such as reliance, economic loss, and loss causation. See *United States v. Vilar*, 729 F.3d 62, 75 (2d Cir. 2013). It is important, however, not to overstate the implications of this general willingness to treat private and public securities suits differently. Courts have often distinguished between the conduct prohibited by section 10(b), which is the same for both public and private actions, and what must be shown in court to recover under section 10(b) or Rule 10b-5, which is not. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172 (1994) (“In our cases addressing § 10(b) and Rule 10b-5, we have confronted two main issues. First, we have determined the scope of conduct prohibited by § 10(b). Second, in cases where the defendant has committed a violation of § 10(b), we have decided questions about the elements of the 10b-5 private liability scheme . . . .”)

context surrounding *Morrison* reveals the extent to which the case specifically responded to concerns over aggressive private, rather than public, securities litigation.

*Morrison* emerged from a climate of frustration over the proliferation of “f-cubed” actions—shareholder lawsuits in U.S. courts brought by foreign plaintiffs against foreign defendants over foreign securities transactions.<sup>39</sup> *Morrison* was itself an f-cubed action involving a class of Australian citizens who brought suit against National Australia Bank as shareholders of the bank’s Australia-issued securities. As Justice Ginsburg aptly observed during oral arguments, the case “has ‘Australia’ written all over it.”<sup>40</sup>

The Court’s opinion reflected its desire to limit this type of problematic shareholder litigation. Writing for the majority, Justice Scalia cited several commentators who had catalogued the drawbacks of f-cubed actions,<sup>41</sup> and noted widespread concern that America had “become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”<sup>42</sup>

In particular, the Court seemed troubled by the effects of aggressive shareholder litigation on international comity. A number of foreign governments and international organizations filed amicus briefs in *Morrison*, and their pleas had a significant impact on the Court’s reasoning:

The Commonwealth of Australia, the United Kingdom of Great Britain and Northern Ireland, and the Republic of France have filed *amicus* briefs in this case. So have (separately or jointly) such international and

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(internal citations omitted)). While courts have considerable flexibility to modify the elements of private 10b-5 liability, “when it comes to the scope of the conduct prohibited by Rule 10b-5 and § 10(b), the text of the statute controls our decision.” *Morrison*, 130 S. Ct. at 2881 n.5 (internal punctuation omitted).

39. See, e.g., Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 14 (2007); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 466.
40. Transcript of Oral Argument at 7, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).
41. See *Morrison*, 130 S. Ct. at 2880 (citing Choi & Silberman, *supra* note 39, at 467-68); *id.* at 2886 (citing Buxbaum, *supra* note 39, at 38-41). Justice Scalia specifically cited Choi and Silberman for the proposition that application of section 10(b) had been “unpredictable and inconsistent” rather than for the proposition that f-cubed actions create problematic consequences, *id.* at 2880, but Choi and Silberman’s entire discussion of inconsistent enforcement occurs in the context of “how courts in the United States have dealt with the extraterritorial application of U.S. securities laws to f-cubed cases,” Choi & Silberman, *supra* note 39, at 466-67.
42. *Morrison*, 130 S. Ct. at 2886.



foreign organizations as [list of organizations]. They all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence. The transactional test we have adopted . . . meets that requirement.<sup>43</sup>

Examining the contentions of these amici helps illuminate the Court's decision. And every single one stated that its primary concern was private shareholder actions.<sup>44</sup> Australia, for example—the country of origin for both parties—emphasized that its brief “deals with private suits under § 10(b) and Rule 10b-5 and does not address issues relating to enforcement action by the SEC under those provisions.”<sup>45</sup>

The Solicitor General felt the same way. In its amicus brief, the government argued that “SEC enforcement actions are unlikely to produce conflict with foreign nations . . . . Private securities actions, in contrast, present a significant risk of conflict . . . .”<sup>46</sup>

What does all this mean? Justice Stevens more or less summed it up in his concurrence: “The Court’s opinion does not . . . foreclose the [Securities and Exchange] Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission’s authority is presented by this case.”<sup>47</sup> As Justice Stevens noted, “The Commission’s enforcement

43. *Id.* at 2885-86.

44. See Brief for Amici Curiae the Institute of International Bankers et al. in Support of Respondents at 3, *Morrison*, 130 S. Ct. 2869 (No. 08-1191); Brief of the Government of the Commonwealth of Australia as Amicus Curiae Supporting Defendants-Appellees at 2, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) [hereinafter Brief for Australia]; Brief for the Republic of France as Amicus Curiae Supporting Respondents at 3-5, *Morrison*, 130 S. Ct. 2869 (No. 08-1191); Brief of Amici Curiae the Securities Industry and Financial Markets Association et al. in Support of Respondents at 6-7, *Morrison*, 130 S. Ct. 2869 (No. 08-1191); Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 2, *Morrison*, 130 S. Ct. 2869 (No. 08-1191). The brief for the International Chamber of Commerce et al. does acknowledge that its proposed limitation on section 10(b)'s extraterritorial reach would “appl[y] equally to the SEC.” Brief for the International Chamber of Commerce et al. in Support of Respondents at 4, *Morrison*, 130 S. Ct. 2879 (No. 08-1191). However, it nonetheless emphasizes that “potential U.S. class action litigation”—not SEC enforcement—“is chief among the concerns of would-be investors in the U.S. marketplace,” *id.* at 3, and even explicitly discusses “the difference between the SEC, cabined by prosecutorial discretion that includes consideration of comity concerns, and the plaintiffs’ securities bar, which has no such check,” *id.* at 34-35.

45. Brief for Australia, *supra* note 44, at 5.

46. Brief for the United States, *supra* note 30, at 26-27.

47. *Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring). It could be argued that Justice Stevens missed the point of the majority’s holding, which seems to speak in broad terms

proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, but they also pose a lesser threat to international comity.”<sup>48</sup> Justice Stevens could have elaborated in greater detail, but it is not hard to understand his point. Barring extraterritorial public enforcement actions seriously hamstrings securities regulators in a world where close to forty percent of American investors hold some foreign assets.<sup>49</sup> Such a categorical ban is not a reasonable response to concerns over f-cubed actions and frivolous shareholder suits.

Of course, since Justice Stevens’s proposed limitation appears only in a concurrence, it lacks the force of law, and the *Vilar* court was not bound to accept it. But as persuasive authority it is, in combination with all the other evidence of *Morrison*’s scope, quite powerful. It seems apparent that *Morrison* responded to the particular set of problems posed by private shareholder litigation. Its precedent should not be stretched beyond the circumstances to which its reasoning most clearly applies.

### III. CONGRESS SPEAKS (CLUMSILY): DODD-FRANK AND THE PUBLIC/PRIVATE ENFORCEMENT DISTINCTION

In case the distinction between public and private enforcement slipped by some readers of *Morrison*, Congress quickly set about clarifying things on its own. Just days after *Morrison* was handed down, Congress passed the massive Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>50</sup> In section

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about section 10(b)’s extraterritorial application rather than draw fine lines between private and Commission-initiated actions. *See, e.g., id.* at 2883 (majority opinion) (“In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.”). However, it is not clear that the majority actually forecloses Justice Stevens’s interpretation of its opinion. The Court explicitly notes that its holding addresses “whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges,” *id.* at 2876 (emphasis added), suggesting that its more sweeping statements in other parts of the opinion may be dicta. Furthermore, Justice Stevens’s assertion that the decision did not affect the SEC’s enforcement authority drew no response from the majority, providing additional support for its credibility.

48. *Id.* at 2894 n.12 (Stevens, J., concurring) (internal citation omitted).

49. Nidi M. Geevarghese, Note, *A Shocking Loss of Investor Protection: The Implications of Morrison v. National Australia Bank*, 6 BROOK. J. CORP. FIN. & COM. L. 235, 247 (2011) (noting that in 2007, thirty-six percent of American investors held foreign securities (citing Jeffrey M. Jones, *Public Divided as to Effect of Foreign Investing on U.S. Economy*, GALLUP (Mar. 19, 2007), <http://www.gallup.com/poll/26905/public-divided-effect-foreign-investing-us-economy.aspx>)).

50. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

929P, entitled “Strengthening Enforcement by the Commission,” the statute amended the Exchange Act to provide “extraterritorial jurisdiction” for any “action or proceeding brought or instituted by the Commission or the United States” regarding securities frauds that involved “conduct within the United States” or “conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”<sup>51</sup> Congress declined to include private plaintiffs in this grant, instead recommending in a later section that the SEC “conduct a study to determine the extent to which private rights of action . . . should be extended” to cover extraterritorial transactions.<sup>52</sup>

In other words, in its post-*Morrison* legislation, Congress appears to have drawn precisely the distinction that this Comment proposes. It attempted to ensure that public enforcement of the securities laws, whether by the SEC or the Department of Justice, would not be confined to domestic securities transactions under *Morrison*’s “transactional test.” It was more cautious about private actions.

Dodd-Frank’s legislative history reveals that this differentiation was a considered choice. An earlier draft of section 929P extended extraterritorial jurisdiction to all suits under section 10(b), but its language was modified to refer only to actions brought by the SEC and DOJ in the final version.<sup>53</sup> As the provision’s sponsor, Representative Paul Kanjorski, made clear, section 929P was specifically designed to rebut the presumption against extraterritoriality for public enforcement “by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department.”<sup>54</sup>

In an unfortunate twist, however, this indication turned out to be far less clear than Kanjorski assumed. The text of section 929P explicitly addresses only the “jurisdiction” of federal courts, whereas *Morrison* established that section 10(b)’s extraterritorial application “is a merits question.”<sup>55</sup> As a result, read literally, this part of Dodd-Frank does nothing more than grant federal

51. *Id.* § 929P.

52. *Id.* § 929Y(a).

53. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7216 (as introduced in House, Dec. 2, 2009); see also Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 201-02 (2011) (noting this change and commenting that the final language was drafted with the help of the SEC).

54. 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

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

courts jurisdiction they already possessed—a fact that many commentators were quick to note after the bill was signed into law.<sup>56</sup>

If section 929P expands the substantive reach of section 10(b) in spite of this apparent drafting error—as it might under a generous reading that emphasized the provision’s history and purpose over its plain text—then *Vilar*’s expansion of *Morrison*’s holding to criminal contexts is clearly misguided. Even if section 929P is unsalvageable, however, it still could have carried some weight in the *Vilar* court’s deliberation. Its very existence indicates that Congress sees an important distinction between public and private enforcement of section 10(b) and does not wish to have the former hampered by strict territorial limitations. This fact cannot be ignored because the presumption against extraterritoriality is, at its root, an assumption about how Congress is likely to think.<sup>57</sup> Whether and when the presumption accurately reflects congressional intent is something of an empirical question—one that the legislative history of section 929P seems to answer in the negative as far as public enforcement of section 10(b) is concerned.

Of course, section 929P provides more powerful evidence about the intentions of the 111th Congress, which passed Dodd-Frank in 2010, than about the desires of the 73rd Congress, which created the Exchange Act in 1934.<sup>58</sup> Yet it should still alter our understanding of the ’34 Act’s meaning. The Supreme Court has noted that “repeal by implication of a legal disposition implied by a statutory text”—such as the Court’s construction of section 10(b) in *Morrison*—requires a much less clear statement of intent than the repeal of a statute itself.<sup>59</sup> Therefore, a contemporary Congress can provide a new gloss on old laws even if its legislative actions fall short of formally amending those

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56. See, e.g., Richard Painter et al., *When Courts and Congress Don’t Say What They Mean*, 20 MINN. J. INT’L L. 1, 3-4 (2011); Meny Elgadeh, Note, *Morrison v. National Australia Bank: Life After Dodd-Frank*, 16 FORDHAM J. CORP. & FIN. L. 573, 593-94 (2011). In a recent SEC enforcement action, the Northern District of Illinois suggested that section 929P “merely addresses subject matter jurisdiction . . . rather than the substantive reach of Section 10(b).” SEC v. A Chi. Convention Ctr., LLC, No. 13 C 982, 2013 WL 4012638, at \*5 (N.D. Ill. Aug. 6, 2013).
57. See *Morrison*, 130 S. Ct. at 2883 (noting that the presumption is not a clear statement rule and that “context can be consulted as well” to determine whether Congress intends for a statute to apply extraterritorially); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176-77 (1993) (discussing how a range of nontextual sources can inform the Court’s understanding of congressional intent regarding extraterritorial application).
58. Some commentators have, however, suggested that current congressional preferences should influence the way that courts construe old statutes. See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2034 (2002).
59. *United States v. Fausto*, 484 U.S. 439, 453 (1988).

laws. The “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”<sup>60</sup>

As a result, courts should not use the presumption against extraterritoriality to block public enforcement under section 10(b) without taking Congress’s recent attempts to repudiate such an approach into account.<sup>61</sup>

## CONCLUSION

*Vilar* extended *Morrison* further than it should go. While *Morrison* may speak in broad terms about the extraterritorial application of the Exchange Act, it is evident that much of its reasoning responds to specific features of private shareholder lawsuits that public enforcement actions—including criminal prosecutions—do not share. In securities law, as in many other areas, the presumption against extraterritoriality is not nearly as compelling when applied to public, rather than private, rights of action. The executive branch is institutionally well-positioned to weigh the consequences of extending law extraterritorially, and should be given broader leeway than private plaintiffs to do so. This proposition is especially powerful in light of Congress’s recent attempt to enact it into law in section 929P, however sloppy the effort may have been. In order to preserve an effective securities regulation regime and faithfully implement the will of Congress, courts should remove strict territorial bars to public enforcement of the Exchange Act.

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60. *Id.*; see also Painter et al., *supra* note 56, at 20 n.84 (suggesting that Congress “implicitly modified the judicial construction of Section 10(b) as to DOJ and SEC enforcement actions when it affirmatively introduced statutory indicia of extraterritoriality”).

61. One potential criticism of this proposal—which *Vilar* mentions, see *United States v. Vilar*, 729 F.3d 62, 74 (2d Cir. 2013)—is that it would arguably give section 10(b) different meanings in public and private enforcement contexts. However, this is not as problematic as it might sound. The Supreme Court has noted that the same statutory provision “may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 573-74 (2007) (construing “modification” to have two different meanings in two different contexts in spite of the fact that the term was defined only once in the relevant statute).

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